No. _____

In the Supreme Court of the United States

STEVE 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

PETITION FOR WRIT OF CERTIORARI

SARA R. GREWING
City Attorney
LOUISE TOSCANO SEEBA
Counsel of Record
K. MEGHAN KISCH
Assistant City Attorneys
750 City Hall and Court House
15 West Kellogg Boulevard
Saint Paul, MN 55102
(651) 266-8772
louise.seeba@ci.stpaul.mn.us

Counsel for Petitioners

February 14, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). Respondents are owners of rental properties who argue that Petitioners violated the Fair Housing Act by "aggressively" enforcing the City of Saint Paul's housing code. According to Respondents, because a disproportionate number of renters are African-American, and Respondents rent to many African-Americans, requiring them to meet the housing code will increase their costs and decrease the number of units they make available to rent to African-American tenants. Reversing the district court's grant of summary judgment for Petitioners, the Eighth Circuit held that Respondents should be allowed to proceed to trial because they presented sufficient evidence of a "disparate impact" on African-Americans.

The following are the questions presented:

1. Are disparate impact claims cognizable under the Fair Housing Act?

2. If such claims are cognizable, should they be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?

PARTIES TO THE PROCEEDING

A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

No. 09-1209

Defendants-Appellees and Petitioners: STEVE MAGNER, individually and as a supervisor of the City of Saint Paul's Department of Neighborhood Housing and Property Improvement, MICHAEL CASSIDY, JOEL ESSLING, STEVE SCHILLER, JOE YANNARELLY, DENNIS SENTY, individually and as code enforcement officers of the City of Saint Paul, MICHAEL URMANN, individually and as a fire inspector of the City of Saint Paul, ANDY DAWKINS, individually and as Director of the City of Saint Paul's Department of Neighborhood Housing and Property Improvement, RANDY KELLY, individually and as Mayor of the City of Saint Paul, JOHN DOE and JANE DOE, individually and in their official capacities as code enforcement officers, law enforcement officers, or other officials or employees of the City of Saint Paul, and the CITY OF SAINT PAUL, a municipal corporation.

Plaintiffs-Appellants and Respondents: THOMAS J. GALLAGHER, JOSEPH J. COLLINS, SR., DADDER'S PROPERTIES, LLC, DADDER'S ESTATES, LLC, DADDER'S ENTERPRISES, LLC, DADDER'S HOLDINGS, LLC, TROY ALLISON, JEFF KUBITSCHEK and SARA KUBITSCHEK.

No. 09-1528

Defendants-Appellees and Petitioners: CITY OF SAINT PAUL, a municipal corporation, RANDY KELLY, individually and as Mayor of the City of Saint Paul, ANDY DAWKINS, individually and as Director of the City of Saint Paul's Department of Neighborhood Housing and Property Improvement, LISA MARTIN, individually and as a code enforcement officer of the City of Saint Paul, STEVEN MAGNER, individually and as a supervisor of the City of Saint Paul's Department of Neighborhood Housing and Property Improvement, DEAN KOEHNEN, individually and as a law enforcement officer of the City of Saint Paul, JOHN DOE and JANE DOE, individually and in their official capacities as code enforcement officers, law enforcement officers, or other officials or employees of the City of Saint Paul.

Plaintiffs-Appellants and Respondents: FRANK J. STEINHAUSER, III, MARK E. MEYSEMBOURG, KELLY G. BRISSON.

No. 09-1579

Defendants-Appellees and Petitioners: STEVE MAGNER, individually and as a supervisor of the City of Saint Paul's Department of Neighborhood Housing and Property Improvement, MICHAEL KALIS, DICK LIPPERT, KELLY BOOKER, JACK REARDON, PAULA SEELEY, LISA MARTIN, individually and as code enforcement officers of the City of Saint Paul, DEAN KOEHNEN, individually and as a law enforcement officer of the City of Saint Paul, ANDY DAWKINS, individually and as Director of the City of Saint Paul's Department of Neighborhood Housing and

Property Improvement, RANDY KELLY, individually and as Mayor of the City of Saint Paul, JOHN DOE and JANE DOE, individually and in their official capacities as code enforcement officers, law enforcement officers, or other officials or employees of the City of Saint Paul, and the CITY OF SAINT PAUL, a municipal corporation.

Plaintiffs-Appellants and Respondents: SANDRA HARRILAL, STEVEN R. JOHNSON, d/b/a Market Group and Properties.

Plaintiffs: BEE VUE, LAMENA VUE.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's order granting summary judgment in favor of Petitioners dated December 18, 2008, is published at 595 F. Supp. 2d 987. Pet. App. 48a-115a. The opinion of the United States Court of Appeals for the Eighth Circuit reversing the district court on the issue of disparate impact and dated September 1, 2010, is published at 619 F.3d 823. Pet. App. 1a-42a. The order of the United States Court of Appeals for the Eighth Circuit denying Petitioners' petition for rehearing *en banc* was filed on November 15, 2010. Pet. App. 116a-125a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 2010. Pet. App. 43a-47a. On November 15, 2010, the Court of Appeals opinion denying Petitioners' request for rehearing *en banc* was entered. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Fair Housing Act provides in relevant part:

[I]t shall be unlawful --

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of the services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a)-(b).

STATEMENT OF THE CASE

The issue of whether disparate impact analysis applies to the Fair Housing Act has been percolating among the circuits for two decades. In 2005, this Court provided guidance to the question in *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005). In *Smith*, a disparate impact theory of liability was found cognizable under the Age Discrimination in Employment Act (ADEA) based on the "identical text" found in § 703(a)(2) of Title VII and § 4(a)(2) of the ADEA. In the case at bar, the petition for rehearing *en banc* was denied, but the five judge dissent recognized this important and timely issue and found that the text in both the ADEA and Title VII contains triggering language for a disparate impact analysis

application based on "a prohibition on 'limiting, segregating, or classifying employees in any way which would . . . adversely affect [an individual's] status as an employee, because of such individual's' race or age." Pet. App. 122a. The *en banc* dissent recognized that this language is not part of the applicable Fair Housing Act language and instead recognized the language similarities between Title VI, which does not allow a disparate impact claim, and the Fair Housing Act.

Only two circuits have applied a disparate impact analysis since *Smith*; in addition there has been "virtually no discussion of the matter by any court of appeals since the Court in *Smith* explained how the text of Title VII justified the decision [applying disparate impact analysis in the *Griggs* Title VII case]." Pet. App. 123a. Because there has been virtually no discussion, and because this Court has not decided the issue, the circuits that have found disparate impact analysis applies have used conflicting tests with differing results. This case is the perfect vehicle to decide these important and impactful issues.

Respondents collectively are owners or former owners of approximately 120 rental properties within the City of Saint Paul. All properties in the City, whether owner occupied, renter occupied, publicly owned, or privately owned, are subject to the City's housing code. The code was enacted "to protect the public health, safety and welfare in all structures and on all premises." St. Paul, Minn., Legislative Code § 34.01. The City's housing code requires that properties meet minimum maintenance standards such as requiring the property be free from rodent infestation, have an operable toilet and a safely

maintained heating facility. If the properties do not meet the housing code, owners are subject to the City's code enforcement wherein owners are required to bring their properties into compliance with the housing code. Respondents claim that the City's aggressive housing code enforcement has a disparate impact on African-Americans.

The aggressive code enforcement that Respondents challenge has a purposeful, positive impact on those living in neglected rental homes; concentrating services on those properties that are in most disrepair. Respondents seek to use the Fair Housing Act to thwart City enforcement of its housing code and therefore to prevent the City from protecting those residents who need it most. Respondents seek to avoid fixing up their properties to meet the minimum housing code because it will cut their profits and prevent them from renting out dilapidated homes. This defeats the goal of the Fair Housing Act.

Below, the district court granted Petitioners' motion for summary judgment under a disparate impact claim by applying a three part burden shifting test. The court found that Respondents must show that a facially neutral policy results in, or can be predicted to result in, disparate impact on protected classes compared to a relevant population. If Respondents make that showing, Petitioners must be able to show that the objected to policy has a "manifest relationship" to legitimate, common, non-discriminatory policy objectives and "is justifiable on the ground it is necessary to" the attainment of those objectives. Pet. App. 61a. If Petitioners make that showing, the court stated the burden shifts back to Respondents to show that a viable alternative means

is available to achieve the legitimate policy objective without discriminatory impact. Pet. App. 61a.

The district court found that Respondents did not show that the City's aggressive code enforcement had a disparate impact on African-Americans. The district court, relying on the Tenth Circuit, found "[Respondents] must do more than show that the housing code increases the cost of low-income housing and that minorities tend to have lower incomes."[1] Pet. App. 63a. Furthermore, the district court found, even had Respondents made a *prima facie* case of disparate impact, the City put forth evidence that enforcement of the housing code had a manifest relationship to a legitimate, nondiscriminatory policy objective which was to maintain minimum property standards for properties within the City. Respondents argued that a previous, and limited, City enforcement program named "PP2000"[2] would achieve the City's objectives without discriminatory impact. The district court rejected this argument because PP2000 did not change minimum maintenance requirements or excuse

---

[1] The Tenth Circuit does not apply the three part burden shifting test to a Fair Housing Act disparate impact analysis that the district court applied here. It applies a three part balancing test derived from a four part balancing test from the Seventh Circuit. *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007).

[2] In fall 1999, the City began a program known as PP2000, short for problem properties 2000. As part of the program, a limited number of landlords in the City who owned some of the most Problematic Properties -- properties that violated the City's housing code frequently and in many areas -- worked with a specified housing inspector. The program lasted approximately one year and had 12-15 participating landlords and two inspectors assigned to it.

property owners from compliance with the housing code. The program required the same costs to bring the property up to the minimum standards and therefore had the same effect on African-Americans.

A panel of the Court of Appeals reversed and found that Respondents offered evidence to support the following conclusions: a) the City experienced a shortage of affordable housing, b) racial minorities, especially African-Americans, made up a disproportionate percentage of lower income households in the City that rely on low income housing, c) the aggressive housing code enforcement practices increased costs for property owners that rent to low income tenants, d) the increased burden on rental property owners from aggressive code enforcement resulted in less affordable housing in the City. The panel acknowledged that "[t]hough there is not a single document that connects the dots of [Respondents'] disparate impact claim, it is enough that each analytic step is reasonable and supported by the evidence." Pet App. 20a.

In making this finding, the panel applied a "three-step analysis to [Respondents'] disparate impact claim." Pet App. 16a. The panel identified the first step as requiring Respondents to show that the objected to conduct resulted in a disparate impact on protected classes as compared to a relevant population. The panel found that the burden then shifts to Petitioners to show that housing code enforcement has a manifest relationship to legitimate, non-discriminatory objectives. Pet App. 24a. Respondents conceded that the City's housing code enforcement has a manifest relationship to legitimate, non-discriminatory objectives. Pet App. 24a. The panel

then found that the burden shifts back to Respondents to offer a viable alternative that satisfies the City's legitimate, policy objectives while reducing the discriminatory impact of the City's housing code enforcement. Pet App. 24a. The panel found that Respondents identified PP2000 as a viable alternative to citywide code enforcement.

The panel did not identify any evidence that the PP2000 program satisfies the City's legitimate policy objectives while reducing the discriminatory impact of the City's code enforcement practices. The panel relied on a report that found that the program was effective in reducing complaints against participating owners. There was no evidence that it reduced any maintenance costs of the participating owners, or that the limited program met Petitioners' legitimate policy objectives of keeping all properties (not just participants' properties) in the City maintained to minimum property standards and safe for the inhabitants.

Petitioners requested a rehearing *en banc* arguing, *inter alia,* that applying a disparate impact analysis to housing codes would in effect prevent racially diverse municipalities with a shortage of affordable housing from enforcing their housing codes. Petitioners highlighted that under the panel's analysis, a per se case of disparate impact exists when neglectful landlords fail to meet minimum maintenance standards in a racially diverse municipality. Furthermore, the panel did not require that Respondents offer any statistical information or show how the City's housing code enforcement affected those tenants not in protected classes. The impact of the

City's enforcement on unprotected classes versus protected classes was not shown and is still unknown.

The Eighth Circuit denied Petitioners' request for a rehearing *en banc* with five of the eleven judges dissenting. Those dissenting were Chief Judge Loken and Circuit Judges Colloton, Riley, Gruender, and Shepherd. The dissent recognized that this Court has not yet decided whether the Fair Housing Act allows for recovery based on a disparate impact theory. Also, the dissent found that there exists an important undecided question of "whether 'aggressive' enforcement of a housing code is the sort of facially neutral policy that can trigger disparate impact analysis under the [Fair Housing Act]. . . ." Pet. App. 118a. "Second, if disparate impact analysis should be applied to claims under the [Fair Housing Act] based on the 'purpose' of the statute, then it seems appropriate to consider whether the purpose of the statute extends to declaring a city liable for disparate impact caused by its 'aggressive' enforcement of a housing code." Pet. App. 124a (internal citation omitted).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DECIDE THE ISSUE OF WHETHER DISPARATE IMPACT ANALYSIS APPLIES TO FAIR HOUSING ACT CLAIMS.

Most courts of appeals permit disparate impact claims under the Fair Housing Act, but the circuits that have decided to apply that analysis are divided on the approach for resolving these claims. Before this Court reaches the issue of which test should be applied to a Fair Housing Act disparate impact claim, the

Court should first consider the threshold question of whether disparate impact claims are cognizable under the Fair Housing Act at all. This Court has specifically recognized that this is an open question, and as the dissent to the Order denying the petition for rehearing *en banc* has made clear, there is a serious question as to whether disparate impact claims challenging a city's code enforcement should be recognized. Deciding the threshold question may obviate the need to decide which test to apply and provide a definitive answer to the circuits on this important and fully developed, twenty year old question.

The Fair Housing Act makes it unlawful "to refuse to sell or rent . . . or otherwise make available or deny, a dwelling to any person because of race, color, religion, sex, familial status or national origin." 42 U.S.C. § 3604(a). Or, "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). District and circuit courts have interpreted this language to encompass both a disparate treatment and a disparate impact theory of liability.

Disparate treatment claims allege intentional discrimination on the basis of a protected characteristic. Proof of discriminatory purpose is crucial for a disparate treatment claim. *Int'l Broth. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Applied to housing code enforcement, a plaintiff would have to show that the action or policy she challenged had the purpose of discriminating against those in a protected class.

In comparison, disparate impact claims usually do not depend on the intent of the action or policy. However, the circuits have applied conflicting tests to Fair Housing Act disparate impact analysis. Currently, courts in all eleven circuits and the D.C. Circuit have applied at least four distinct tests to Fair Housing Act disparate impact analysis. At least one test, followed by the Fourth and Seventh Circuits (two of the circuits relied upon by the panel) and various district courts, factors in discriminatory intent.

This Court has not yet decided whether the Fair Housing Act allows for recovery based on a disparate impact theory. In *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curium) this Court specifically recognized that it had not yet decided the question of whether a disparate impact analysis is appropriate in a Fair Housing Act claim. However, this Court did not decide the issue in *Town of Huntington* because the parties conceded its applicability. 488 U.S. at 18. As a result, the issue of whether a disparate impact analysis applies to the Fair Housing Act remains unresolved and has been ripe for review for over two decades.

A. The Text Of The Fair Housing Act Does Not Support A Cognizable Disparate Impact Claim.

In 2005, this Court analyzed disparate impact as it applies to claims brought under the ADEA. *Smith*, 544 U.S. 228. In *Smith,* this Court held that a disparate impact theory is cognizable under the ADEA. In doing so, this Court emphasized that § 703(a)(2) of Title VII at issue in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971), and the comparable language

in the ADEA "prohibits such actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's' race or age." *Smith*, 544 U.S. at 235 (plurality opinion).

This Court recognized "key textual differences" between § 4(a)(1) of the ADEA, which makes it unlawful "to fail or refuse to hire . . . any individual . . . because of such individual's age," which does *not* encompass disparate impact liability, and § 4(a)(2), which does authorize recovery based on disparate impact. *Id.* at 236 n.6 (omissions in original) (internal quotations omitted). This Court has found that another important civil rights statute, Title VI of the Civil Rights Act, forbids only intentional discrimination and does not prohibit actions taken with a non-discriminatory motive that have a disparate impact on racial groups. *See Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001). In contrast to Title VII and the ADEA, the text of Title VI does not proscribe activities that would "adversely affect" a person because of a protected characteristic. *See* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Four years later, this Court analyzed Title IX which states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681. This language was found, like *Alexander*, to allow a cause of action

premised on intentional discrimination but did not permit a cause of action premised on disparate impact.

Similarly, the Fair Housing Act does not include text comparable to that relied on in *Smith* and appearing in § 703(a)(2) of Title VII, and § 4(a)(2) of the ADEA. Rather, the text of 42 U.S.C. § 3604(a) makes it unlawful to ". . . make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." This language is similar to § 4(a)(1) of the ADEA, which the Court in *Smith* said does not support a claim based upon disparate impact alone. *Smith*, 544 U.S. at 236 n.6 (plurality opinion).

However, most circuit courts have found that disparate impact analysis applies to Fair Housing Act claims. They have done this although there has been no consideration by this Court of the textual basis for disparate impact's application to Fair Housing Act claims. Furthermore, since the *Smith* Court explained how the text of Title VII justified its decision in *Griggs*, there has been nearly no discussion of the matter by any court of appeals. Accordingly, certiorari should be granted so that this Court can decide this important question: Does a disparate impact analysis apply to Fair Housing Act claims?

B. The Fair Housing Act Does Not Reach Every Event That Might Conceivably Affect The Availability Of Housing.

Congress has declared that the purpose of the Fair Housing Act is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. As recognized as early as

1977, in one of the first cases to permit a Fair Housing Act disparate impact claim, the Seventh Circuit emphasized not "every action which produces discriminatory effects is illegal." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (*Arlington Heights II*). Indeed, here Petitioners, like cities throughout the United States, are enforcing a municipality's housing code citywide. The housing code undisputedly applies to all properties, both rental and owner occupied properties, without regard to the race of the tenants or the property owners. The City is enforcing minimum property standards so that all who live in the City have dwellings that are structurally sound, safe, and provide minimally basic shelter. Any municipality enforcing its housing codes does so in part to protect residents from structurally unsound or unsafe dwellings. It is a welcome consequence that renters are protected from neglectful landlords and landlords are required to meet minimum property maintenance standards.

In *United States v. City of Black Jack, Missouri*, 508 F.2d 1179 (8th Cir. 1974), the Eighth Circuit reasoned by analogy to this Court's decision in *Griggs*, 401 U.S. at 430-431, that the discretion of local zoning officials recognized in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), must be curbed where "the clear result of such discretion is the segregation of low income Blacks from all White neighborhoods." (*Citing Banks v. Perk*, 341 F. Supp. 1175, 1180 (N.D. Ohio 1972) *aff'd in part and rev'd in part without opinion*, 473 F.2d 910 (6th Cir. 1973). The purpose of the Fair Housing Act, to provide fair housing throughout the United States, is not different from what a municipality is doing when it applies a race neutral

minimum maintenance standard to properties within a city. It is a city's housing code that protects the very same individuals that the Fair Housing Act was meant to protect. Members of protected classes should not be forced to live in properties that are neglected and do not meet minimum standards. To prevent this, cities must be allowed to enforce their housing codes.

In *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir. 1999), minority landowners challenged the placement of a highway in Maryland claiming disparate impact under the Fair Housing Act. The placement of the highway, they argued, violated the purpose of the Fair Housing Act. The court found that the Fair Housing Act did not apply to plaintiff's claims challenging a highway placement. The court held that the Fair Housing Act does not reach every event "that might conceivably affect the availability of housing." *Id.* at 192 (*citing Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984)). "Section 3604(a) is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons." *Id.* (*citing Southend Neighborhood Imp. Ass'n v. St. Clair Cnty.*, 743 F.2d 1207, 1210 (7th Cir. 1984)). The landowners argued they were more burdened by the highway than others, but as the court explained under this theory

> [H]ow is a multicultural society ever to locate a highway? Suppose a roadway runs by a neighborhood that is thirty-five percent Anglo, forty-five percent Latino, and twenty-percent African-American. Does the predominant ethnic group have a disparate impact claim? . . . Will planners have to relocate the corridor to ensure that it affects each ethnicity

> proportionally? Simply to pose these questions is to demonstrate the absurdity of the result: a twisting, turning roadway that zigs and zags only to capture equally every ethnic subset of our population.

Id. at 194.

In code enforcement cases, recognizing disparate impact claims would be just as illogical as building a zig-zagging highway. Barring municipalities from enforcing housing codes in homes because they are occupied by protected class members "would lead to race-based decision making of the worst sort. We do not think the drafters of the Fair Housing Act ever contemplated such a reading." *Id.* This inability to enforce health and safety codes would eventually result in exactly what the Fair Housing Act was historically enacted to eliminate, urban neighborhoods rife with substandard housing, disproportionally occupied by protected class members. This would prevent any municipality with a diverse population of renters from enforcing housing codes on rental properties neglected by their owners.

II. THE COURTS OF APPEALS ARE DIVIDED AS TO WHAT TEST APPLIES TO A FAIR HOUSING ACT CLAIM.

This Court has not addressed the issue of what test would apply to a Fair Housing Act disparate impact analysis. Without given any guidance from this Court

on how to do so, nine circuits[3] have developed their own approaches which relate back to three early Fair Housing Act disparate impact cases. *Arlington Heights II*, 558 F.2d at 1283; *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988). The test each circuit uses generally falls into one of two categories, either a burden shifting or balancing approach. Each circuit then modifies their approach and has formulated a specific test for their circuit.

A. Balancing Factors Approach.

The Seventh Circuit was one of the first circuits to hold that claims of disparate impact are cognizable under the Fair Housing Act. *Arlington Heights II*, 558 F.2d at 1283. In doing so, the court emphasized that not every action that results in a discriminatory impact is a violation of the Fair Housing Act. *Id.* 1290. "Such a per se rule would go beyond the intent of Congress and would lead courts to untenable results in specific cases." *Id.* The court developed a balancing test and identified four factors to consider when determining whether the conduct that produces the disparate impact violates the Fair Housing Act: (1) the

---

[3] The Fifth Circuit has held that actions causing discriminatory impact can violate the Fair Housing Act, but has not decided what analysis to use after a plaintiff establishes disparate impact. *Cox v. City of Dallas, Tex.*, 430 F.3d 734, 746 (5th Cir. 2005). The Eleventh and D.C. Circuits have not yet decided the threshold question of whether such claims can be brought. *Schwarz v. City of Treasure Island*, 544 F.3d 1201 (11th Cir. 2008); *2922 Sherman Ave. Tenants' Ass'n v. Dist. of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006).

strength of the plaintiff's showing of discriminatory impact; (2) evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*, 426 U.S. 229, 239 (1976); (3) the defendant's interest in the challenged conduct; and (4) whether the plaintiff seeks affirmative relief or merely to restrain the defendant from interfering with individual property owners who wish to provide housing. *Id.*

The Fourth Circuit has also recognized disparate impact claims under the Fair Housing Act. *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982). However, the Fourth Circuit is unique in that it applies two different tests. When the case involves a public defendant, the court balances the four factors listed above in *Arlington Heights II*. E.g., *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 989 n.5 (4th Cir. 1984). When the case includes a private defendant, the court uses the burden shifting test developed for employment discrimination cases by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (once the plaintiff makes a *prima facie* showing, the private defendant must articulate "a compelling business necessity exists, sufficient to overcome the showing of disparate impact").

The Sixth Circuit uses an *Arlington Heights II* analysis, but does not require any showing of discriminatory intent and therefore only weighs three of the four *Arlington Heights II* factors. *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574-575 (6th Cir. 1986). The court held that only the following factors should be considered: (1) how strong is the plaintiff's showing of discriminatory impact; (2) what is the defendant's interest in taking the action complained of; and

(3) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. *Id.*, *cited by Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 640 (6th Cir. 2001), *rev'd in part, vacated in part sub nom.* 538 U.S. 188 (2003). "We adopt three of the four factors pronounced in *Arlington [Heights] II.* Under the second factor, the Seventh Circuit inquired whether plaintiffs introduced some evidence of discriminatory intent. The court, however, concluded that this factor was 'the least important of the four factors.' We agree and additionally decide not to consider this factor in our analysis." *Arthur*, 782 F.2d at 575 (*citing Arlington Heights II,* 558 F.2d at 1292).

The Tenth Circuit, like the Sixth Circuit, applies a modified *Arlington Heights II* test which includes only the first, third, and fourth factors of *Arlington Heights II. Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007); *see Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1252 (10th Cir. 1995). In eliminating the 'intent' requirement, the court explained that intent is required only in claims for disparate treatment. *Reinhart*, 482 F.3d at 1229; *see Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995). In contrast, in disparate impact claims, the plaintiff need not show that the policy was formulated with discriminatory intent because the plaintiff is challenging a facially neutral policy that "actually or predictably results in . . . discrimination." *Reinhart*, 482 F.3d at 1229 (*citing Huntington Branch, NAACP*, 844 F.2d at 934 (internal quotation marks omitted), *aff'd sub nom.*, 488 U.S. 15 (1988)).

B. Burden Shifting Approach.

Soon after the Seventh Circuit developed its test in *Arlington Heights II,* the Third Circuit developed its own completely different test based on a burden shifting framework similar to what had been used in Title VII employment cases. *Rizzo*, 564 F.2d at 148. Under the *Rizzo* approach, the plaintiff can make a *prima facie* case by showing that the defendant's action has a discriminatory impact. *Id.* at 148. The defendant can rebut this by showing a justification which "serve[s], in theory and in practice, a legitimate, bona fide interest" and by showing that "no alternative course of action could be adopted that would enable the interest to be served with less discriminatory impact." *Id.* at 149.

The Eighth and Ninth Circuits both recognize disparate impact claims under the Fair Housing Act but apply a modified burden shifting framework that includes three steps. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902-903 (8th Cir. 2005); *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999). Using this approach, plaintiffs still carry the first burden of showing a discriminatory impact, but to rebut defendants need only provide a bona fide, non-discriminatory justification. The burden then shifts back to the plaintiffs to show an alternative that is less discriminatory but that also serves the defendants' interest. *Darst-Webbe Tenant Ass'n Bd.*, 417 F.3d at 902-903, *Oti Kaga, Inc. v. S. Dakota Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003).

> To prove discrimination under a disparate impact analysis [plaintiff] must show a facially neutral policy has a significant adverse impact

> on members of a protected minority group. The burden then shifts to [defendant] to show the policy has a manifest relationship to the [action that produces the discriminatory impact] and is justifiable on the ground it is necessary to [defendant's action]. If [defendant] is able to show the policy is justified, [plaintiff] may nonetheless prevail by showing another policy would accomplish [defendant's] objectives without the discriminatory effects.

Oti Kaga, Inc., 342 F.3d at 883.

C. Hybrid Burden Shifting And Balancing Test.

Ten years after the decision in *Arlington Heights II*, the Second Circuit developed a third test by merging the burden shifting test in *Rizzo* with the balancing test in *Arlington Heights II*. *Huntington Branch, NAACP*, 844 F.2d 926. The *Huntington Branch, NAACP* court held that the plaintiff must first establish a *prima facie* case of discriminatory impact by showing that the "challenged practice of the defendant actually or predictably results in racial discrimination." *Huntington Branch, NAACP*, 844 F.2d at 934 (*citing Rizzo*, 564 F.2d at 148-149). The burden then shifts to the defendant to rebut this case by showing that its "actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Id.* After the burden shifting test is applied, the Second Circuit balances two of the *Arlington Heights II* factors (numbers 2 and 4) before making an ultimate determination on the merits. *Id.* Although the plaintiff is not required to

show it to establish a *prima facie* case, the court first looks to see whether there is any evidence of discriminatory intent on the part of the defendant. *Id.* "Though we have ruled that such intent is not a requirement of the plaintiff's *prima facie* case, there can be little doubt that if evidence of such intent is presented, that evidence would weigh heavily on the plaintiff's side of the ultimate balance." *Id.* The second factor weighed is "whether the plaintiff is suing to compel a governmental defendant to build housing or only to require a governmental defendant to eliminate some obstacle to housing that the plaintiff itself will build." *Id.*

The First Circuit, in choosing the *Huntington Branch, NAACP* hybrid burden shifting approach over any sort of balancing test, explained, "[W]e do not think that the courts' job is to 'balance' objectives, with individual judges deciding which seem to them more worthy. True, one circuit court decision did refer to balancing . . . but the few later circuit court decisions on point come closer to a simple justification test . . . and we think this is by far the better approach." *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000) (internal citations omitted).

III. THIS CASE PROVIDES THE IDEAL VEHICLE FOR RESOLVING IMPORTANT ISSUES REGARDING THE SCOPE OF THE FAIR HOUSING ACT.

A. This Case Presents Purely Legal Questions That Should Be Determined By This Court.

It is appropriate for this Court to hear cases that present purely questions of law. Whether disparate impact analysis applies to Fair Housing Act claims

squarely fits that category as the question presented is entirely a legal question. The specific facts involved here are immaterial to the resolution of the questions presented and therefore the issues presented are appropriate for this Court's review. *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982); and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (both holding that purely legal questions presented in a petition for certiorari may be appropriate for decision even if not addressed by the lower court).

B. The Application Of Disparate Impact Analysis To A Fair Housing Act Claim Was Raised Below.

In the motion for summary judgment to the district court, the brief to the Eighth Circuit Court of Appeals, and in the petition for rehearing *en banc*, Petitioners continuously argued that Respondents did not present evidence to support a Fair Housing Act claim analyzed under disparate impact analysis. Furthermore, in the petition for rehearing *en banc* Petitioners argued that the Eighth Circuit panel created a circuit split by its decision which was in direct conflict with law in other circuits cited by the panel. As correctly recognized by the dissent "the petition raises important questions concerning whether 'aggressive' enforcement of a housing code is the sort of facially neutral policy that can trigger disparate-impact analysis under the [Fair Housing Act]. . . ." Pet. App. 118a. Petitioners properly preserved the claim for Supreme Court review by consistently challenging Respondents' Fair Housing Act claim and the panel's application of the law. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("in our view [the argument that Amtrak was part of the government is] not a new

claim . . . but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment"); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) (since petitioners "raised a taking claim in the state courts," they "could have formulated any argument they liked in support of that claim here"); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (where Americans with Disabilities Act coverage issue was raised below, the Court would entertain a new argument regarding the statute's scope).

Furthermore, the threshold issue, whether or not disparate impact analysis applies to a Fair Housing Act case at all, was specifically discussed by the *en banc* dissent. Pet. App. 119a–120a. Therefore, the issue, as discussed by the *en banc* dissent, is particularly well suited for this Court's review. *Virginia Bankshares, Inc. v. Sandberg,* 501 U.S. 1083, 1099 n.8 (1991) (raising such an issue before the Court is particularly appropriate where the question (1) is in "a state of evolving definition and uncertainty," and (2) is "one of importance to the administration of federal law"); *see also Lebron*, 513 U.S. at 379 ("even if this were a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below").

Finally, Petitioners challenged the disparate impact claim based on Eighth Circuit precedent, and other circuit court cases that applied disparate impact analysis to Fair Housing Act claims. That Petitioners may not have directly challenged the application of disparate impact analysis to the Fair Housing Act claims does not preclude review of that threshold issue

by this Court. Petitioners' approach to challenging disparate impact analysis and the application chosen by the panel reflects Petitioners' assessment that an argument to the Eighth Circuit to ignore Eighth Circuit precedent would be futile. *See, e.g., Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (limiting contract argument to a few pages does not suggest waiver but reflects counsel's sound assessment that the argument would be futile).

C. The Lack Of Uniformity In The Circuits Nationwide Leads To Confusion About Cities' Ability To Enforce Their Housing Codes.

The way the law stands, cities with a diverse population located in the Fourth and Seventh Circuits (which apply a four part balancing test) can enforce their housing codes where protected class individuals live in properties subject to the housing code at a rate greater than those non-protected class individuals. The balancing test allows courts in those jurisdictions to use common sense when determining whether or not a violation of the Fair Housing Act has occurred.

Likewise, those in the Sixth and Tenth Circuits may be able to enforce the housing codes in a racially diverse municipality depending on how the modified *Arlington Heights II* approach (three part balancing test) is applied.

The First and Second Circuits apply the burden shifting test from the Third Circuit and then two of the parts from the balancing test from the Fourth and Seventh Circuits. This hybrid test, depending on how applied, may also allow courts in the Second Circuit to

use common sense when deciding whether or not there was a violation of the Fair Housing Act.

In the Eighth and Ninth Circuits, applying housing codes in a diverse municipality when protected class individuals live in properties violating the housing code at a higher rate than non-protected class individuals, would be a per se violation of the Fair Housing Act.

The Eleventh and D.C. Circuits have not determined whether disparate impact analysis applies to a claim brought under the Fair Housing Act at all. In light of the analysis this Court relied upon in *Smith*, 544 U.S. 228, it is possible that these circuits would find that there is no basis for a disparate impact analysis in a Fair Housing Act claim.

As it stands today, Los Angeles, Minneapolis, Phoenix, San Francisco, and all other municipalities in the Eighth and Ninth Circuits cannot enforce minimum maintenance standards on properties within the municipality without inviting a claim brought under the Fair Housing Act. All that the burden shifting in those circuits requires, under the panel's analysis, is a showing that there is a shortage of affordable housing, racial minorities make up a disproportionate number of low income individuals who rely on affordable housing, code enforcement increases costs to landlords who rent to low income individuals, and because of the increased cost to those landlords there will be a decrease in the amount of affordable housing available. Every municipality in the Eighth and Ninth Circuit with a racially diverse population falls into that category.

In contrast, the four part balancing test employed by Fourth and Seventh Circuits may not allow for such a draconian disparate impact analysis. If you are a protected class individual in Chicago or Raleigh, or any other municipality in those circuits, you can expect that city's code enforcement will be allowed to function and code enforcement will be applied to provide minimally safe properties for all residents. The three part balancing test in the Sixth and Tenth Circuits is more likely to allow code enforcement that will ensure that all properties, no matter the race of the resident, meet minimum maintenance standards. That would leave cities such as Denver and Columbus more likely than Minneapolis to enforce minimum maintenance standards without the threat of a Fair Housing Act claim.

The possibility of such divergent results is untenable. It makes absolutely no sense for cities with similar demographics to have different standards in enforcing housing codes. Some municipalities would be in violation of the Fair Housing Act in their enforcement while others, providing the same code enforcement, would not run afoul of the Fair Housing Act. Clearly, this issue must be resolved for the benefit of all American cities. Should landlords be choosing a business location because the Fair Housing Act in some cities will prevent code enforcement against their neglected properties? It is doubtful that the drafters of the Fair Housing Act ever contemplated such a twisted result.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

SARA R. GREWING
City Attorney
LOUISE TOSCANO SEEBA
Counsel of Record
K. MEGHAN KISCH
Assistant City Attorneys
750 City Hall and Court House
15 West Kellogg Boulevard
Saint Paul, MN 55102
(651) 266-8772
louise.seeba@ci.stpaul.mn.us

Attorneys for Petitioners

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

[Filed September 1, 2010]

No. 09-1209

Thomas J. Gallagher; Joseph J. Collins, Sr.; Dadder's Properties, LLC; Dadder's Estates, LLC; Dadder's Enterprises, LLC; Dadder's Holdings, LLC; Troy Allison; Jeff Kubitschek; Sara Kubitschek,	)
Plaintiffs - Appellants,	)
v.	)
Steve Magner, individually and as a supervisor of City of St. Paul's Department of Neighborhood Housing and Property Improvement; Mike Cassidy, individually and as a code enforcement officer of the City of St. Paul; Joel Essling, individually and as a code enforcement officer of the City of St. Paul; Steve Schiller, individually and as a code enforcement officer of the City of St. Paul; Joe Yannarelly,	)

individually and as a code enforcement officer of the City of St. Paul; Dennis Senty, individually and as a code enforcement officer of the City of St. Paul; Michael Urmann, individually and as a fire inspector of the City of St. Paul; Andy Dawkins, individually and as Director of City of St. Paul's Department of Neighborhood Housing and Property Improvement; Randy Kelly, individually and as Mayor of City of St. Paul; John Doe; Jane Doe, individually and in their official capacities as code enforcement officers of City of St. Paul's Department of Neighborhood Housing and Property Improvement, law enforcement officers or other officials or employees of the City of St. Paul; City of St. Paul, a municipal corporation,

Defendants - Appellees,

No. 09-1528

Frank J. Steinhauser, III; Mark E. Meysembourg; Kelly G. Brisson,

Plaintiffs - Appellants,

v.

City of St. Paul, a municipal

corporation; Randy Kelly, individually and as Mayor of City of St. Paul; Andy Dawkins, individually and as Director of City of St. Paul's Department of Neighborhood Housing and Property Improvement; Lisa Martin, individually and as a code enforcement officer of City of St. Paul's Department of Neighborhood Housing and Property Improvement; Steve Magner, individually and as a supervisor of City of St. Paul's Department of Neighborhood Housing and Property Improvement; Dean Koehnen, individually and as a law enforcement officer of City of St. Paul; John Doe; Jane Roe, individually and in their official capacities as code enforcement officers of City of St. Paul's Department of Neighborhood Housing and Property Improvement, law enforcement officers or other officials or employees of the City of St. Paul,

Defendants - Appellees.

No. 09-1579

Sandra Harrilal,

Plaintiff - Appellant,

Bee Vue; Lamena Vue,

Plaintiffs,

Steven R. Johnson, doing business as Market Group and Properties,

Plaintiff - Appellant,

v.

Steve Magner, individually and as a supervisor of City of St. Paul's Department of Neighborhood Housing and Property Improvement; Michael Kalis, individually and as a code enforcement officer of City of St. Paul; Dick Lippert, individually and as a code enforcement officer of the City of St. Paul; Kelly Booker, individually and as a code enforcement officer of the City of St. Paul; Jack Reardon, individually and as a code enforcement officer of the City of St. Paul; Paula Seeley, individually and as a code enforcement officer of the City of St. Paul; Lisa Martin, individually and as a code enforcement officer of the City of St. Paul; Dean Koehnen, individually and as a law enforcement officer of the City of St. Paul; Andy Dawkins, individually and as Director of the City of St. Paul's Department of Neighborhood Housing and Property Improvement; Randy Kelly, individually and as Mayor of the City of St. Paul; individually, jointly and severally; John and Jane Doe,

individually and in their official capacities as code enforcement officers of the City of St. Paul's Department of Neighborhood Housing and Property Improvement, law enforcement officers or other officials or employees of the City of St. Paul; City of St. Paul, a municipal corporation,

Defendants - Appellees.

Appeals from the United States District Court for the District of Minnesota.

Submitted: February 11, 2010
Filed: September 1, 2010

Before WOLLMAN, BYE, and MELLOY, Circuit Judges.

MELLOY, Circuit Judge.

Several owners and former owners of rental properties in St. Paul, Minnesota brought these consolidated actions, challenging the City of St. Paul's ("the City") enforcement of its housing code. The property owners appeal the district court's (1) dismissal of their claims on summary judgment, (2) denial of sanctions for spoliation of evidence, and (3) denial of discovery regarding Appellee Steve Magner. We affirm in all respects except the dismissal

of Appellants' disparate impact claim under the Fair Housing Act.

I. Background

In 1993, the City enacted the Property Maintenance Code ("the Housing Code"), which "[e]stablishes minimum maintenance standards for all structures and premises for basic equipment and facilities for light, ventilation, heating and sanitation; for safety from fire; for crime prevention; for space, use and location; and for safe and sanitary maintenance of all structures and premises." St. Paul, Minn. Code § 34.01(1). Sometime shortly before or during 2002, the City established the Department of Neighborhood Housing and Property Improvement ("DNHPI") as an executive department responsible for administering and enforcing the Housing Code. DNHPI was empowered to inspect all one- and two-family dwellings and administer and enforce laws regulating maintenance of residential property.

Appellee Andy Dawkins was the director of DNHPI from 2002 to 2005. In that position, Dawkins favored owner-occupied housing over rental housing "for the sake of the neighborhood[.]" Toward that end, Dawkins increased the level of Housing Code enforcement targeted at rental properties. In addition to responding to citizen complaints about particular properties, DNHPI inspectors conducted proactive "sweeps" to detect Housing Code violations. Furthermore, Dawkins raised inspection standards by directing DNHPI inspectors to "code to the max," that is, writing up every violation—not just what was called in—and writing up all the nearby properties—not just the reported properties. Lastly, DNHPI instituted a

user-friendly system for inspectors and observers to report Housing Code violations. Dawkins expected that this vigilance would help DNHPI raise an additional $500,000 in revenue, which would cover the costs of additional inspections.

Under Dawkins' leadership, DNHPI also increased its Housing Code enforcement efforts regarding so-called "problem properties." The DNHPI website defined a problem property by saying: "If you live next door to a problem property you know it! Constant calls to get rid of the junk, intolerable behavior by occupants and guests, etc." DNHPI sought to compel property owners to take greater responsibility for their properties or, alternatively, force changes in ownership. To achieve its objectives, DNHPI employed a variety of strategies for renter-occupied dwellings, including orders to correct or abate conditions, condemnations, vacant-building registration, fees for excessive consumption of municipal services, tenant evictions, real-estate seizures, revocations of rental registrations, tenant-remedies actions, and if necessary, court actions. DNHPI coordinated its efforts with the St. Paul police and an assistant City attorney.

In addition, the City used a procedure known as "Code Compliance Certification" to require rental properties to meet current housing and building standards. The contours of this procedure are unclear, but it appears that the City required rental property owners to acquire Code Compliance Certification if a property was remodeled or deemed a dangerous structure, a nuisance building, or vacant. Code Compliance inspections were conducted by the City's Office of License, Inspections, and Environmental

Protection, which would evaluate the building's structure, plumbing, electrical condition, and mechanical condition. Code Compliance Certification allegedly forced property owners to undertake expensive renovations, especially with regard to older properties that were exempt from current building codes under Minnesota law.

Appellants own or formerly owned rental properties in the City. Appellants' individual rental portfolios ranged from one property to over forty properties. They rented primarily to low-income households, and a majority of their tenants received federal rent assistance. The parties agree that African-Americans generally made up a disproportionate percentage of low-income tenants in private housing in St. Paul, and specifically, Appellants claim that they rented to a higher-than-usual percentage of African-Americans.

Appellants' properties were subject to the City's Housing Code enforcement from 2002 to 2005. They received code enforcement orders that, in many cases, cited between ten and twenty-five violations per property for conditions including rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors and screens, and broken or missing guardrails or handrails. Several of Appellants' properties were designated as problem properties, subject to Code Compliance Certification, or, in a few cases, both. As a result of the City's Housing Code enforcement, Appellants suffered increased maintenance costs, fees, condemnations, and were forced to sell properties in some instances.

In 2004 and 2005, Appellants filed these actions against the City, the City's mayor (Randy Kelly), the City's fire inspector (Michael Urmann), a police officer who worked with DNHPI (Dean Kohnen), and several DNHPI employees, including Dawkins, a supervisor (Steve Magner), and several code enforcement officers.[1] We refer to Appellees collectively as "the City" unless specification is warranted. Appellants' legal claims and the relevant facts are described in greater detail below.

The district court consolidated Appellants' actions and resolved them together. The court referred several discovery matters to a magistrate judge, including Appellants' motion and renewed motion for sanctions due to the City's alleged discovery abuses and Appellants' motion to compel discovery of Steve Magner's personal records. The magistrate judge denied both of those motions, and the district court affirmed. Then, the City moved for summary judgment. After a hearing, the district court granted the City's motion for summary judgment in its entirety. Appellants challenge the summary judgment order, the denial of spoliation-of-evidence sanctions, and the denial of discovery regarding Magner's personal records.

---

[1] The named code enforcement officers are: Mike Cassidy, Joel Essling, Steve Schiller, Joe Yannarelly, Dennis Senty, Lisa Martin, Michael Kalis, Dick Lippert, Kelly Booker, Jack Reardon, and Paula Seeley. Appellants do not appeal the district court's dismissal of their claims against two unnamed code enforcement officers.

II. Summary Judgment

"We review a decision to grant summary judgment de novo, applying the same standard as the District Court." Riley v. Lance, Inc., 518 F.3d 996, 999 (8th Cir. 2008). We will affirm if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2). We view the facts in the light most favorable to Appellants, drawing all reasonable inferences in their favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

A. Fair Housing Act

The Fair Housing Act ("FHA") prohibits property owners and municipalities from blocking or impeding the provision of housing on the basis of race, color, religion, sex, familial status, or national origin. 42 U.S.C. § 3604(a)–(b). Appellants argue that summary judgment was inappropriate because there is sufficient evidence to support their claims under the following theories: disparate treatment, disparate impact, retaliation, and failure to affirmatively further fair housing. We address each theory in turn.[2]

(1) Disparate Treatment

Disparate-treatment claims under the FHA are tested under the same framework as Title VII disparate-treatment claims. Ring v. First Interstate

---

[2] The district court concluded that Appellants have prudential standing to pursue a claim under the FHA, and the City does not challenge that holding on appeal.

Mortgage, Inc., 984 F.2d 924, 926 (8th Cir. 1993) (applying the three-stage Title VII analysis to a FHA disparate treatment claim). The standard is familiar—did the defendant(s) treat the plaintiff(s) less favorably than others based on their race, color, religion, sex or national origin? Appellants contend that the manner in which the City enforced its Housing Code was discriminatory. Specifically, Appellants allege that the City enforced the Housing Code more aggressively with regard to their properties because they rented to a disproportionately high amount of racial minorities, particularly African-Americans.

Proof of discriminatory purpose is crucial for a disparate treatment claim. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Summary judgment is warranted if the plaintiff cannot produce either (a) direct evidence of discriminatory intent or (b) indirect evidence creating an inference of discriminatory intent under the McDonnell Douglas[3] burden-shifting framework. Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004); see also East-Miller v. Lake County Highway Dep't, 421 F.3d 558, 563–64 (7th Cir. 2005) (applying the "direct evidence" and McDonnell Douglas frameworks in the FHA context). The district court concluded that Appellants did not assert a claim under the McDonnell Douglas framework, and we agree. Presentation of the McDonnell Douglas framework on appeal raises new issues and is therefore not appropriate for our consideration. See Cronquist v. City of Minneapolis, 237 F.3d 920, 924–25 (8th Cir. 2001) (refusing to

---

[3] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

consider a mixed-motive discrimination theory because it was not presented to the district court); Universal Title Ins. Co. v. United States, 942 F.2d 1311, 1314 (8th Cir. 1991) (new issues are generally not considered on appeal). As such, we turn to whether there is direct evidence that discriminatory animus motivated the City's code enforcement actions.

Direct evidence is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." Griffith, 387 F.3d at 736 (quotation omitted). "Direct evidence does not include stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself." Twymon v. Wells Fargo & Co., 462 F.3d 925, 933 (8th Cir. 2006) (alteration, quotation marks, and citations omitted).

Appellants cite many statements that purportedly show the "discriminatory attitude" of Housing Code enforcement in the City. Nearly all of these statements are not direct evidence of racial discrimination because they have little or no connection to a DNHPI policy or action. See id. We limit our discussion to statements from people within DNHPI or connected to a DNHPI policy or action.

Appellant Steven Johnson alleges that code enforcement officer Lisa Martin and police officer Dean Koehnen made racially derogatory remarks about Johnson's African-American tenants (e.g., "The black plague come like roaches") when Johnson asked why the City was "coming after" his properties. The

district court did not address Johnson's allegations, however, as Appellants failed to bring them to the court's attention. Indeed, the district court noted its frustration with "voluminous materials—four file boxes worth—submitted by Plaintiffs in opposition to Defendants' motions for summary judgment." Steinhauser v. City of St. Paul, 595 F. Supp. 2d 987, 1020 (D. Minn. 2008). The court explained that Appellants failed to "winnow out the relevant documents," and therefore "the burden of doing so fell to the Court." Id. Johnson's allegations about Martin and Koehnen were contained in a single paragraph of a thirty-page affidavit, among nearly 2,000 pages of record evidence. Appellants do not contest the district court's portrayal of how the evidence was presented to the district court. Given these circumstances, we decline to reverse on the basis of Johnson's allegations. See Midwest Oilseeds, Inc. v. Limagrain Genetics Corp., 387 F.3d 705, 715 (8th Cir. 2004) ("'Factual assertions that defeat a summary judgment,' however, 'cannot be presented for the first time to [an] appellate court, and only those matters properly before [the] district court for summary judgment consideration are subject to appellate review.'" (citation omitted)); see also Crossley v. Ga.-Pac. Corp., 355 F.3d 1112, 1113–14 (8th Cir. 2004) (per curiam) (affirming summary judgment because the plaintiff failed to designate specific facts as per Rule 56; he attached full transcripts from six depositions and argued that his claim could be understood only upon a full reading of the depositions); White v. McDonnell Douglas Corp., 904 F.2d 456, 458 (8th Cir. 1990) (per curiam) ("A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire

record for some specific facts that might support the nonmoving party's claim.") (quotation omitted).

On several occasions, viewing the record most favorably to Appellants, Dawkins made statements that demonstrate his desire and intent to reduce the amount of low-income tenants in the City. These statements merit our attention because of Dawkins' role within DNHPI. However, all of Dawkins' statements are facially race-neutral, and we have stated, "Facially race-neutral statements, without more, do not demonstrate racial animus on the part of the speaker." Twymon, 462 F.3d at 934. Appellants have failed to connect Dawkins' allegedly hostile attitude toward low-income tenants with discriminatory intent; merely calling these statements evidence of racial animus is not enough to create a genuine dispute of fact. See Thomas v. Corwin, 483 F.3d 516, 527 (8th Cir. 2007) ("Mere allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions, are insufficient to withstand a motion for summary judgment.").

Appellants also argue that discriminatory intent should be inferred from the City's knowledge that its actions would likely have a disproportionate impact on racial minorities. The Supreme Court discussed a similar theory in Village of Arlington Heights v. Metropolitan Development Corp., 429 U.S. 252 (1977). There, the court of appeals held that a city's zoning decision violated the equal protection clause of the Fourteenth Amendment, which required a finding of discriminatory intent, solely because the "ultimate effect" of the decision was racially discriminatory. Id. at 254. The Supreme Court explained that in some cases, "an important starting point" for determining

discriminatory intent is whether an official action "bears more heavily on one race than another." Id. at 266 (quotation omitted). "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." Id. The Court explained that discriminatory impact alone is not determinative outside of "rare" cases where the pattern of discriminatory effect is "stark." Id. Ultimately, the Court held that an arguable disparate impact on racial minorities was insufficient to prove a discriminatory purpose. Id. at 269–71.

Applying the Arlington Heights analysis here, the evidence of a disparate impact on African-Americans, which we discus in greater detail in the next section, is not so stark and unexplainable on other grounds to justify, on its own, an inference of discriminatory purpose. See Ricketts v. City of Columbia, Mo., 36 F.3d 775, 781 (8th Cir. 1994) ("[I]n only a few cases, where a facially neutral policy impacted exclusively against one suspect class and that impact was unexplainable on neutral grounds, has the impact alone signaled a discriminatory purpose."). The City's explanation, which has greater support in the record, is that DNHPI targeted properties occupied mostly by low-income tenants. Although racial minorities were disproportionately represented, those low-income tenants included people of all races. Such conduct may be actionable, but not under the rubric of disparate treatment. See id. ("When there is a rational, neutral explanation for the adverse impact and the law or custom disadvantages both men and women, then an inference of discriminatory purpose is not permitted.").

In sum, there is insufficient evidence to reasonably infer discriminatory intent. Accordingly, the district court properly granted summary judgment with regard to Appellants' disparate treatment claim under the FHA.

(2) Disparate Impact

As alluded to in the previous section, Appellants allege that the City violated the FHA because aggressive enforcement of the Housing Code had a disparate impact on racial minorities. We apply a three-step analysis to Appellants' disparate impact claim. First, Appellants must establish a prima facie case, which requires showing "that the objected-to action[s] result[ed] in . . . a disparate impact upon protected classes compared to a relevant population." Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., 417 F.3d 898, 902 (8th Cir. 2005). Stated differently, Appellants "must show a facially neutral policy ha[d] a significant adverse impact on members of a protected minority group." Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir. 2003). Appellants are not required to show that the policy or practice was formulated with discriminatory intent. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934--35 (2d Cir.), aff'd, 488 U.S. 15 (1988) (per curiam); Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976). If Appellants establish a prima facie case, the burden shifts to the City to demonstrate that its policy or practice had "'manifest relationship'" to a legitimate, nondiscriminatory policy objective and was necessary to the attainment of that objective. Darst-Webbe, 417 F.3d at 902 (quoting Oti Kaga, 342 F.3d at 883). If the City shows that its actions were justified, then the burden shifts back to

Appellants to show "a viable alternative means" was available to achieve the legitimate policy objective without discriminatory effects. Id. at 902--03.

The first component of Appellants' prima facie case is an identifiable, facially-neutral policy or practice. See Mems v. City of St. Paul, 224 F.3d 735, 740 (8th Cir. 2000). The district court interpreted Appellants' disparate impact claim as a challenge to the City's policy of enforcing the Housing Code instead of the Federal Housing Quality Standard ("HQS"), which applies to all rental properties that receive federal rent assistance. This interpretation was too narrow. Appellants have consistently challenged the City's aggressive Housing Code enforcement practices. The common denominator in Appellants' affidavits, allegations, and briefs is that the City issued false Housing Code violations and punished property owners without prior notification, invitations to cooperate with DNHPI, or adequate time to remedy Housing Code violations. Punishments included fines, evictions, condemnations, revocation of rental registrations, and the financial burden of Code Compliance Certification. Therefore, turning to the next step in the prima facie case, we evaluate whether the City's aggressive code enforcement resulted in a disparate impact on a protected class.

To demonstrate a disparate impact, Appellants have offered evidence supporting the following conclusions:

(a) The City experienced a shortage of affordable housing. The City represented in its 2003 report to the U.S. Department of Housing and Urban Development ("HUD")

that "the lack of affordable housing opportunities remains a major issue facing many Saint Paul lower income households, who are also protected class members," and that "27.6% of Saint Paul's lower income residents cannot find adequate affordable housing in the City." Then, in 2005, the City estimated that 32% of the households in St. Paul had unmet housing needs (cost burdens, overcrowding, etc.).

(b) Racial minorities, especially African-Americans, made up a disproportionate percentage of lower-income households in the City that rely on low-income housing. The district court noted that the parties agree that African-Americans make up a disproportionate percentage of low-income tenants in the City. The City's 2000 census data showed that 11.7% of the City's population was African-American, whereas data from October 2004 showed that 61% and 62% of those on waiting lists for public housing and Section 8 assistance, respectively, were African-American. Further, the City's 2000 report to HUD showed that 52% of minority-headed renter households were in the bottom bracket for household adjusted median family income, compared to 32% of all renter households.

(c) The City's aggressive Housing Code enforcement practices increased costs for property owners that rent to low-income tenants. Appellants produced at least six affidavits describing the toll that the City's

aggressive Housing Code enforcement took on their rental business. They reported a substantial increase in costs, resulting in evictions for tenants and "forced sales" of their properties in some cases. These allegations are corroborated by an internal memorandum from the City's fire marshal in 1995, comparing the Housing Code and the HQS and concluding that the Housing Code was more strict in regard to 82% of the examined categories.

(d) The increased burden on rental-property owners from aggressive code enforcement resulted in less affordable housing in the City. Documents from the City and the Public Housing Authority acknowledged that any decrease in federally assisted rental housing would reduce the amount of affordable housing in the City. Those predictions were supported by the City's Vacant Buildings Report, which showed that the number of vacant homes listed in the City rose from 367 to 1,466 between March 2003 and November 2007, which was a nearly 300% increase. Further, Appellants submitted affidavits from three tenants who alleged that they endured hardship when their homes were condemned for minimal or false Housing Code violations.

These premises, together, reasonably demonstrate that the City's aggressive enforcement of the Housing Code resulted in a disproportionate adverse effect on racial minorities, particularly African-Americans. Viewed in the light most favorable to Appellants, the evidence

shows that the City's Housing Code enforcement temporarily, if not permanently, burdened Appellants' rental businesses, which indirectly burdened their tenants. Given the existing shortage of affordable housing in the City, it is reasonable to infer that the overall amount of affordable housing decreased as a result. And taking into account the demographic evidence in the record, it is reasonable to infer racial minorities, particularly African-Americans, were disproportionately affected by these events. See 215 Alliance v. Cuomo, 61 F. Supp. 2d 879, 889 (D. Minn. 1999) ("[M]inority, elderly, and disabled tenants face significant hurdles in locating housing above and beyond the mere shortage of low-income housing. . . . Any policy which results in the displacement of low-income tenants will disproportionately affect these particular low-income citizens whose housing options are especially constrained."). Though there is not a single document that connects the dots of Appellants' disparate impact claim, it is enough that each analytic step is reasonable and supported by evidence.

We note that a common method of showing a disproportionate adverse effect is to compare levels of dependence on affordable housing. Where a plaintiff demonstrates that a protected group depends on low-income housing to a greater extent than the non-protected population, other courts have found it reasonable to infer that the protected group will experience a disproportionate adverse effect from a policy or decision that reduces low-income housing. See, e.g., Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 575–76 (2d. Cir. 2003) (plaintiffs can establish disparate impact by showing statistics that (1) $x\%$ of all of a protected class in an area depend on a type of housing affected by the challenged policy or

practice, (2) *y*% of all of the non-protected population depends on that type of housing, and, crucially, (3) *x* is significantly greater than *y*); Huntington Branch, 844 F.2d at 938 (disparate impact was established by evidence showing the number of African-American families that need subsidized housing, currently occupied subsidized rental projects, hold Section 8 certificates, and are on the waiting list for such certificates is disproportionate to the percentage of African-American families in the general population); Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982) ("The undisputed statistical picture leaves no doubt that the black population of Bladen County was adversely affected by the termination of the housing project, as it is that population most in need of new construction to replace substandard housing, and it is the one with the highest percentage of presumptively eligible applicants."); Owens v. Charleston Hous. Auth., 336 F. Supp. 2d 934, 943 (E.D. Mo. 2004), aff'd in part, Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729 (8th Cir. 2005) (inferring a disparate impact based on evidence "that African-Americans represent a disproportionate number of low-income residents in need of low-income housing"); cf. Artisan/Am. Corp. v. City of Alvin, Tex., 588 F.3d 291, 298–99 (5th Cir. 2009) (plaintiff's claim failed due to absence of the types of evidence typically used to show a disparate impact: a waiting list for affordable housing, a demonstrated shortage of affordable housing, or identifiable tenants affected by the challenged action).

Relying on Reinhart v. Lincoln County, 482 F.3d 1225, 1230 (10th Cir. 2007), the City argues that Appellants must do more than show that the Housing Code increases the cost of low-income housing and that

African-Americans tend to have lower incomes. The City's argument is misplaced, because Appellants have shown more in this case. Viewed most favorably to Appellants, the evidence demonstrates that there is a shortage of affordable housing and that the City's aggressive code enforcement exacerbated that shortage. See United States v. City of Black Jack, Mo., 508 F.2d 1179, 1186 (8th Cir. 1974) (FHA disparate impact claim supported in part by the fact that forty percent of African-American residents were living in substandard or overcrowded units).[4] To the extent the City argues that a FHA violation cannot arise from a statistical link between income and race, we disagree. "While [the City] ultimately may not be held liable under the [FHA] for economic discrimination, the existence of a significant statistical disparity, even one resulting from economic inequality, is sufficient to create a *prima facie* case and shift the burden to come forward with a legitimate business justification for the challenged practice." Williams v. The 5300 Columbia Pike Corp., 891 F. Supp. 1169, 1180 n.23 (E.D. Va. 1995); see also Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1288 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978) (exclusion of

---

[4] Of course, merely showing that there is a shortage of housing accessible to a protected group is insufficient to establish a prima facie case for a disparate impact claim. Plaintiffs must also show that such a shortage is causally linked to a neutral policy, resulting in a disproportionate adverse effect on the protected population. See Quad Enters. Co., LLC v. Town of Southold, No. 09-2963-cv, 2010 WL 807946, at *2 (2d Cir. Mar. 10, 2010) ("Simply proffering evidence that there is a shortage of handicapped-accessible housing in the Town of Southold compared to its handicapped population does not show that the neutral policy at issue is the cause.").

low-cost housing units from defendant village had a discriminatory effect because "a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing"); Black Jack, 508 F.2d at 1186 (reversing dismissal of plaintiff's FHA challenge to an exclusionary zoning ordinance, holding that disparate impact was established in part because a larger proportion of African-American than white households have low incomes); Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148, 154–55 (S.D.N.Y. 1989) (defendant apartment complex violated the FHA by refusing to consider prospective tenants based on their income levels).

The district court concluded that Appellants must show (1) the different costs of rent for African-Americans under the City's Housing Code and the federal HQS and (2) the percentages of African-Americans and non-African-Americans who could not afford rent because the City enforced the Housing Code instead of the HQS. We agree that such a before-and-after cost-of-rent comparison is one way to show that African-Americans experience a disproportionate adverse effect. However, it is not the *only* way.[5] Appellants are not required provide a

---

[5] In support of the district court's standard, Appellees cite Andrews v. City of New York, No. CV-01-7333, 2004 U.S. Dist. LEXIS 30290 (E.D.N.Y.) and Brown v. Omaha Housing Authority., No. 8:05CV423, 2007 WL 2123750 (D. Neb. July 20, 2007). Neither of those cases, however, specifies what method of proof is required for a disparate impact claim. At most, Andrews and Brown support the conclusion that statistics are useful to demonstrate a disparate impact. See also Tsombanidis, 352 F.3d

particular statistical comparison. See Teamsters, 431 U.S. at 340 (statistics to prove discrimination "come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances."). We conclude that Appellants offered enough evidence to withstand summary judgment on their prima facie case, thereby shifting the burden to the City to show a legitimate, non-discriminatory objective.

Turning to the second step of our analysis, Appellants concede that enforcement of the Housing Code has a manifest relationship to legitimate, non-discriminatory objectives. Specifically, the City has shown that enforcement of the Housing Code promotes the objectives of providing minimum property maintenance standards, keeping the City clean and housing habitable, and making the City's neighborhoods safe and livable. As such, the burden falls back on Appellants to "offer a viable alternative that satisfies the [City's] legitimate policy objectives while reducing the . . . discriminatory impact" of the City's code enforcement practices. Darst-Webbe, 417 F.3d at 906 (emphasis removed).

The district court held in the alternative that Appellants' disparate impact claim fails as a matter of law under the third step of the burden-shifting analysis. On appeal, Appellants identify as a viable alternative the City's former program for Housing Code enforcement called "Problem Properties 2000"

---

at 575–76 (statistical evidence is "normally used in cases involving fair housing disparate impact claims").

("PP2000").[6] A "Progress Report" prepared by City employees in charge of PP2000 lists the goals and tactics of PP2000: identification of properties with a history of unresolved or repeat Housing Code violations, meeting with the owners individually, encouraging the owners to take a more business-like approach to managing their properties, keeping closer tabs on changes of ownership, and using consistent inspectors at each property. Appellants contend that PP2000 embodied a flexible and cooperative approach to code enforcement, which achieved the goals of code enforcement while maintaining a consistent supply of affordable housing. In support, they point to the Progress Report, which describes meetings with property owners as "very productive in gaining the cooperation of owners to step up their efforts towards improving their properties and the neighborhoods they are in." The report described a "good working relationships and lines of communication with these owners," which resulted in "owners working hard to be pro active in maintaining their properties." The report concluded, "[T]he program has been effective in eliminating complaints against the participating owners." These conclusions are corroborated by statements from a member of the PP2000 inspector group (Jeff Hawkins); a code enforcement officer (Appellee Dick Lippert); and Appellant Frank Steinhauser.

---

[6] The district court stated that Appellants abandoned PP2000 as a proposed alternative. However, Appellants argued for four pages in their joint brief in opposition to summary judgment that PP2000 was an alternative to the City's "heavy code enforcement." Appellants did not expressly abandon PP2000 as an alternative during the summary judgment hearing, and therefore we will consider it in this appeal.

Thus far, the City has not argued that PP2000 would be more costly or would fail to accomplish the objectives of Housing Code enforcement. Rather, the City asserts that PP2000 would not reduce the alleged impact on protected class tenants. The district court agreed with the City, explaining, "Because participating landlords were not excused from compliance with the Housing Code, they would still incur the same costs of compliance with the housing code, leaving any alleged discriminatory effect on African-Americans unchanged." Steinhauser, 595 F. Supp. 2d at 999 n.9. This reasoning, however, fails to appreciate that Appellants complain about *how* the City enforced the Housing Code—not just the code's standards and requirements. Appellants offer evidence that the challenged enforcement practices burdened rental-property owners and thereby reduced affordable housing options. There is also evidence that PP2000 generated a cooperative relationship with property owners, achieved greater code compliance, and resulted in less financial burdens on rental property owners. It is reasonable to infer from these facts, viewed most favorably to Appellants, that PP2000 would significantly reduce the impact on protected class members. Thus, there is a genuine dispute of fact regarding whether PP2000 was a viable alternative to the City's aggressive Housing Code enforcement practices.

Appellees do not advance any other basis for dismissing the FHA disparate impact claim. Accordingly, summary judgment was improper as to Appellants' disparate impact claim.

(3) Other FHA Claims

The FHA also prohibits retaliation against any person on account of his having exercised or enjoyed a right granted or protected by the FHA. 42 U.S.C. § 3617; see generally Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 54 (2d Cir. 2002) (elements of FHA retaliation claim). Appellants vaguely assert that the City's code enforcement actions were retaliatory, but they have not identified how they exercised or encouraged others to exercise rights under the FHA or how the City retaliated. Appellants' unsupported and conclusory allegations cannot defeat summary judgment. Fed. R. Civ. P. 56(e)(2) (nonmoving party may not "rely merely on allegations or denials in its own pleading; rather its response must . . . *set out specific facts* showing a genuine issue for trial") (emphasis added); Weger v. City of Ladue, 500 F.3d 710, 728 (8th Cir. 2007) (same). Further, to the extent that Appellants allege that the City retaliated against them for leasing to tenants in protected classes, their claim fails as a matter of law. Appellants were not exercising a right under the FHA by leasing to racial minorities. Were we to adopt Appellants' expansive view of § 3617, every disparate treatment claim would automatically become a retaliation claim.

Appellants also contend that the City failed to "affirmatively further fair housing," contrary to its certifications to HUD.[7] Included in this duty, according

---

[7] The duty to affirmatively further fair housing is actually rooted in the Quality Housing and Work Responsibility Act, 42 U.S.C. § 1437c-1(d)(16).

to Appellants, was an obligation to analyze impediments to fair housing. This claim is not properly before the Court because Appellants failed to pursue it as anything more than background information before the district court. See Universal Title, 942 F.2d at 1314. Were we to consider this claim, we would nonetheless conclude that the City's duty to "affirmatively further fair housing" has no independent significance. See Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 72–73 (D. Mass. 2002) (duty to affirmatively further fair housing mirrors the obligations imposed by the FHA); see also Charleston Hous. Auth., 419 F.3d at 740 (assuming that the "affirmatively further fair housing" claim is subsumed by the FHA claim).

Accordingly, the district court properly granted summary judgment on Appellants' claims that the City unlawfully retaliated against them, failed to affirmatively further fair housing, and failed to analyze impediments to fair housing.

B. Claims Pursuant to 42 U.S.C. §§ 1981, 1982, and 1985

Appellants' claims pursuant to 42 U.S.C. §§ 1981, 1982, and 1985 are duplicative with their FHA disparate treatment claim, as the underlying constitutional violations for these claims require a showing of discriminatory intent. See Dirden v. Dep't of Hous. & Urban Dev., 86 F.3d 112, 114 (8th Cir. 1996) (per curiam) (sections 1981 and 1982); Larson v. Miller, 76 F.3d 1446, 1454 (8th Cir. 1996) (section 1985). Appellants acknowledge this overlap and argue that the district court did not consider "the evidence from the FHA analysis" when it evaluated their

constitutional claims. However, the "evidence from the FHA analysis" is insufficient to establish discriminatory intent, and therefore it is irrelevant that the district court did not repeat its analysis. Because there is insufficient evidence to show a discriminatory intent, see supra Sec. II-A-(1), summary judgment was proper as to Appellants' claims under §§ 1981, 1982, and 1985.

C. Equal Protection

Appellants contend that the district court improperly dismissed their equal-protection claim under 42 U.S.C. § 1983. Appellants do not argue that they are members of a suspect class or that their claims involve a fundamental right. Instead, they assert a "class of one" claim based on the City's preferential treatment of the Public Housing Authority ("PHA"), a distinct government entity funded by HUD that provided 4,300 units of public housing in St. Paul. To prevail on this claim, Appellants must prove that the City "intentionally treated [them] differently from others similarly situated and that there is no rational basis for the difference in treatment." Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam).

Even assuming *arguendo* that the City intentionally treated PHA differently than private property owners, summary judgment was warranted because Appellants have not refuted the rational basis for treating PHA differently from private rental properties. As the district court explained, "PHA is an organization with a comprehensive inspection schedule, staff dedicated to maintenance, and a demonstrated record for maintaining its properties."

Steinhauser, 595 F. Supp. 2d at 1008. The evidence presented by Appellees shows that PHA responds quickly and appropriately to DNHPI correction orders. The district court concluded, "Given the City's limited resources and PHA's record of maintaining its properties, Defendants have a rational basis for permitting PHA to manage its own repairs." Id. at 1009. Appellants fail to explain why this justification was inadequate. We conclude, therefore, that summary judgment was appropriate on their equal-protection claim.

D. Substantive Due Process

Appellants in Case No. 09-1209 ("the Gallagher Appellants") appeal the dismissal of their substantive due process claim pursuant to 42 U.S.C. § 1983. We interpret their claim as challenging the City's Housing Code enforcement as applied to them, not as a facial challenge to any policy or practice. "[T]he theory of substantive due process is properly reserved for truly egregious and extraordinary cases." Myers v. Scott County, 868 F.2d 1017, 1018 (8th Cir. 1989). To prevail on this claim, the Gallagher Appellants must show "a constitutionally protected property interest and that [City] officials used their power in such an arbitrary and oppressive way that it 'shocks the conscience.'" Entergy, Ark., Inc. v. Nebraska, 241 F.3d 979, 991 (8th Cir. 2001) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998)). In light of the uncontested legitimate goals of enforcing the Housing Code, there is insufficient evidence to reasonably conclude that this is a "truly egregious and extraordinary" example of government regulation.

In addition, the Gallagher Appellants contend that Code Compliance Certification violated their substantive due process rights because that procedure conflicts with the Minnesota State Building Code. The supposed conflict with Minnesota state law is not actionable under § 1983, Myers, 868 F.3d at 1018, and will be discussed further in Section II-G.

For these reasons, summary judgment was proper on the Gallagher Appellants' substantive due process claim.

E. Void for Vagueness

The Gallagher Appellants allege that the St. Paul Legislative Code is void for vagueness in violation of the due process clauses of the Fifth and Fourteenth Amendments. They appear to assert both an "as applied" challenge and a facial challenge.

First, the Gallagher Appellants challenge the term "vacant building" in § 43.02(7)(e) as applied to the property at 1522/1524 Carroll Ave. The Carroll Ave. property was allegedly declared vacant twenty-three days after the property was sold to Appellant Troy Allison. The Gallagher Appellants complain that the DNHPI inspector ignored the "obvious occupancy" of the home and based his vacancy determination merely on an observation that the second-story window lacked any blinds or window coverings. However, as the district court noted, Allison admitted in his deposition testimony that the downstairs unit at the Carroll Ave. property was unoccupied and had multiple Housing Code violations when the City declared it a vacant building. The Gallagher Appellants do not challenge that finding on appeal. As such, the Carroll Ave.

property was clearly within the definition of a vacant building. See St. Paul, Minn. Code § 43.02(7)(e) (defining a "vacant building" as "[a] building or portion of a building which is . . . unoccupied and has multiple housing or building code violations"). Therefore, Allison cannot complain of the vagueness of § 43.02(7)(e). See Parker v. Levy, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

The Gallagher Appellants also assert a facial challenge to several chapters of the St. Paul Code under the void-for-vagueness doctrine. Facial challenges to legislative enactments are, to say the least, discouraged. See United States v. Stephens, 594 F.3d 1033, 1037 (8th Cir. 2010). Appellants' basic complaint is that the St. Paul Code does not provide sufficient notice of rental property owners' obligations under the law, placing unwarranted discretion in the hands of DNHPI. The Gallagher Appellants point to several City employees' inability to explain the categorization of vacant buildings and the meaning of the terms "problem property" and "Code Compliance Certification." However, the Gallagher Appellants must do more than allege general confusion regarding a legislative enactment. To start with, they must identify a particular section of the St. Paul Code that is impermissibly vague, as we will not declare entire chapters of the St. Paul Code facially unconstitutional. Appellants fail to reference a particular section of the St. Paul Code, let alone analyze why that section is vague. Without more, the Gallagher Appellants' facial void-for-vagueness claim fails as a matter of law.

F. RICO[8]

Appellants allege causes of action under 18 U.S.C. §§ 1962(c) and (d). "A plaintiff who brings suit under 18 U.S.C. § 1962(c) must prove that the defendant engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Handeen v. Lemaire, 112 F.3d 1339, 1347 (8th Cir. 1997). Under § 1962(d), conspiracy to violate § 1962(c) is also prohibited. "Racketeering activity" is defined in 18 U.S.C. § 1961(1) as a list of predicate acts, including certain state law crimes, conduct that is indictable under various federal provisions, and numerous other offenses. On appeal, Appellants have narrowed the alleged RICO predicate acts to several patterns of conduct, which we address in turn.

Appellants allege that Magner, a DNHPI supervisor, engaged in a scheme of extortion and attempted extortion. Specifically, they allege that Magner approached property owners after he wrote up Housing Code violations and offered to arrange a sale of their property for a price well-below market value. It is undisputed that none of those property owners actually accepted Magner's offer. Appellants assert that Magner transferred "inside knowledge" to a "close friend," Wally Nelson, who subsequently purchased "many distressed single family and duplex homes under Magner's control." They further allege that Nelson, in return, has provided construction services to Magner's father at a discounted rate.

---

[8] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*

Even if we assume there is sufficient evidence of a RICO predicate act, Appellants lack standing to challenge Magner's conduct. Importantly, the only evidence offered to support Appellants' allegations are three affidavits from rental-property owners who are not plaintiffs in these consolidated lawsuits. Appellants have not shown that they themselves suffered any injury from the alleged extortion scheme, and therefore their RICO-based extortion claims fail for lack of standing. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) ("[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."); Bowman v. W. Auto Supply Co., 985 F.2d 383, 384 (8th Cir. 1993) (Section 1964(c) "confers standing on any individual who has experienced injury to his or her business or property that occurred 'by reason of' a RICO violation"); see also Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1347 (2d Cir. 1994).

Next, the Appellants in Cases No. 09-1528 and 09-1579 argue on appeal that the City went so far as to 'fix' the State District Court in their favor." Collectively, the allegations amount to a pattern of cooperation between Dawkins, the city attorney, the mayor, a housing referee, and a Minnesota state judge, resulting in a "crackdown" on landlords in the City. Though these are serious allegations, summary judgment was nonetheless appropriate. The sole evidentiary basis for this claim is Appellant Meysembourg's affidavit, which essentially mirrors the argument in Appellants' brief. Notably, Meysembourg's affidavit merely states that he "learned" this troublesome story without any explanation of how he learned it. Appellants "may not

rest on mere allegations," but instead must "set forth specific facts showing that there is a genuine issue for trial." Postscript Enters. v. City of Bridgeton, 905 F.2d 223, 226 (8th Cir. 1990) (quotation omitted). Affidavits are one way to set forth such facts, but "the affidavits must be made on personal knowledge, must set forth facts which would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated." Id. Under these standards, Appellants' proffered evidence is insufficient. Alternatively, Appellants' claim fails because they have not explained what predicate act they are alleging. General allegations of inter-governmental cooperation and use of phrases like "buy in" are not enough to formulate a RICO claim.

Appellants allege other predicate acts, including falsification of Housing Code violations, intentional delay and misdirection of notices, concealment of the strict nature of the Housing Code, condemnation of properties without justification, and violation of the state building code. These claims, however, lack adequate evidentiary support for a RICO claim. Accordingly, summary judgment was appropriate on all of Appellants' RICO claims.

G State Law Claims – Abuse of Process, Tortious Interference with Contract, Tortious Interference with Business Expectancy

Appellants seemingly appeal the district court's dismissal of their state law claims, but they fail to offer any evidence in support of these claims or explain why the district court's analysis was wrong. Instead, they merely reiterate the theme of their case—the

"discriminatory environment and attitude in housing code enforcement." These conclusory allegations are insufficient to defeat summary judgment. Rodgers v. City of Des Moines, 435 F.3d 904, 907–08 (8th Cir. 2006) ("Without some guidance, we will not mine a summary judgment record searching for nuggets of factual disputes to gild a party's arguments.").

H. Conflict with the Minnesota State Building Code

Appellants argue that the City's use of Code Compliance Certification violated the Minnesota State Building Code by requiring properties to satisfy current building code standards, thereby removing "grandfathered" protections under state law. Appellants have articulated this claim under the doctrine of preemption. See generally City of Morris v. SAX Invs., Inc., 749 N.W.2d 1 (Minn. 2008) (holding that the Minnesota State Building Code expressly preempts a city's licensing ordinances for rental properties). We do not reach Appellants' preemption arguments because they are not before the Court. We have reviewed the latest amended complaints in these actions, which total 228 pages, and even the most liberal construction of the complaints does not indicate a preemption claim. Indeed, the amended complaints do not even allege that the City has violated state law, let alone state "a short and plain statement of the claim showing that [Appellants are] entitled to relief." Fed. R. Civ. P. 8(a)(2). As such, Appellants' preemption arguments are inapposite to the causes of action before the Court. We note that Appellants may amend their complaint on remand, see City of Columbia, Mo. v. Paul N. Howard Co., 707 F.2d 338, 341 (8th Cir. 1983) ("An amendment can be proper after remand to the

district court even if the claim was presented for the first time on appeal or had not been presented to the district court in a timely fashion."), and also that our partial affirmance of summary judgment in this case is without prejudice to any preemption claim that may be available in state court.

III. Spoliation-of-Evidence Sanctions

A brief history of the discovery disputes in this case is appropriate. Appellants filed their complaints in these actions in May 2004, March 2005, and July 2005. Initial discovery requests were served as early as November 2004. In 2007, Appellants learned that, pursuant to routine document-retention policies, the City destroyed emails sent or received prior to December 2005 and Truth-in-Sale-of-Housing ("TISH") reports from 2001 to 2003.[9] Appellants moved for sanctions against the City based on the City's failure

---

[9] The City's Truth-in-Sale-of-Housing ordinance is a consumer protection measure that requires any person who sells a dwelling in the City to have an evaluation completed by a TISH evaluator licensed by the TISH examining board. St. Paul, Minn. Legis. Code § 189.03. The TISH evaluator, who is not a city employee, then produces a TISH disclosure report. The owner must (a) make available the TISH report to all potential buyers and (b) file the TISH report with the examining board before the sale of the dwelling. Id. As the district court recognized, the 2001-2003 TISH reports may have contained pertinent evidence in this case because TISH evaluators are required to note deviations from TISH guidelines, major structural defects, and immediate hazards to health and safety. Id. § 189.05. However, the probative value is likely weak, as the St. Paul Code also states, "Nothing in the disclosure report shall indicate, or shall be deemed to indicate, that such dwellings meet all minimum housing and building standards." Id.

to produce several documents not relevant to this appeal and failure to place a litigation hold on destruction of TISH reports and emails/e-data. The magistrate judge denied the motion for sanctions, explaining that Appellants failed to demonstrate prejudice, i.e., that the material would have contained pertinent evidence. The magistrate judge noted that Appellants could renew their motion for sanctions if and when they could demonstrate prejudice. The district court affirmed the magistrate judge's denial of sanctions.

In February 2008, Appellants renewed their motion for sanctions. The magistrate judge noted the "extensive discovery" that had occurred since the court's first order. She then denied the renewed motion for sanctions because Appellants still failed to demonstrate prejudice. The magistrate also concluded that Appellants did not demonstrate that the City intentionally destroyed or withheld evidence to suppress the truth. The district court affirmed.

Appellants challenge both denials of sanctions, arguing that the City abused the discovery process by failing to place a litigation hold on the destruction of emails and TISH reports. They request an inference that "the evidence destroyed was unfavorable" to the City. District courts have the inherent power to "fashion an appropriate sanction for conduct which abuses the judicial process." Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991). We review an order denying discovery sanctions for an abuse of discretion. Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 745 (8th Cir. 2004). "We give substantial deference to the district court's determination as to whether sanctions are warranted because of its familiarity with the case

and counsel involved." Willhite v. Collins, 459 F.3d 866, 869 (8th Cir. 2006); accord Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007).

It appears that, with the assistance of a data-recovery firm, the City provided Appellants over one million email files following the magistrate judge's first order. With regard to the email files produced, the district court acted within its discretion by refusing sanctions. See Greyhound Lines, 485 F.3d at 1035 ("Because Archway received responsive answers months before trial, the district court properly refused discovery sanctions."). To the extent Appellants complain about the delay in production of those email files, such prejudice was remedied at the district-court level by the postponement of the summary judgment hearing and the extension of pretrial deadlines. Indeed, Appellants had access to the email files three months before they filed their brief opposing the City's motion for summary judgment.

Appellants contend that the City has not produced all email files from before December 2005, although the record on this point is not very clear. Giving Appellants the benefit of the doubt, we assume the City has not produced some of the requested email files from City employee accounts. Appellants argue that the destroyed email files would have supported their claim of intentional discrimination. However, Appellants offer no support for such speculation; there is no basis for inferring that the missing emails would be of a different character than the emails already recovered and produced. Therefore, we agree that Appellants have not demonstrated the requisite prejudice. See Stevenson, 354 F.3d at 748 (prejudice required before sanctions are appropriate); see also

Koons v. Aventis Pharm., Inc., 367 F.3d 768, 780 (8th Cir. 2004) (no prejudice where there is no evidence that the lost document contained anything that would have affected the course of litigation).

With regard to the TISH reports, the City provided Appellants with a list of forty-five TISH evaluators who prepared disclosure reports on properties in the City from 2001 to 2003. From that information, Appellants could subpoena the TISH reports (at the City's expense). Appellants chose not to subpoena the TISH evaluators for their records. The magistrate judge concluded, "Such a failure to pursue discovery is incongruent with Plaintiff's claim of prejudice." We agree. In evaluating prejudice, we have looked to whether an allegedly harmed party took other available means to obtain the requested information. See Sentis Group, Inc. v. Shell Oil Co., 559 F.3d 888, 903 (8th Cir. 2009). Under these circumstances, the district court did not abuse its discretion by finding that prejudice was lacking.

Also critical to our decision is the magistrate judge's conclusion that the City did not intentionally destroy or withhold evidence in an attempt to suppress the truth. See Greyhound Lines, 485 F.3d at 1035 ("The ultimate focus for imposing sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth[.]"). To be sure, a district court does not abuse its discretion by imposing sanctions, even absent an explicit bad faith finding, where a party destroys specifically requested evidence after litigation has commenced. Stevenson, 354 F.3d at 749–50. However, where a court expressly finds, as here, that there is no evidence of intentional destruction of evidence to suppress the

truth, then the district court also acts within its discretionary limits by denying sanctions for spoliation of evidence. See Morris v. Union Pac. R.R., 373 F.3d 896, 901 (8th Cir. 2004) ("The most important consideration in our analysis is the district court's own finding regarding Union Pacific's intent.").[10]

The district court did not abuse its discretion by denying Appellants' motion for sanctions and renewed motion for sanctions.

IV. Discovery of Magner's Personal Records

The Gallagher Appellants also appeal the district court's denial of their motion to compel the production of Magner's tax, banking, and cell phone records. They contend that these records would lead to discoverable evidence to prove extortion for their RICO claim. This issue does not warrant further discussion, as we agree with the magistrate judge's sound reasoning and conclude that the district court did not abuse its discretion. See Stuart v. Gen. Motors Corp., 217 F.3d 621, 631 (8th Cir. 2008) (standard of review for denial of motion to compel).

---

[10] Appellants argue in their reply briefs that the magistrate judge improperly required them to demonstrate bad faith as a precondition for spoliation-of-evidence sanctions. However, Appellants failed to assert their legal argument in their opening briefs, thereby depriving the Court of full briefing on this issue. As such, we deem Appellants' argument waived. See Jenkins v. Winter, 540 F.3d 742, 751 (8th Cir. 2008).

V. Conclusion

For the foregoing reasons, the district court's order granting summary judgment is reversed with regard to Appellants' disparate impact claim and affirmed as to the remaining claims. We affirm the district court's denial of Appellants motions for sanctions, renewed motion for sanction, and motion to compel. We remand these consolidated cases for further proceedings consistent with this opinion.[11]

---

[11] We reject Appellants' request that we assign the case on remand to a district judge from outside the District of Minnesota.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Filed September 1, 2010]

No: 09-1209

Thomas J. Gallagher; Joseph J. Collins, Sr.; Dadder's Properties, LLC; Dadder's Estates, LLC; Dadder's Enterprises, LLC; Dadder's Holdings, LLC; Troy Allison; Jeff Kubitschek; Sara Kubitschek,

Plaintiffs - Appellants

v.

Steve Magner, individually and as a supervisor of City of St. Paul's Department of Neighborhood Housing and Property Improvement; Mike Cassidy, individually and as a code enforcement officer of the City of St. Paul; Joel Essling, individually and as a code enforcement officer of the City of St. Paul; Steve Schiller, individually and as a code enforcement officer of the City of St. Paul; Joe Yannarelly, individually and as a code enforcement officer of the City of St. Paul; Dennis Senty, individually and as a code enforcement officer of the City of St. Paul; Michael Urmann, individually and as a fire inspector of the City of St. Paul; Andy Dawkins, individually and as Director of City of St. Paul's Department of Neighborhood Housing and Property Improvement; Randy Kelly, individually

and as Mayor of City of St. Paul; John Doe; Jane Doe, individually and in their official capacities as code enforcement officers of City of St. Paul's Department of Neighborhood Housing and Property Improvement, law enforcement officers or other officials or employees of the City of St. Paul; City of St. Paul, a municipal corporation,

Defendants - Appellees

No: 09-1528

Frank J. Steinhauser, III; Mark E. Meysembourg; Kelly G. Brisson,

Plaintiffs - Appellants

v.

City of St. Paul, a municipal corporation; Randy Kelly, individually and as Mayor of City of St. Paul; Andy Dawkins, individually and as Director of City of St. Paul's Department of Neighborhood Housing and Property Improvement; Lisa Martin, individually and as a code enforcement officer of City of St. Paul's Department of Neighborhood Housing and Property Improvement; Steve Magner, individually and as a supervisor of City of St. Paul's Department of Neighborhood Housing and Property Improvement; Dean Koehnen, individually and as a law enforcement officer of City of St. Paul; John Doe; Jane Roe, individually and in their official capacities as code enforcement

officers of City of St. Paul's Department of Neighborhood Housing and Property Improvement, law enforcement officers or other officials or employees of the City of St. Paul,

Defendants - Appellees

No: 09-1579

Sandra Harrilal,

Plaintiff - Appellant

Bee Vue; Lamena Vue,

Plaintiffs

Steven R. Johnson, doing business as Market Group and Properties,

Plaintiff - Appellant

v.

Steve Magner, individually and as a supervisor of City of St. Paul's Department of Neighborhood Housing and Property Improvement; Michael Kalis, individually and as a code enforcement officer of City of St. Paul; Dick Lippert, individually and as a code enforcement officer of the City of St. Paul; Kelly Booker, individually and as a code enforcement officer of the City of St. Paul; Jack Reardon, individually and as a code

enforcement officer of the City of St. Paul; Paula Seeley, individually and as a code enforcement officer of the City of St. Paul; Lisa Martin, individually and as a code enforcement officer of the City of St. Paul; Dean Koehnen, individually and as a law enforcement officer of the City of St. Paul; Andy Dawkins, individually and as Director of the City of St. Paul's Department of Neighborhood Housing and Property Improvement; Randy Kelly, individually and as Mayor of the City of St. Paul; individually, jointly and severally; John and Jane Doe, individually and in their official capacities as code enforcement officers of the City of St. Paul's Department of Neighborhood Housing and Property Improvement, law enforcement officers or other officials or employees of the City of St. Paul; City of St. Paul, a municipal corporation,

Defendants - Appellees

Appeal from U.S. District Court
for the District of Minnesota - Minneapolis
(0:05-CV-01348-JNE)
(0:04-cv-02632-JNE)
(0:05-cv-00461-JNE)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part, reversed in part, and remanded to the district court for proceedings consistent with the opinion of this court.

September 01, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

[Filed December 18, 2008]

Frank J. Steinhauser, III, et al.,	)	
	)	
Plaintiffs,	)	Civil No.
	)	04-2632
v.	)	(JNE/SRN)
	)	
City of St. Paul et al.,	)	
	)	
Defendants.	)	
	)	
Sandra Harrilal et al.,	)	
	)	
Plaintiffs,	)	Civil No.
	)	05-461
v.	)	(JNE/SRN)
	)	
City of St. Paul et al.,	)	
	)	
Defendants.	)	
	)	
Thomas J. Gallagher et al.,	)	
	)	
Plaintiffs,	)	Civil No.
	)	05-1348
v.	)	(JNE/SRN)
	)	

City of St. Paul et al.,)
)
Defendants.)
)

ORDER

John R. Shoemaker, Esq., Shoemaker & Shoemaker, PLLC, appeared for Plaintiffs Frank J. Steinhauser, III, Mark E. Meysembourg, Kelly G. Brisson, Sandra Harrilal, and Steven R. Johnson d/b/a Market Group and Properties.

Matthew A. Engel, Esq., Aase, Engel & Kirscher, PLLC, appeared for Plaintiffs Thomas J. Gallagher, Joseph J. Collins, Sr., Dadder's Properties, LLC, Dadder's Estates, LLC, Dadder's Enterprises, LLC, Dadder's Holdings, LLC, Troy Allison, Jeff Kubitschek, and Sara Kubitschek.

Plaintiffs Bee Vue and Lamena Vue did not appear.

Louise Toscano Seeba, Esq., St. Paul City Attorney's Office, appeared for Defendants City of St. Paul, Randy Kelly, Andy Dawkins, Lisa Martin, Steve Magner, Dean Koehnen, Michael Kalis, Dick Lippert, Kelly Booker, Jack Reardon, Paula Seeley, Mike Cassidy, Joel Essling, Steve Schiller, Joe Yannarelly, Dennis Senty, Michael Urmann, Rich Singerhouse, John Doe, Jane Doe, and Jane Roe.

These three related cases are before the Court on Defendants' motions for summary judgment.[1] The cases are unwieldy because each of the sixteen separate plaintiffs makes different factual allegations about his, her, or its treatment by some subset of the eighteen named defendants. The number of claims asserted by Plaintiffs compounds the unwieldiness of the cases. As foreshadowed by the previous two sentences, resolution of Plaintiffs' claims requires lengthy explanation.

Some commonalities exist between Plaintiffs. Plaintiffs are or were private owners of residential rental properties in the City of St. Paul (City). Plaintiffs rented the properties to low-income households. Plaintiffs, as landlords, received multiple code enforcement orders for conditions existing at their rental properties. In many cases, the code enforcement orders cited between ten and twenty-five violations for conditions including rodent infestation, missing deadbolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors and screens, and broken or missing guardrails and handrails. In some cases, Plaintiffs' properties were condemned as unfit for habitation.

Plaintiffs claim Defendants enforced the City's minimum residential property maintenance standards against them in a manner that violated state and federal law because Plaintiffs are "private landlords"

---

[1] For the sake of brevity, the Court refers to the sixteen plaintiffs collectively as "Plaintiffs" and the eighteen named defendants collectively as "Defendants" unless additional specificity is required.

and because they rented to protected classes. More specifically, Plaintiffs claim the City, former City Mayor Randy Kelly, the former Director of the City's Department of Neighborhood Housing and Property Improvement (DNHPI) Andy Dawkins, DNHPI supervisor Steve Magner, and other City employees violated Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act Amendments of 1988 (Fair Housing Act), 42 U.S.C. §§ 3601-3619 (2000); 42 U.S.C. §§ 1981, 1982, 1983, 1985 (2000); and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (2000), through their enforcement actions. Plaintiffs also make claims under Minnesota law for abuse of process, tortious interference with contract, and tortious interference with business expectancy. In addition, plaintiffs Thomas J. Gallagher, Joseph J. Collins, Troy Allison, Jeff and Sara Kubitschek, Dadder's Properties, LLC, Dadder's Estates, LLC, Dadder's Enterprises, LLC, and Dadder's Holdings, LLC (collectively, Gallagher plaintiffs) assert an antitrust claim under 15 U.S.C. §§ 1, 2, 13, 18 (2000), and claim that chapters 34, 43, 45, and 51 of the St. Paul Legislative Code are unconstitutionally vague. For the reasons set forth below, the Court grants Defendants' motions for summary judgment and dismisses all three cases.[2]

---

[2] Plaintiffs ask the Court to reconsider the facts and issues raised in Plaintiffs' earlier motions for sanctions in deciding the present motion. The Court considered these facts and issues when it affirmed the magistrate judge's orders denying the sanctions motions. Plaintiffs have not shown any reason why the Court should reconsider these issues, and the Court declines to do so. *See* D. Minn. LR 7.1(g).

I. BACKGROUND

A. City of St. Paul Housing Code and Enforcement

Chapter 34 of the St. Paul Legislative Code (housing code) sets forth the minimum property maintenance standards for all structures occupied or intended to be occupied for residential purposes in the City. St. Paul, Minn., Code §§ 34.01, 34.03 (1993). The stated purpose of the housing code is to "protect the public health, safety and welfare in all structures and on all premises." *Id.* § 34.01. It "[e]stablishes minimum maintenance standards for all structures and premises for basic equipment and facilities for light, ventilation, heating and sanitation; for safety from fire; for crime prevention; for space, use and location; and for safe and sanitary maintenance of all structures and premises." *Id.*

In 2003, the City established DNHPI as an executive department responsible for administering and enforcing the housing code. *Id.* § 14A.01 (repealed 2008). Randy Kelly, who was the City Mayor at the time, appointed Andy Dawkins as the director of DNHPI. The responsibilities of DNHPI included inspecting all buildings and properties as required by the City codes; administering and enforcing laws regulating the maintenance of residential property, including the City's vacant building program and the City's rental registration program; and enforcing violations of the City's codes related to property maintenance. *Id.* § 14A.01(b). According to the DNHPI website, DNHPI's mission was to "keep the city clean, keep its housing habitable, and make [its] neighborhoods the safest and most livable [of]

anywhere in Minnesota." The DNHPI website identified closing down "problem properties" as one of DNHPI's priorities. The DNHPI website described a "problem property" as "[i]f you live next door to a problem property[,] you know it! Constant calls to get rid of the junk, intolerable behavior by occupants, and guests, etc." Problem properties included both rental and owner-occupied properties.

During Dawkins's tenure as director, DNHPI enforced the housing code by conducting proactive sweeps requested by City District Councils and responding to citizen complaints. According to the DNHPI website, to respond to a citizen complaint, a housing inspector visited the subject property and determined if a violation existed. If the complaint was founded, DNHPI mailed a correction or an abatement order to the occupant and the property owner.

Dawkins created written rules and procedures for DNHPI, which were publicly available from the DNHPI website. These rules stated that DNHPI's goal was consistent application of the rules, but noted that "universal application of the housing code" was not possible due to DNHPI's limited resources. Housing inspectors therefore had discretion in their application of the rules, in their prioritization of cases, to determine which problems received the closest scrutiny, and to achieve compliance through a conversation with the property owner rather than issuing a work order or misdemeanor tag. To aid housing inspectors in exercising their discretion, the rules established the following priorities: serious health and safety cases, problem properties, garbage and nuisance violations, falling down/dilapidated

structures, interior habitability cases, and structures with multiple violations.

Enforcement tools available to housing inspectors included orders to correct or abate conditions, condemnation and vacant building registration, criminal charges, and fees for excessive consumption of City services. In addition, rental properties were subject to revocation of rental registration, evictions initiated by the City Attorney, and City-initiated Tenant Remedies Actions pursuant to Minn. Stat. § 504B.395, subd. 1(4) (2006). At times, properties not in compliance with the housing code were required to undergo a "code compliance" inspection by the City's Office of License, Inspections, and Environmental Protection, which would evaluate the building's structure, plumbing, electrical condition, and mechanical condition.

B. St. Paul Public Housing Agency

The St. Paul Public Housing Agency (PHA), a governmental entity separate and distinct from the City, owns and manages 4300 units of public housing in the City. The United States Department of Housing and Urban Development (HUD) funds PHA's public housing program through an operating subsidy and capital improvement funds. PHA's public housing includes high-rise properties, family townhome developments, and 450 "scattered site" properties, which are single family or duplex properties located throughout the City. Plaintiffs claim these scattered site properties are similar to their rental properties. According to PHA documents, the scattered site properties' tenant base is about 32% African-American and 58% Asian/Pacific Islander.

PHA also operates the Section 8/Housing Choice Voucher program (HCV program) for the City. HUD funds the HCV program. PHA pays HCV program funds directly to landlords on behalf of households participating in the HCV program.

According to Jon Gutzmann, Executive Director of PHA, there is a shortage of affordable housing in the City. About 6000 households are on the waiting list for PHA public housing. Approximately 3000 households are on the HCV program's waiting list, which is closed. Although the record does not reflect the demographic breakdown for the City, it is undisputed that non-whites make up a disproportionate percentage of these waiting lists.

PHA properties are subject to the federal Uniform Physical Condition Standard (UPCS). Properties owned by PHA also are subject to the City's codes, including the housing code. According to Henry Petro, Director of Maintenance for PHA, the City sends code enforcement orders to a single contact person at PHA, who then forwards the order to the appropriate PHA department. City housing inspectors have ordered repairs on PHA homes, primarily for exterior deficiencies. The City rarely, if ever, condemns a PHA scattered site property, declares a PHA scattered site property a vacant building, or subjects a PHA scattered site property to a code compliance inspection. The City has, however, condemned non-scattered site PHA properties, including apartments in PHA high-rises.

HUD inspects a subset of PHA properties every two years. HUD consistently rates PHA as a "high performer" in overall operations. Between 2002 and

2005, PHA received scores between 88% and 90% for the physical condition of its properties. A score over 80% results in HUD inspecting PHA properties every other year rather than every year.

In addition to undergoing HUD inspections, PHA properties are subject to frequent inspections by PHA itself. According to Al Hester, Housing Policy Director for PHA, every PHA unit is subject to an annual preventative maintenance inspection and an annual housekeeping inspection. PHA conducts yard-care and building-condition inspections of its scattered site properties five times a year. PHA also conducts pest-control inspections of its properties. Petro testified that PHA's maintenance department employs ninety-eight people. Seventy-seven of the maintenance department employees are maintenance line workers. PHA documents indicate that in 2002, PHA completed 28,577 non-emergency work orders and 6573 emergency work orders. PHA makes routine repairs in approximately 3.6 days and emergency repairs within 24 hours.

Private-sector properties rented to HCV program tenants must meet the federal Housing Quality Standards (HQS) set forth in 24 C.F.R. § 982.401 (2008), as well as the City's housing code. According to Hester, the HQS is a lower standard than the UPCS. In 1995, the City Fire Department compared the City's housing code to the HQS and concluded that the housing code was stricter than the HQS for seventy-seven of the ninety-four items compared, or 82% of the items. The housing code was as strict as the HQS for

twelve items, and the housing code was less strict than the HQS for three items.[3]

C. Plaintiffs

Plaintiffs are current or former owners of residential rental properties in the City. Of the sixteen plaintiffs, three are non-whites. Plaintiffs describe Sandra Harrilal as "Black American" and Bee and Lamena Vue as Asian-American. According to Plaintiffs, between 60% and 70% of their tenant base is African-American.

Throughout their Complaints, Plaintiffs allege Defendants committed multiple acts of wrongdoing. Plaintiffs challenge the legitimacy of code enforcement orders they received and claim that neighboring properties also had code violations but did not receive code enforcement orders. Plaintiffs claim City housing inspectors and law enforcement personnel conducted unconstitutional searches or inspections of Plaintiffs' rental properties. Plaintiffs challenge the designation of certain properties as vacant buildings and the legality of code compliance inspections. Plaintiffs contend that PHA received preferential treatment from the City with respect to housing code enforcement while the City took a "heavy enforcement" and "code to the max" approach with Plaintiffs. In addition, Plaintiffs claim Defendants targeted them for code enforcement because Plaintiffs rented to protected classes. Finally, Plaintiffs claim the City intentionally delayed mailings or intentionally sent

---

[3] The Fire Department classified the relative strictness of two of the ninety-four items as "undetermined."

mailings containing code enforcement orders to wrong addresses to prevent Plaintiffs from responding before a deadline expired.

II. DISCUSSION

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant "bears the initial responsibility of informing the district court of the basis for its motion," and must identify "those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant satisfies its burden, the nonmovant must respond by submitting evidentiary materials that "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In determining whether summary judgment is appropriate, a court must look at the record and any inferences to be drawn from it in the light most favorable to the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A. Claims Against John Doe, Jane Doe, and Jane Roe

Defendants argue that Plaintiffs' claims against John Doe, Jane Doe, and Jane Roe should be dismissed because Plaintiffs have not identified them or set forth their involvement with the matters alleged in the Complaints. The true identity of those defendants was not uncovered during discovery. Accordingly, the Court

dismisses the claims against John Doe, Jane Doe, and Jane Roe without prejudice. *See Munz v. Parr*, 758 F.2d 1254, 1257 (8th Cir. 1985) (discussing when dismissal of claims against John and Jane Does is appropriate).

B. Fair Housing Act Claims

Section 3604 of the Fair Housing Act (FHA) makes it unlawful to refuse to sell or rent to any person or discriminate in the terms, conditions, or privileges of sale or rental of a building on the basis of race, color, religion, sex, familial status, or national origin. 42 U.S.C. § 3604(a)-(b). The FHA also makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by" section 3604. *Id.* § 3617.

Until oral argument, it was unclear which protected class Plaintiffs claimed was discriminated against by Defendants. In their Complaints, Plaintiffs identified not only "African-Americans, Hispanics, Asians, American-Indians, families with children, individuals with disabilities, [and] those receiving state and federal financial assistance," but a broad category they termed "others less fortunate." At oral argument, counsel for Plaintiffs clarified that the key to Plaintiffs' FHA claims is that Plaintiffs rent to a higher percentage of African-Americans than PHA does. The Court therefore analyzes Plaintiffs' FHA claims in the context of disparate impact on African-Americans and disparate treatment of African-Americans.

1. Standing

Defendants contend that Plaintiffs lack prudential standing to bring their FHA claims. By imposing prudential limits on standing, "the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to litigants best suited to assert a particular claim." *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99-100 (1979). Accordingly, a plaintiff may have Article III standing yet lack prudential standing because the "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *See Warth v. Seldin*, 422 U.S. 490, 499 (1975). The test for prudential standing "is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* at 500.

Congress intended standing under the FHA to extend "to the full limits" of Article III. *See Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 881-82 (8th Cir. 2003). Plaintiffs need not be members of a protected class to suffer harm from discrimination. *See id.* at 881. Plaintiffs claim that Defendants' enforcement of the housing code against Plaintiffs because of their tenants' race has caused Plaintiffs harm in the form of increased maintenance costs, and in some cases, forced Plaintiffs to sell their properties. These injuries, which result from the alleged discrimination, are distinct and unique, and fall within the zone of interests protected by the FHA. Plaintiffs have prudential standing to bring their FHA claims. *See id.*

2. FHA Disparate Impact

To succeed on their disparate impact claim, Plaintiffs must show that a facially neutral policy results in, or can be predicted to result in, a disparate impact on protected classes compared to a relevant population.[4] *See Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902 (8th Cir. 2005). If Plaintiffs make that showing, Defendants must demonstrate that the objected-to policy has a "manifest relationship" to legitimate, nondiscriminatory policy objectives and "is justifiable on the ground it is necessary to" the attainment of those objectives. *Id.* If Defendants make that showing, the burden shifts back to Plaintiffs to show that a viable alternative means is available to achieve the legitimate policy objectives without discriminatory effects. *Id.* at 902-03.

In their memorandum in support of their motion, Defendants argue that Plaintiffs' disparate impact claim fails because Plaintiffs failed to identify a facially neutral policy. At oral argument, Plaintiffs identified for the first time Defendants' enforcement of the City's housing code instead of the federal HQS as

---

[4] Counsel for Plaintiffs argued for the first time at oral argument that the federal HQS preempts the City's housing code and that Defendants' conduct violated their duty to affirmatively further fair housing. As Plaintiffs did not raise these arguments in their motion papers (despite describing the duty in their recitation of the facts), Defendants have had no opportunity to address them. Plaintiffs' belated claims of preemption and violation of the duty to affirmatively further fair housing are insufficient to avoid summary judgment. *See N. States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1056-57 (8th Cir. 2004).

the challenged facially neutral policy.[5] Defendants made arguments in their memoranda addressing whether the City's housing code policies have an adverse impact on a protected class, whether the City's policies are justifiable as necessary to achieve legitimate policy objectives, and whether an alternative policy exists that would permit Defendants to achieve those objectives without discriminatory effects. Because Defendants addressed these aspects of Plaintiffs' disparate impact claim, the Court considers Plaintiffs' disparate impact claim despite Plaintiffs' untimely identification of the challenged facially neutral policy.

Plaintiffs claim that enforcement of the housing code, which is stricter than the HQS for 82% of the items considered,[6] has a disparate impact on African-Americans because compliance with the housing code

---

[5] In their brief, Plaintiffs direct the bulk of their disparate impact arguments to Defendants' alleged "targeting" of Plaintiffs for aggressive code enforcement and Defendants' alleged preferential treatment of PHA. The Court considers these arguments in the context of Plaintiffs' FHA disparate treatment claim and equal protection claim.

[6] Plaintiffs place great weight on the City Fire Department's conclusion that the City's housing code was stricter than the HQS for 82% of the items considered. The 82% figure, in isolation, is not particularly helpful to the disparate impact analysis because the cost of complying with each item varies. For example, the cost of ensuring that structural members are structurally sound would differ greatly from the cost of ensuring that deadbolt locks have a one-inch throw. Accordingly, the Court cannot conclude that the City's housing code is 82% stricter than the HQS as a whole, or perhaps more critically to the question of disparate impact, that the cost of compliance with the City's housing code is 82% greater than the cost of compliance with the HQS.

increases the costs of low-income housing and African-Americans make up a disproportionate percentage of low-income tenants.[7] Plaintiffs' argument, without supporting evidence, is insufficient to withstand summary judgment. Plaintiffs must do more than show that the housing code increases the cost of low-income housing and that minorities tend to have lower incomes. *See Reinhart v. Lincoln County*, 482 F.3d 1225, 1230 (10th Cir. 2007) ("It is not enough for the [plaintiffs] to show that (1) a regulation would increase housing costs and (2) members of a protected group tend to be less wealthy than others. It is essential to be able to compare who could afford the housing before the new regulations with who could afford it afterwards."). To make a prima facie case of disparate impact and withstand Defendants' motion for summary judgment, Plaintiffs needed to offer evidence establishing what rents are under the City's housing code, what rents would be under the HQS, and the percentages of African-Americans and non-African-Americans who could not afford to rent in the City because the City enforced the housing code rather than the HQS. *See id.* at 1230-31. Plaintiffs offered no such evidence.[8]

---

[7] The parties agree that African-Americans make up a disproportionate percentage of low-income tenants in both private and PHA housing.

[8] At oral argument, counsel for Plaintiffs argued that Kelly Brisson had passed an HQS inspection shortly before receiving code enforcement orders from DNHPI. Plaintiffs did not present evidence of the costs incurred by Brisson in complying with housing code requirements that exceeded HQS requirements. Further, the HQS inspection encompassed only the lower unit and basement of Brisson's property. Because Plaintiffs put forth no evidence showing which violations were found in the portions of

Instead, Plaintiffs argue that two pieces of evidence support their claim of disparate impact: the shortage of affordable housing in the City and the 2006 Mortgage Foreclosure and Vacant Buildings Trends in St. Paul report (Vacant Buildings report). The Court addresses each in turn.

First, Plaintiffs contend that the City's affordable housing shortage supports a conclusion of disparate impact. No evidence suggests that Defendants' enforcement of the housing code caused or contributed to the City's affordable housing shortage. Jon Gutzmann, Executive Director of PHA, identified insufficient federal funding as contributing to the affordable housing shortage. He did not identify the housing code as a contributor. His testimony is undisputed. The existence of an affordable housing

---

Brisson's property that passed the HQS inspection and which were not, the Court cannot determine whether Brisson received correction orders for conditions that complied with the HQS. At least two of the conditions for which DNHPI cited Brisson after the HQS inspection—a missing interior handrail and a missing upper-story window screen—also violated the HQS. Brisson admitted these conditions existed. Thus, the fact that Brisson received code enforcement orders two months after a portion of his property passed an HQS inspection does not establish that enforcement of the City's housing code rather than the HQS increases costs or rents, much less the extent of the increase.

Counsel also argued that Bee and Lamena Vue received code enforcement orders after passing an HQS inspection. The Vues did not appear for their noticed deposition, and no evidence in the record supports this claim. The Court will not consider counsel's argument regarding the Vues. *See Wittenburg v. Am. Exp. Fin. Advisors, Inc.*, 464 F.3d 831, 838 (8th Cir. 2006) (arguments of counsel are not evidence).

shortage does not support Plaintiffs' claim of disparate impact.

Second, Plaintiffs put forth the Vacant Buildings report as evidence of disparate impact. According to Plaintiffs, the number of vacant homes in the City increased from 367 in 2003 to 1466 in 2007. Relying on the statement in the Vacant Buildings report that "foreclosed properties are or were disproportionately renter-occupied," Plaintiffs argue that enforcement of the City's housing code caused the increase in vacant buildings. The Vacant Buildings report suggests that an increase in foreclosures caused the increase in vacant buildings and identifies equity stripping, predatory lending practices, sub-prime lending, unforeseen life events such as loss of income and health issues, increasing interest rates, and unemployment levels as causes of foreclosures. The Vacant Buildings report does not identify enforcement of the City's housing code as a cause of increased vacancies or foreclosures. Therefore, the Vacant Buildings report does not support Plaintiffs' disparate impact claim. Plaintiffs have not made a prima facie case of disparate impact.

Even if Plaintiffs had made a prima facie case, Defendants contend that enforcement of the housing code rather than the HQS has a manifest relationship to legitimate, nondiscriminatory policy objectives and is necessary to attain those objectives. *See Darst-Webbe*, 417 F.3d at 902-03. Defendants identified DNHPI's objectives as providing minimum property maintenance standards, keeping the City clean and housing habitable, and making the City's neighborhoods the safest and most livable of any in Minnesota. Plaintiffs do not dispute that these

objectives are legitimate and non-discriminatory, that enforcement of the housing code has a manifest relationship to these objectives, or that enforcement of the housing code is necessary to achieving those objectives. Accordingly, Plaintiffs can only prevail on their disparate impact claim by showing that a viable alternative exists that would allow Defendants to achieve the same objectives without discriminatory effects. *See id.* at 903.

At oral argument, counsel for Plaintiffs argued that the HQS is a viable alternative to the housing code. Plaintiffs have not put forth any evidence showing Defendants could achieve their legitimate, non-discriminatory policy objectives if they adopted the HQS. According to the Fire Department's analysis, the HQS contains no provision at all for a number of exterior conditions, including sanitation, extermination, and lighting. Because these exterior conditions affect the safety and cleanliness of the City, adoption of the HQS would prevent Defendants from achieving their policy objectives. Further, although Plaintiffs assume that the HQS would have a less discriminatory effect because it is a laxer standard, they presented no evidence showing the effect of adopting the HQS on the availability of low-income housing or the expected decrease in rents. Thus, even if Plaintiffs had made their prima facie case, they could not prevail on their disparate impact claim because they have not shown the HQS permits Defendants to achieve their legitimate, non-discriminatory policy objectives without discriminatory effects.[9] *See id.* at 906.

---

[9] Plaintiffs identified the City's former Problem Properties 2000 (PP2000) program as a viable alternative in their brief. The

It is for the City, not the Court, to strike the proper balance between the need for safe, clean, and habitable housing and the need for low-income housing. In the absence of evidence supporting Plaintiffs' allegations of disparate impact on African-Americans, the Court declines to rewrite the City's housing code. The Court dismisses Plaintiffs' disparate impact claim.

3. FHA Disparate Treatment

Plaintiffs make a claim for disparate treatment under the FHA. Disparate treatment, which occurs when some people are treated less favorably than others because of their race, color, religion, sex, or national origin, "is the most easily understood type of discrimination." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Proof of discriminatory motive is crucial to a disparate treatment claim. *Id.*

Plaintiffs may survive summary judgment on their disparate treatment claims by presenting either

---

PP2000 program focused on communicating with landlords of properties having a history of repeated or unresolved code violations to formulate a better plan for compliance rather than simply imposing punishment. Frank Steinhauser was a participating landlord. Having identified the City's use of the housing code rather than the federal HQS as the challenged facially-neutral policy, Plaintiffs apparently no longer assert that the PP2000 is a viable alternative. Further, Plaintiffs offered no evidence showing that the PP2000 program would achieve the DNHPI's objectives without discriminatory effect. Because participating landlords were not excused from compliance with the housing code, they would still incur the same costs of compliance with the housing code, leaving any alleged discriminatory effect on African-Americans unchanged.

"direct evidence" of discrimination or "creating the requisite inference of unlawful discrimination" under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). *See Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004); *East-Miller v. Lake County Highway Dept.*, 421 F.3d 558, 563 (7th Cir. 2005) (distinguishing between "direct evidence" and *McDonnell Douglas* framework in FHA context). In the context of Plaintiffs' disparate treatment claim, "direct evidence" is not the opposite of circumstantial evidence. *See Griffith*, 387 F.3d at 736. Rather, the term "direct" refers to the causal *strength* of the proof. *Id.* (emphasis added). "[D]irect evidence is evidence 'showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated'" the adverse action. *See id.* Direct evidence does not include stray remarks, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself. *See Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 933 (8th Cir. 2006) (quotation marks omitted); *Harris v. Itzhaki*, 183 F.3d 1043, 1055 (9th Cir. 1999) (applying direct evidence exclusions in FHA context).

A plaintiff with direct evidence that illegal discrimination motivated the adverse action does not need the three-part *McDonnell Douglas* analysis to survive summary judgment, even if the strong evidence is circumstantial. *See Griffith*, 387 F.3d at 736. A plaintiff who lacks evidence that clearly points to the presence of an illegal motive, however, can only avoid summary judgment by creating the requisite inference of unlawful discrimination under the *McDonnell Douglas* framework. *Id.*

Under the *McDonnell Douglas* framework, once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. *See Gilbert v. Des Moines Area Cmty. Coll.*, 495 F.3d 906, 914 (8th Cir. 2007). If the defendant offers a legitimate, nondiscriminatory reason, the burden shifts back to the plaintiff to put forth evidence showing the defendant's proffered explanation is a pretext for unlawful discrimination. *Id.* Plaintiffs make no argument under the *McDonnell Douglas* framework. The Court therefore considers whether Plaintiffs have offered evidence showing a specific link between the alleged discriminatory animus and the challenged decision that is sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse action.

Plaintiffs contend that a December 2005 e-mail chain originated by Jane Prince, a legislative aide to former City Council member Jay Benavav, demonstrates that the City knew its code enforcement targeted minorities, but dismissed the discriminatory effect and took no remedial action. Prince's e-mail related to a call from a City resident who was concerned that her neighbors were calling in complaints about her because she was a person of color. In the e-mail, Prince said that there was a "very real possibility that people of color are unfairly targeted by the city's complaint[-]based system." Prince also wrote that her office would set up a block meeting with the neighbors to address this concern.

The e-mail chain demonstrates that the resident was concerned about the neighbors, not the City, targeting her on the basis of race. Further, it is clear

from the e-mail chain that the City took the resident's concerns seriously and sought to resolve the issue. The Prince e-mail chain is not evidence of discriminatory animus on the part of Defendants.

Plaintiffs contend the City Council's "Chronic Problem Properties in Saint Paul: Case Study Lessons" report (Problem Properties report) shows bias and discrimination on the part of City residents. The Problem Properties report does not condone or even accept City residents' bias, and is not evidence that Defendants harbored any discriminatory animus toward African- Americans.

Plaintiffs also contend that the Problem Properties report used "derogatory labels"—such as "Down 'n Out"—to refer to protected class residents. The record does not support this contention. The Problem Properties report states that "'Down 'n Out' is a large, old mansion converted into 20 single resident units." "Down 'n Out" refers to the mansion, not the residents. The Problem Properties report does not use derogatory labels to refer to residents in general or African-Americans in particular. Nothing in the Problem Properties report suggests any discriminatory animus on the part of Defendants.

Plaintiffs quote several statements made by Kelly and Dawkins while they were state legislators back in the 1980s and 1990s. After reviewing the statements, the Court concludes that the statements are not direct evidence of discrimination. For example, Plaintiffs quote Kelly as saying:

> Saint Paul needs to do all that it can to preserve and improve the existing privately owned rental

> stock that provides much of our affordable housing, where owners are now struggling with maintenance and management issues. If we lose that housing stock, we have lost a great housing resource in the city.

Nothing in this quotation, or any of the others offered by Plaintiffs, suggests any discriminatory animus toward African-Americans. Rather, this statement evidences Kelly's belief that the City needs to preserve privately-owned affordable housing.

Even if the Court were to assume that these statements evidenced discriminatory animus toward African-Americans, given that Kelly and Dawkins made these statements at least a decade before Defendants made any decision challenged in this lawsuit, they would not be direct evidence of discrimination. At most, they would be "statements by decisionmakers unrelated to the decisional process itself." *See Twymon*, 462 F.3d at 933.

Plaintiffs offer the City's decision to use its housing code rather than the HQS as direct evidence of discrimination. Plaintiffs contend that the City failed to disclose the differences between the City's housing code and the HQS to the public and to HUD. The City's housing code is set forth in Chapter 34 of the St. Paul Legislative Code. The HQS is set forth in 24 C.F.R. § 982.401. Both standards are matters of public record, and the differences are not concealed from anyone.

Plaintiffs claim the City recognized that proceeding with its housing code instead of the HQS would adversely affect the availability of affordable housing in the City and proceeded with the intent of causing

that adverse effect. In a memorandum cited by Plaintiffs, Dawkins wrote:

> No code enforcement program can be universal – 24/7 on every violation at every property – there's just not enough resources; moreover, in most cities a balance has to be struck between aggressive enforcement to preserve livability and over-zealous enforcement potentially leading to wholesale abandonment of properties or the inner-city.
>
> In St. Paul the balance has been struck this way . . . [listing measures permitting the City to become more pro-active without increased resources].

In a section of deposition transcript also quoted by Plaintiffs, Dawkins said:

> I used the example of Baltimore where the aggressive enforcement had tipped the scale so that there was a start of abandonment of properties more than the city had hoped for in Baltimore. And I wanted to make sure that everyone understood that using whatever levers or rules or policies the city has, that we need to make sure that we didn't hit a tipping point.

When considered in context, Dawkins's statements illustrate his desire to avoid wholesale abandonment of properties and his belief that the City's policies did not cause wholesale abandonment. Dawkins's statements do not suggest any discriminatory animus. Further, no evidence suggests that the City designed

and enforced its housing code with the intent of reducing the availability of affordable housing.

Plaintiffs claim other memoranda authored by Dawkins are direct evidence of discrimination. One memorandum relates to a request made by Kelly that City departments think of instances where City government might be susceptible to racism and develop corrective measures. Plaintiffs claim Dawkins's statement that "[p]erhaps a disproportionate number of folks getting [excessive consumption] bills are people of color, but if this is so, then maybe it's because a disproportionate number of families living in poverty are people of color" is evidence of discriminatory animus. The fact that Dawkins continues "[a]nd if this is so, then maybe we should seriously move forward on hiring someone to . . . help this group find the resources to get the job done" belies Plaintiffs' argument. Rather than showing discriminatory animus, this memorandum is evidence of Dawkins's desire to reduce excessive consumption fees imposed on people of color by helping them find the resources to repair their properties.

Another memorandum authored by Dawkins and quoted by Plaintiffs states:

> As you know, the new way to bill-out for excessive consumption is extremely easy compared to the old way. Everything counts – so you don't have to comb the file for exterior property violations, you don't have to count to four cycles, etc. And, we get to assess the bill to the property taxes if not paid. I estimate the new ordinance will bring in half a million dollars or more, and the Mayor has basically

> said it's [ours] to spend – which is good, because . . . the new rental registration ordinance will likely increase the number of interior inspections we do by a substantial amount and either we're going to get a lot of overtime, or [we're] going to have to do some new hires.

The Court discerns no evidence of discriminatory animus in this description of the new excessive consumption and rental registration ordinances.

Plaintiffs claim a statement Dawkins made to Bill Cullen, a real estate investor, is direct evidence of discrimination. Cullen testified that Dawkins had asked a group of landlords "how would [the landlords] feel if all those tenants that are at the bottom of the box were no longer in St. Paul?" Dawkins's statement is facially neutral with respect to race, but Plaintiffs suggest that this statement reveals a racially discriminatory mindset. The Court therefore considers the statement's context. *See Twymon*, 462 F.3d at 934.

According to Cullen, Dawkins made this statement during a meeting about how to improve neighborhood conditions in the City's Payne/Phalen neighborhood. The executive director of the Payne/Phalen neighborhood suggested that landlords screen their tenants, which prompted a discussion about the attributes of low-income tenants. Cullen drew a box for the meeting participants showing the "best" tenants as those with the most income, best credit, and least criminal history. The "bottom of the box" tenants were those having poor credit scores, criminal records, poor rental histories, and lower incomes. Race was not one of the attributes discussed.

Cullen interpreted Dawkins's statement as a statement that Dawkins was trying to get rid of the "bottom of the box" tenants. Even if the Court assumes Cullen's interpretation is correct, Plaintiffs ask the Court to then conclude that Dawkins's desire to exclude "bottom of the box" tenants from the City meant that Dawkins was trying to exclude persons of color—specifically, African-Americans—from the City. While the Court must draw all reasonable inferences in favor of Plaintiffs on Defendants' motion for summary judgment, the Court shall "do so without resort to speculation." *See Twymon*, 462 F.3d at 934. Dawkins's race-neutral statement made in the context of a discussion about improving the conditions of the Payne/Phalen neighborhood reveals no discriminatory animus. *See id.* (facially race-neutral statements, without more, do not demonstrate racial animus).

Plaintiffs also offer a statement Dawkins made to Sara Anderson, a housing advocate. According to Anderson, Dawkins said that he "didn't want low-income individuals renting in the City."[10] Dawkins made this statement during a meeting to discuss Steinhauser's properties attended by Dawkins, Steinhauser, and Anderson. No evidence suggests that this facially race-neutral statement arose from racial animus on the part of Dawkins. *See id.*

Plaintiffs claim an affidavit from Steve Mark, a St. Paul landlord, supports their disparate treatment

---

[10] Anderson also testified that she never heard Dawkins make any other negative statements about low-income tenants, nor did she ever hear any other City employee say they did not want low-income people renting in the City during subsequent discussions.

claim. According to Mark, a City Fire Inspector issued an overcrowding citation for an apartment containing three Hispanic tenants but did not issue an overcrowding citation for an identically-sized apartment in the same building housing three white tenants. Mark claims the square footage of both apartments complied with City codes regarding occupancy. The housing code sets forth several criteria in addition to the required space in a dwelling unit for determining legal occupancy, including minimum ceiling height, required space in sleeping rooms, and the presence of an escape window meeting certain specifications. St. Paul, Minn., Code § 34.13. Mark's affidavit did not provide the stated basis for the overcrowding order or indicate whether the apartments and sleeping rooms were equivalent with respect to all relevant criteria. The record does not indicate that Mark appealed the overcrowding order. The Court therefore cannot conclude that the overcrowding order was improper, much less that it was based on racial animus. Even if the Court assumed that the overcrowding order demonstrated racial animus toward Hispanics, the order would not support Plaintiffs' claim of discrimination against African-Americans. *See Griffith*, 387 F.3d at 736 (evidence that employer made insensitive remarks about African-American and women employees not direct evidence of discrimination against Hispanic employee).

Plaintiffs point to the deposition testimony of former Legal Aid attorney Perry DeStefano as direct

evidence of discrimination.[11] DeStefano testified regarding his representation of Robert King, an African-American tenant/caretaker of a building located at 321 Bates Avenue. King was challenging the decision of the City's Department of Fire and Safety Services (DFSS) to revoke the certificate of occupancy for 321 Bates Avenue.

DeStefano testified that his client had not received correction orders from the City. The St. Paul Legislative Code states "[t]he fire marshal may, in writing, issue a notice to the owner(s) and the interested parties known to the fire marshal of the city's suspension or revocation of a fire certificate of occupancy." St. Paul, Minn., Code § 40.06(a). The minutes from King's legislative appeal indicate that DFSS sent the correction orders to the property owner, who lived in Georgia. The property owner did not give written authorization to the City to send copies of DFSS notices, reports, and other correspondence to King or inform the City that King had the authority to evict tenants and manage the property until after King appealed the notice of condemnation. The City's decision to mail correction orders to the property owner in accordance with the law is not direct evidence of intentional discrimination on the basis of race.

DeStefano believed that a letter dated July 22, 2004, from DFSS listing a number of code deficiencies identified during a July 12, 2004, inspection was

---

[11] For the most part, DeStefano's testimony and supporting exhibits are likely hearsay. Because Defendants did not make this argument in their motion papers, the Court considers DeStefano's testimony and supporting exhibits for the purposes of this motion.

"backdated" because it indicated that a re-inspection would occur on or after July 12—the same date as the inspection and ten days before the date on the letter. Plaintiffs offer no evidence that the letter was backdated rather than simply delayed. Further, no evidence suggests that the delayed mailing was intentional, motivated by the race of the tenants residing at 321 Bates Avenue, or anything other than clerical or computer error. The delayed mailing is insufficient to raise an inference of discrimination. *See Daniels v. Dillard's, Inc.*, 373 F.3d 885, 887 (8th Cir. 2004) (no inference of discrimination when inability of one African-American to pay by check was likely computer malfunction).

Finally, although DeStefano believed that neighbors were making false allegations to the police because of the tenants' protected class status, discriminatory animus on the part of neighbors is not evidence of discriminatory animus on the part of Defendants.[12]

Plaintiffs offer a statement by Assistant City Attorney Maureen Dolan as direct evidence of intentional discrimination. Bee Vue, a Laotian immigrant, stated in an affidavit that Dolan told him "[p]ersonally, I don't think you people deserve to be in this country." According to Vue, Dolan made this statement after Vue expressed his concern that a misdemeanor criminal citation for a housing code violation could affect his application for U.S.

---

[12] DeStefano himself recognized this, as he stated in a letter regarding his representation of King "I know the City did not intend to have a disparate impact."

citizenship. While the Court does not condone such a statement, it is a stray comment unrelated to the decision to issue the misdemeanor citation or any other challenged decision, and is not direct evidence of discrimination. *See Twymon*, 462 F.3d at 934. It was a housing inspector, not Dolan, who issued the misdemeanor citation.

Moreover, Plaintiffs' FHA claim is premised on their argument that the City prefers Asian-American tenants to African-American tenants. Dolan's statement, directed toward a Laotian immigrant, could not possibly refer to African-Americans, and therefore does not support a claim of discrimination based on the African-American status of Plaintiffs' tenants. *See Griffith*, 387 F.3d at 736.

Plaintiffs argue that the opinion of Cathleen Royce, leader of the Community Stabilization Project (CSP), that "Magner is racist" is direct evidence of intentional discrimination.[13] Royce testified about her opinion of Magner as follows:

> **Q:** Now, you mentioned Steve Magner. When did you first have any contact with Steve Magner in any shape within the City of St. Paul structure?

---

[13] Royce also testified that tenants renting from Steinhauser, Johnson, and Bee Vue came to CSP for assistance in forcing these landlords to make repairs. Royce testified that she visited one of the properties for which Steinhauser challenges code enforcement activity after CSP received a complaint from the tenant, who was caring for an infant. The tenant's apartment lacked adequate heat and did not have a door between the apartment and a common hallway. The stove and refrigerator did not work. There were holes in the wall, and Royce saw two mice while she was present.

A: Back in the day, so James Trice, who was with CSP as an organizer for the first year maybe that I was director, maybe two years, and James is an African American man, fairly intelligent, very outspoken and had very negative interactions with Magner.

Q: Was this back in the mid 1990s?

A: Probably, even earlier than that maybe.

Q: Did you ever have any observations as to Mr. Trice and Mr. Magner's interactions that you personally saw?

A: Yeah. And here we're riding on the edge of my memory, but I had strong feelings about it that I'm – there were a couple of interactions that I either was a party to over the phone or in person that I – again it's a very vague memory, but – and I've had – I believe Magner is racist and had some issues with James.

Royce was unable to provide any specifics as to Magner's allegedly racist behavior. Royce's opinion, based on two vaguely remembered interactions she observed several years before the events giving rise to this lawsuit, is not direct evidence of discrimination.

Finally, Plaintiffs argue that the City's decision to terminate the PP2000 program, through which the City worked with landlords to achieve their compliance with the housing code, is direct evidence of discrimination. Plaintiffs contrast the City's decision to terminate the PP2000 program with the City/PHA partnership on crime prevention at PHA's family

townhome developments through the A Community Outreach Program (ACOP). Plaintiffs do not explain the relevance of the City's crime-prevention efforts to the City's relationship with landlords, including Steinhauser, who owned properties with a "history of unresolved or repeat [housing code] violations." Plaintiffs have offered no evidence that discriminatory animus motivated the City's decision to terminate the PP2000 program. In the absence of evidence that an illegitimate criterion actually motivated the City's decision to terminate the PP2000 program, it is not the Court's role to second-guess the wisdom of the City's policies. The Court cannot conclude that the City's decision is direct evidence of discrimination.

Much of Plaintiffs' evidence does not support a conclusion of racial animus toward African-Americans, and none of the evidence shows a specific link between the alleged racial animus and any challenged decision sufficient to support a finding by a reasonable finder of fact that an illegitimate criterion actually motivated a challenged decision. For these reasons, Plaintiffs have not supported their claims of disparate treatment using direct evidence. *See Griffith*, 387 F.3d at 736. Because Plaintiffs have failed to create a genuine issue of material fact as to whether Defendants intentionally discriminated against Plaintiffs on the basis of their tenants' African-American status, the Court dismisses Plaintiffs' FHA disparate treatment claims.

C. Section 1981 and 1982 Claims

Plaintiffs are required to show discriminatory intent to prevail on their claims under 42 U.S.C. §§ 1981, 1982. *Dirden v. Dep't of Housing and Urban Dev.*, 86 F.3d 112, 114 (8th Cir. 1996). As discussed

with respect to Plaintiffs' FHA disparate treatment claim, Plaintiffs have not shown discriminatory intent on the part of Defendants.

Plaintiffs argue that *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673 (D.C. Cir. 2006), supports their § 1981 claim. In *2922 Sherman*, the District of Columbia's lack of explanation for how it narrowed a list of seventy-five properties recommended for closure that were evenly distributed across the city down to five apartment buildings located in neighborhoods having an average Hispanic population 4.4 times that of the city as a whole supported an inference of intentional discrimination. 444 F.3d at 684. Here, Plaintiffs submit maps showing their properties are located in areas having a high percentage of minorities, but offer no evidence showing their properties were targeted while other properties in similar condition located in areas having a low percentage of minorities were not. Plaintiffs' maps are not evidence of intentional discrimination. Plaintiffs' § 1981 and 1982 claims fail.

D. Section 1983 Claims

Plaintiffs make claims under 42 U.S.C. § 1983 for alleged violations of their rights under the Fourth, Fourteenth, and Fifth Amendments to the United States Constitution. Success on a § 1983 claim requires a showing of: "(1) [a] violation of a constitutional right, (2) committed by a state actor, (3) who acted with the requisite culpability and causation to violate the constitutional right." *Shrum v. Kluck*, 249 F.3d 773, 777 (8th Cir. 2001).

1. Fourth Amendment

Plaintiffs claim Defendants violated Plaintiffs' Fourth Amendment right to freedom from unreasonable searches and seizures when City code enforcement and law enforcement officers conducted warrantless searches of Plaintiffs' rental properties without valid consent. Defendants contend that Plaintiffs lack standing to assert this claim because Plaintiffs have no reasonable expectation of privacy in their tenants' apartments.[14] Plaintiffs did not respond to this argument.[15] Nothing in the record suggests that these landlords had a reasonable expectation of privacy in their tenants' apartments. Plaintiffs therefore lack standing to bring § 1983 claims based on searches of their tenants' apartments. *See Rozman v. City of Columbia Heights*, 268 F.3d 588, 591 (8th Cir. 2001).

---

[14] Technically speaking, there is no doctrine of "standing" in Fourth Amendment law. However, courts in the Eighth Circuit use the term "standing" as a shorthand reference to the issue of whether a party's Fourth Amendment interests are implicated. *See United States v. Green*, 275 F.3d 694, 698 n.3 (8th Cir. 2001).

[15] Plaintiffs asserted for the first time at oral argument that their Fourth Amendment claim was really an interference claim under the FHA. As Plaintiffs did not plead this claim in their Complaints or raise it in their motion papers, Defendants have had no opportunity to address this argument. The Court will not consider Plaintiffs' FHA interference argument as it relates to the challenged searches and inspections. *See N. States Power Co.*, 358 F.3d at 1056-57.

2. Fourteenth Amendment

Plaintiffs allege violations of their Fourteenth Amendment right to equal protection as a result of the City's code enforcement policies. The Equal Protection Clause of the Fourteenth Amendment requires state actors to treat similarly situated people alike and permits state actors to treat dissimilarly situated people dissimilarly. *Ganley v. Minneapolis Park & Recreation Bd.*, 491 F.3d 743, 747 (8th Cir. 2007). As a threshold matter, Plaintiffs must establish that Defendants treated them differently from similarly situated landlords. *Id.* In addition to unequal treatment, Plaintiffs must also show intentional or purposeful discrimination. *See Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir. 2007).

Plaintiffs allege violations of equal protection based on several grounds. First, Plaintiffs contend that Defendants targeted Plaintiffs' properties because Plaintiffs rented to African-Americans. As discussed with respect to Plaintiffs' FHA disparate treatment claim, Plaintiffs have put forth no evidence showing intentional discrimination on the part of Defendants. Plaintiffs' equal protection claim based on race fails. *See id.*

Plaintiffs make a "class of one" equal protection argument based on what Plaintiffs describe as the City's preferential treatment of the St. Paul Public Housing Agency. The purpose of a class-of-one equal protection claim is "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Vill. of Willowbrook v. Olech*, 528

U.S. 562, 564 (2000). Plaintiffs may prevail on their class-of-one claim by showing they have been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.*; *see also Costello v. Mitchell Pub. School Dist. 79*, 266 F.3d 916, 921 (8th Cir. 2001).

Plaintiffs first contend that the City routinely closed housing code inspection files for PHA properties without action or a follow-up inspection. Plaintiffs cited a number of inspection records in support of this claim. The Court's review of the inspection records reveals that they fail to support Plaintiffs' allegation of inaction or no follow-up inspections. For example, the inspection records indicate that DNHPI received a complaint about a PHA property on May 1, 2003, for debris and furniture in the yard. The inspector left a message with PHA. When the inspector rechecked the property on May 12, the furniture and debris were gone. DNHPI received a complaint about three abandoned vehicles in the yard and alley at another PHA property on May 13, 2003. The inspector checked the property and found that all three vehicles had current license plate tabs. He called PHA and was told that PHA would tell the tenants to move the cars off the grass. DNHPI kept the file open until the inspector verified that all of the vehicles were removed. While conducting a sweep in July 2004, DNHPI found a PHA property that had household items and vehicle parts in the back yard. The inspector called PHA. When the inspector checked back in early August, the items and vehicle parts were gone.

Further, the records offered by Plaintiffs show that a PHA property received a correction order for

sanitation in August 2001, another PHA property received a vehicle abatement order in May 2002, and a third PHA property received a correction notice for refuse, lack of garbage bins, and inadequate paint/siding underneath a window. In short, the evidence does not support Plaintiffs' claims of inaction and no follow-up inspections.

Plaintiffs also make allegations of preferential treatment because the City has never subjected a PHA scattered site property to a code compliance inspection, condemned a PHA scattered site property, or declared a PHA scattered site property a vacant building. As an initial matter, Plaintiffs do not identify any PHA scattered site property that *should* have been subject to these regulatory activities. Instead, Plaintiffs make the broad claims that "PHA has a history of being subject to serious health and safety complaints on [its] properties" and "PHA homes also appear to be frequently subject to mold growth and wet basements." The record indicates that four scattered site properties—out of 450—experienced mold problems. In the most severe case, after working with the tenant for several years, PHA installed a new roof and siding and then hired an independent contractor to test for mold and make additional recommendations for repair. This evidence does not demonstrate that any PHA property should have been subject to a code compliance inspection, declared a vacant building, or condemned.

Plaintiffs also contend the residents at one of PHA's high-rise buildings complained of and had to live with "deadly mold conditions" for a "considerable period of time." The record reflects that PHA became aware of a mold problem in a high-rise building on March 8, 2000, after residents in seven apartments complained.

An April 14, 2000, report from an indoor air and mold expert retained by PHA indicated that the expert found high levels of potentially toxic mold in one apartment and growth of the mold on sheetrock in a second apartment. Leaky showers caused the mold problem. PHA released emergency funds and began repairs of the 124 leaky showers in May 2000. No evidence suggests that PHA failed to correct the mold problem in a timely manner once it became aware of it, much less that DNHPI should have condemned the apartments, declared the high-rise or portions of it a vacant building, or subjected the high-rise to a code compliance inspection.

Finally, Plaintiffs cite a 2001 list of high-rise resident comments on PHA's capital fund program as evidence that PHA had a "wide variety of other problems with proper maintenance of its public rental units." Plaintiffs have put forth no evidence showing these comments demonstrate the need for a code compliance inspection, condemnation, or vacant building declaration. Many of the comments do not even relate to the housing code. (E.g., "Install more shade trees on the Hi-Rise grounds," "Install more storage – would like lockers in the basement," "Install a large screen TV," and "Need more grocery carts".)

Even if the Court assumed that PHA properties received preferential treatment from the City, Plaintiffs would still be required to show there is no rational basis for the difference in treatment between Plaintiffs and PHA to prevail on their class-of-one equal protection claim. *See Costello*, 266 F.3d at 921. PHA is an organization with a comprehensive inspection schedule, staff dedicated to maintenance, and a demonstrated record for maintaining its

properties. Plaintiffs have not put forth any evidence showing that PHA's properties are in poor condition or that PHA fails to make repairs or correct situations after receiving notification of a violation of the housing code. On the contrary, the record indicates that PHA responds appropriately to DNHPI correction orders and makes repairs in a timely manner. Given the City's limited resources and PHA's record of maintaining its properties, Defendants have a rational basis for permitting PHA to manage its own repairs.

Plaintiffs also appear to make a class-of-one equal protection argument on the grounds that they received housing code enforcement orders when property owners having similar code violations were not cited. To succeed on such a claim, Plaintiffs must demonstrate that their neighboring property owners were not just similar, but "prima facie identical in all relevant respects." *See Lerch v. City of Green Bay*, 271 F. App'x. 528, 529-30 (7th Cir. 2008). Plaintiffs face a high bar in showing their neighboring property owners were similarly situated because "various factual traits, circumstantial nuances, and peculiarities can set entities apart, rendering them, by virtue of their differences, amenable to disparate treatment." *Id.* at 530. Here, although several Plaintiffs testified that violations existed on neighboring properties, Plaintiffs have not shown that the neighboring properties were "prima facie identical in all relevant respects," nor have they shown that DNHPI was aware of the alleged violations. In fact, several Plaintiffs testified that they did not complain to DNHPI about the alleged violations. Further, although Plaintiffs assume the neighboring property owners did not receive enforcement orders for the alleged violations, no evidence in the record supports this conclusion.

Because Plaintiffs have failed to show the neighboring properties were "prima facie identical in all relevant respects," Plaintiffs' class-of-one equal protection claim based on differential treatment between Plaintiffs and their neighbors fails.

3. Substantive Due Process

Plaintiffs contend Defendants' enforcement of the housing code violated their substantive due process rights. Plaintiffs must show that a governmental power was exercised arbitrarily and oppressively to succeed on their substantive due process claims. *See Rozman*, 268 F.3d at 593. The government action must be arbitrary in the constitutional sense. *Id.* "[T]he theory of substantive due process is properly reserved for truly egregious and extraordinary cases." *Id.*

Plaintiffs argue that Defendants' policy of "coding to the max" to force landlords to evict their tenants or sell their properties and declaring properties vacant to facilitate their condemnation is such an egregious case. Plaintiffs base these claims on a November 13, 2002, tabular listing of problem properties containing annotations reading "code to the max" or similar.[16] Nothing on the problem properties listing suggests that DNHPI was enforcing the housing code in an arbitrary or oppressive manner. On the contrary, it is evident from the listing that the City had received multiple calls alleging code violations and illegal

---

[16] Plaintiffs' characterization of these statements as "Dawkins's notes" is incorrect, as he repeatedly testified during his deposition that he did not enter the comments Defendants rely on, and no evidence suggests otherwise.

activity at the many of the properties. Enforcement of the housing code and related provisions of the St. Paul Legislative Code achieves the legitimate interests of keeping the City's neighborhoods safe and housing habitable. Plaintiffs have not explained how Defendants' enforcement of these codes at properties having a documented history of non-compliance constitutes a substantive due process violation.

Plaintiffs also contend that Defendants intentionally delayed mailing notices. Although Plaintiffs did not identify evidence supporting this claim in their brief, the Court notes that Sandra Harrilal testified during her deposition that she received two mailings that were postmarked two weeks after the date on the letter. The City also sent a correction notice and notice of Tenant Remedy Action (TRA) to the rental property rather than to Harrilal's residence, and she received her rental registration certificate several days after the postmarked date. Harrilal received notice of the TRA before the hearing date when a housing inspector orally notified her of the TRA. Harrilal also received the correction notices before the hearings. Plaintiffs speculate that the delays and misdirection were intentional, but offer no evidence in support of this claim. While the Court must draw all reasonable inferences in favor of Plaintiffs on Defendants' motion for summary judgment, the Court shall "do so without resort to speculation." *See Twymon*, 462 F.3d at 936. Even if evidence of intentionally delayed or misdirected mailings existed, mailings that did not result in adverse action against Harrilal would not rise to the level of a substantive due process violation.

Plaintiffs' third argument in support of their substantive due process claim is that Defendants employed a "large and physically imposing police officer to force his way into residences to discover interior code violations." Plaintiffs' substantive due process claim based on forced entries appears duplicative of their Fourth Amendment claims and therefore should be analyzed as such. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." (quotations omitted)). Even if this claim is not subsumed by Plaintiffs' Fourth Amendment claim, Plaintiffs failed to put forth deposition testimony from the tenants supporting Plaintiffs' claims of forced entries, much less demonstrate a substantive due process violation based on these entries. Further, as discussed with respect to Plaintiffs' Fourth Amendment claims, Plaintiffs lack standing to bring claims based on searches of their tenants' apartments. *See Rozman*, 268 F.3d at 591.

Finally, Plaintiffs contend Defendants engaged in "widespread falsification of code enforcement orders." Plaintiffs conceded the legitimacy of many of the violations they received. Plaintiffs do, however, dispute the legitimacy of some violations on narrow grounds. For example, Mark Meysembourg received a correction order citing him for a number of violations, including broken kitchen cabinets. He claims that only one cabinet was broken. Assuming for the purposes of summary judgment that this type of distinction renders a citation illegitimate, Plaintiffs have put forth

no evidence showing any erroneous citations were intentional. Citations containing minor errors do not rise to the level of a substantive due process violation.

In other instances, Plaintiffs argued that violations were illegitimate because their tenants created the conditions that gave rise to the violations. The housing code provides landlords with an affirmative defense to misdemeanor prosecutions on those grounds, but does not preclude enforcement of the housing code through an injunction or an order to correct violations. *See* St. Paul, Minn., Code § 34.18. In the absence of evidence demonstrating that Plaintiffs raised this defense in response to code enforcement orders or that they were entitled to do so, the Court declines to find that issuing an enforcement order for tenant-caused damage violates substantive due process.

4. Fifth Amendment Takings Claim

Plaintiffs claim Defendants have taken their property without just compensation in violation of the Fifth Amendment. Plaintiffs make two arguments in support of this claim: (1) that Defendants' enforcement of the housing code at their properties was unconstitutional and (2) that Defendants illegally required Plaintiffs to bring their properties up to the current building code through code compliance inspections. Defendants contend that Plaintiffs' takings claims are not ripe because they have failed to pursue Minnesota state court procedures for compensation.

"[I]f a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause

until it has used the procedure and been denied just compensation." *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-04 (8th Cir. 2006) (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985)). Plaintiffs may seek just compensation through an inverse condemnation action brought in Minnesota state court. *See Wilson v. Ramacher*, 352 N.W.2d 389, 394 (Minn. 1984). Plaintiffs have not pursued inverse condemnation actions. The Court lacks jurisdiction over Plaintiffs' takings claims because they are not ripe for review. *See Koscielski*, 435 F.3d at 903-04.

5. Ninth Amendment Claim

In their Complaint, Plaintiffs asserted that Defendants violated the Ninth Amendment, which provides that "(t)he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. Defendants argue that the Ninth Amendment has never been recognized as independently securing any constitutional right for purposes of pursuing a civil rights claim, *see Strandberg v. City of Helena*, 791 F.2d 744, 748-49 (9th Cir. 1986), and never been used as a solid basis for any decision from the Supreme Court, *see Nat'l Assoc. of Property Owners v. United States*, 499 F. Supp. 1223, 1246 (D. Minn. 1980).

Plaintiffs did not respond to this argument and no evidence suggests that Plaintiffs have made a viable Ninth Amendment claim. The Court dismisses

Plaintiffs' § 1983 claim based on the Ninth Amendment.[17]

E. Section 1985

Plaintiffs claim Defendants violated 42 U.S.C. § 1985 by conspiring to deny Plaintiffs and their tenants their civil rights. Defendants contend that Plaintiffs have put forth no facts showing any intent to violate Plaintiffs' civil rights, any conduct in furtherance of a conspiracy to do so, or any damages resulting from such a conspiracy.

To prove the existence of a civil rights conspiracy under § 1985(3), the Plaintiffs must prove: (1) that Defendants did conspire, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or equal privileges and immunities under the laws, (3) that one or more of the conspirators did, or caused to be done, any act in furtherance of the object of the conspiracy, and (4) that another person was injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States. *Larson by Larson v. Miller*, 76 F.3d 1446, 1454 (8th Cir. 1996) (quotation marks omitted). The "purpose" element of the conspiracy requires Plaintiffs to prove a class-based "invidiously discriminatory animus." *See id.* Plaintiffs must allege

---

[17] Because the Court finds no constitutional or statutory violation the part of any individual defendant, any inquiry into whether the individual defendants are entitled to qualified immunity or the City's liability pursuant to *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978), is unnecessary. *See Hayek v. City of St. Paul*, 488 F.3d 1049, 1054-55 (8th Cir. 2007).

with particularity and specifically demonstrate with material facts that Defendants reached an agreement, for example, by pointing to at least some facts which would suggest Defendants reached an understanding to violate Plaintiffs' civil rights or their tenants' civil rights. *See id.*

In their memorandum in opposition to Defendants' motion, Plaintiffs recited the applicable law, but put forth no evidence or arguments in support of their § 1985 claim. No evidence demonstrates the requisite agreement. The Court grants summary judgment on Plaintiffs' § 1985 claim.

F. RICO Claims

Plaintiffs brought RICO claims against Defendants claiming violations of 18 U.S.C. § 1962(c), (d). A plaintiff who brings suit under 18 U.S.C. § 1962(c) must prove that the defendant engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Handeen v. Lemaire*, 112 F.3d 1339, 1347 (8th Cir. 1997).[18]

---

[18] Counsel for Defendants brought the parties' stipulation that Plaintiffs do not assert RICO claims against the City or the individual defendants in their official capacity, filed as Docket No. 12 in *Steinhauser v. City of St. Paul*, Civil No. 04-2632, to the Court's attention at oral argument. It is unclear whether this stipulation applies to the related cases *Gallagher v. City of St. Paul*, Civil No. 05-1348, and *Harrilal v. City of St. Paul*, Civil No. 05-461. Regardless, the Court concludes that Plaintiffs have failed to raise a genuine issue of material fact as to whether Defendants violated RICO.

"Racketeering activity" is defined in 18 U.S.C. § 1961(1). That section lists as predicate acts certain state law crimes, conduct that is "indictable" under various federal provisions, and numerous other offenses. *Handeen*, 112 F.3d at 1353. In their Complaints, Plaintiffs based their RICO claims on seven predicate acts: mail fraud, bank fraud, wire fraud, the Hobbs Act, tampering, bribery, and interstate travel or transportation in aid of racketeering enterprises. However, in Plaintiffs' brief, they base their RICO claims on alleged false claims of housing code violations, Defendants' use of the City's housing code rather than the HQS, misrepresentations of code compliance inspections, and extortion. The Court considers each proposed predicate act in turn.

Plaintiffs allege Defendants violated RICO by making false claims of housing code violations. As discussed with respect to Plaintiffs' substantive due process claim, Plaintiffs have not put forth any evidence showing Defendants intentionally falsified code violations. Plaintiffs also claim Defendants violated RICO by concealing the differences between the housing code and the HQS from the public and from HUD. Defendants could not have concealed the differences because the City's housing code and the HQS are publicly available. Further, Plaintiffs fail to explain how this supposed concealment qualifies as a predicate act. Plaintiffs' arguments regarding false claims of housing code violations and concealment of the differences between the housing code and the HQS are unavailing.

Plaintiffs also contend that Defendants engaged in racketeering activity by misrepresenting the nature of a code compliance inspection to Steinhauser, Brisson,

and Meysembourg. Plaintiffs assert that one or more of Defendants told these plaintiffs that a code compliance inspection would require the property to meet the housing code that was effective the date the property was built ("as built"), when in actuality a code compliance inspection required the property to meet the current housing code. Bringing a property up to the current housing code rather than the "as built" housing code would increase the cost of compliance. Plaintiffs rely on Meysembourg's affidavit as a "particularly egregious example" of the City's intent to "force as many illegal code compliances as possible."[19]

Meysembourg's code compliance inspection arose from the settlement of a TRA filed by the City against Meysembourg in which he agreed to undergo a code compliance inspection in exchange for dismissal of the TRA. While representing the City during the hearing on the TRA, Dolan informed the housing court referee:

> Just so the record is clear, Counsel asked the inspector, "Are you going to be requiring him to bring it up to the 2003 code?" The answer was, "No. This building is not a newly built building. It will be expected to be compliant as it was built the year it was built."

When Meysembourg contacted the Office of License, Inspections, and Environmental Protection (LIEP) to schedule the code compliance inspection, he was told that there was no such thing as an "as built" code compliance inspection and that LIEP only inspected to the current code. Meysembourg testified that the LIEP

---

[19] Plaintiffs offered no facts specific to Steinhauser and Brisson.

inspector stated that he would have to talk to his supervisor about the situation, but Meysembourg did not pursue the matter further with LIEP because Meysembourg "knew it was [the inspector's] way of brushing [Meysembourg] off." Instead, Meysembourg simply arranged for the inspection and "pointedly did not talk to [the inspectors]" about the "as built" issue.

Based on the housing court record, Dolan took pains to ensure that the record reflected that Meysembourg's code compliance inspection would be "as built." There is no evidence that she was familiar with the details of code compliance inspections, which LIEP, not the City Attorney's office, conducted. The Court is unable to reconcile Plaintiffs' assertion that Dolan intentionally misrepresented the nature of a code compliance inspection with these facts. Further, given that Meysembourg "pointedly did not talk" to the inspectors again about the "as built" issue, the record does not even show that LIEP refused to conduct an "as built" inspection.

Even if Dolan had intentionally misrepresented the nature of a code compliance inspection, Plaintiffs would still be required to show that her conduct constituted a predicate act giving rise to RICO liability. Generic allegations of common law fraud do not constitute racketeering activity under RICO, *see Giuliano v. Fulton*, 399 F.3d 381, 388 (1st Cir. 2005), and Plaintiffs have put forth no evidence showing Dolan's conduct implicated the mail or wires. Further, Dolan's conduct does not qualify as extortion or attempted extortion because she did not obtain or seek to obtain property from Meysembourg. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 405 (2003) (holding that shutting down abortion clinic was not

extortion because protestors "neither pursued nor received 'something of value from' respondents that they could exercise, transfer, or sell"). Even if Dolan had intentionally misled Meysembourg, Plaintiffs have not established that her conduct constituted a predicate act.

Finally, Plaintiffs base their RICO allegations on alleged attempts at extortion by Magner. Plaintiffs contend that Magner attempted to extort their properties from them by excessively enforcing the housing code at their properties with the intent of forcing them to sell the properties to Magner or his friends. Plaintiffs do not offer evidence showing that Magner tried to purchase their properties. Instead, Plaintiffs offer the affidavits of non-parties Nancy Osterman and Lois Jacobs, who claim that after the City condemned their properties, Magner tried to convince them to sell their properties to him or one of his friends at below-market rates or risk demolition of their properties.[20] For the purposes of summary judgment, the Court assumes that enforcement of the housing code to force property owners to sell their properties to Magner or face demolition of the properties could constitute extortion and qualify as a predicate act. *See* 18 U.S.C. § 1951(b)(2) (defining

---

[20] Defendants contend that Plaintiffs lack standing to assert RICO violations based on Magner's acts with respect to the two non-party affiants because Plaintiffs did not suffer injury as a result of those acts. A person has standing to assert RICO claims if she experienced injury to her business or property that occurred by reason of a RICO violation. *See Bowman v. W. Auto Supply Co.*, 985 F.2d 383, 384 (8th Cir. 1993). Plaintiffs are not claiming standing on behalf of the affiants, but instead rely on the affidavits to establish a pattern of behavior.

extortion as "obtaining . . . property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.").

The Court turns to whether Magner's acts constituted "conduct of an enterprise." *See Handeen*, 112 F.3d at 1347. Plaintiffs identified the City as the requisite enterprise at oral argument. A city may constitute an "enterprise" within the meaning of RICO. *See United States v. Clark*, 646 F.2d 1259, 1263 (8th Cir. 1981). Nevertheless, Plaintiffs have put forth no evidence showing that Magner was doing anything more than conducting his own affairs. *See Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) ("liability depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs"); *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir. 1983) ("Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action.").

Plaintiffs contend that Magner's conduct was a regular way of conducting the City's business because the City refused to address Magner's conduct when brought to its attention. In support of this contention, Plaintiffs submitted an affidavit from Julian Jayasuriya, the purchaser of Jacobs's property. Jayasuriya stated:

> On June 15, 2005, at the City Council hearing, I showed the City Council my receipt for the $10,000 [performance deposit] paid to the City earlier that day. I reminded the council of our prior deal that gave me sixty days, or 30 more

> days from June 15, 2005, to complete the work on the Property at 14 East Jessamine. The City Council rejected my requests and voted to demolish the property in five days. During the Council's hearing, no one from the City ever answered my questions as to who was really benefiting from the forced demolition of the Property, or ever explained how Inspector Magner can operate his own real estate placement firm or tie forcing sales of properties into Code compliance. Magner did not reveal his own misconduct or his real reasons for retaliating against me and this property.

In addition to Jayasuriya's affidavit, Plaintiffs submitted an affidavit from Jacobs stating:

> I was upset and decided to go to the City to meet with City officials to voice my complaints about what happened to my home. I told the City staff that I thought it was improper for someone who worked for the City and was involved in the condemnation of my home to then make an offer to purchase my home. Mr. Magner was present at the meeting but he made no comments.

It is unclear from these affidavits whether the City was aware of Magner's alleged extortionate conduct. These affidavits, without more, are insufficient to permit a jury to reasonably find that Magner's attempts at extortion were a "regular way of conducting the City's business" or the conduct of the City. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could

reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. Plaintiffs' RICO claims fail because they have not put forth evidence that raises a genuine issue of material fact as to whether Magner engaged in "conduct of an enterprise." The Court therefore need not address the parties' arguments regarding the remaining elements of a RICO claim.

Plaintiffs also make RICO conspiracy claims under § 1962(d). A RICO conspiracy requires proof of the additional element of an agreement, that is, the defendant must have objectively manifested an agreement to participate directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes. *United States v. Bennett*, 44 F.3d 1364, 1374 (8th Cir. 1995). Plaintiffs have put forth no evidence that any Defendant entered into the requisite agreement. Plaintiffs' RICO conspiracy claim fails.

G. Void for Vagueness Claim

The Gallagher plaintiffs contend that certain terms found in the City's housing code or used by DNHPI as part of its code enforcement policies are unconstitutionally void for vagueness.[21] Defendants contend that

---

[21] Plaintiffs' brief identifies the following plaintiffs as injured by the alleged vagueness of these terms: Steinhauser, Harrilal, the Dadder's entities, the Kubitscheks, Meysembourg, Johnson, Brisson, and Allison. As Plaintiffs acknowledge in their brief, only the Gallagher plaintiffs made a void for vagueness claim in their Complaint. The Court will not consider any void for vagueness claim by Steinhauser, Harrilal, Meysembourg, Johnson, and Brisson because they did not plead a void for vagueness claim in their Complaints, the time for amending has passed, and these

Plaintiffs did not set forth any evidence establishing that these terms are unconstitutionally vague. In their memorandum in opposition to Defendants' motion, the Gallagher plaintiffs challenge the terms "vacant building," "code compliance," and "problem properties." Plaintiffs offered evidence relating to a property located at 1522/1524 Carroll Avenue in support of their argument regarding the term "vacant building." This property is an upstairs/downstairs duplex and one of seven properties Troy Allison purchased from the Dadder's entities.

"The void-for-vagueness doctrine is embodied in the due process clauses of the fifth and fourteenth amendments." *Woodis v. Westark Community Coll.*, 160 F.3d 435, 438 (8th Cir. 1998). A vague regulation violates the Constitution because it fails (1) to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct and (2) to establish standards to permit enforcement of the law in a non-arbitrary, non-discriminatory manner. *Id.* "In a facial vagueness challenge, an enactment reaching a substantial amount of constitutionally protected conduct may withstand constitutional scrutiny only if it incorporates a high level of definiteness. An enactment imposing criminal sanctions or implicating constitutionally protected rights demands more definiteness than one which regulates the economic behavior of businesses." *Id.* (citations omitted).

---

plaintiffs have not made a motion to amend their Complaints. Further, Plaintiffs have not put forth evidence establishing that these plaintiffs have standing to assert a void for vagueness claim or relating to any such claim.

The Court must first "determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Id.* Where the enactment does not reach constitutionally protected conduct, a plaintiff may succeed in a vagueness challenge "only if the enactment is impermissibly vague in all of its applications." *Id.* (quotation marks and citations omitted). For these reasons, the Court must "examine the [plaintiff's] conduct before analyzing other hypothetical applications of the law, because a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to . . . others." *Id.* (quotation marks and citations omitted).

The St. Paul Legislative Code defines "vacant building" as:

> A building or portion of a building which is:
>
> a. Unoccupied and unsecured;
>
> b. Unoccupied and secured by other than normal means;
>
> c. Unoccupied and a dangerous structure;
>
> d. Unoccupied and condemned;
>
> e. Unoccupied and has multiple housing or building code violations;
>
> f. Condemned and illegally occupied; or
>
> g. Unoccupied for a period of time over three hundred sixty-five (365) days and during

> which time the enforcement officer has issued an order to correct nuisance conditions.

St. Paul, Minn., Code § 43.02(7). There is no suggestion that the definition of "vacant building," which rests on the occupancy of a building, whether it is secure from entry, and the condition of the building, reaches constitutionally protected conduct. The Court therefore examines the Gallagher plaintiffs' arguments regarding the vagueness of "vacant building" in light of the their conduct. *See Woodis*, 160 F.3d at 438.

The Gallagher plaintiffs' challenge focuses on the meaning of "unoccupied" as used in the definition of "vacant building." The St. Paul Legislative Code defines "unoccupied" as "[a] building which is not being used for a legal occupancy as defined in the Saint Paul Legislative Code." St. Paul, Minn., Code § 43.03(5). The St. Paul Legislative Code does not define "legal occupancy," but does define "residential occupancy" as "[o]ccupancy in a building or portion thereof, for residential purposes, used or intended to be used for living, sleeping, and/or cooking or eating purposes." *Id.* § 40.03.

During his deposition, Allison testified that the downstairs tenant had moved out shortly before Allison purchased 1522/1524 Carroll Avenue. Allison also testified that the downstairs unit was "vacant" when he purchased the property and when the City declared the property a vacant building. Thus, Allison does not dispute that the downstairs unit was unoccupied when the City declared the property vacant. Further, Allison does not dispute that the property had housing code violations. A unit that is

unoccupied and has multiple housing code violations, as the downstairs unit of 1522/1524 Carroll Avenue did, falls within the definition of a vacant building, *see id.* § 43.02(7)(e), and is clearly proscribed. Allison lacks standing to challenge the term "vacant building" on the grounds that it is unconstitutionally vague "because a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to . . . others." *See Woodis*, 160 F.3d at 438 (quotation marks and citations omitted).[22]

The Gallagher plaintiffs also cite to testimony from Dawkins and Dick Lippert, the former head of DNHPI's problem property unit, that they did not have a definition for "problem property," "code compliance," "legal occupancy," or "vacant building." Because the Gallagher plaintiffs have set forth no facts establishing their standing to raise void for vagueness claims as to these terms, this testimony is unavailing. The Court dismisses the Gallagher plaintiffs' void for vagueness claims.

---

[22] The Gallagher plaintiffs also base their void for vagueness challenge on the fact that a tenant was living in the upstairs unit of 1522/1524 Carroll Avenue when the inspector declared the building vacant. The inspector based his decision to declare the entire building vacant on the vacancy of the lower unit and his observation of the second story while standing on the ground. While the decision to declare the entire building vacant was incorrect, this does not make the term "vacant building" unconstitutionally vague. In fact, the definition of "vacant building" permits for the designation of a "portion of a building" as a vacant building. St. Paul, Minn., Code § 43.02(7).

H. Antitrust Claim

1. Antitrust Standing

The Gallagher plaintiffs contend that Defendants' conduct violates the antitrust laws. To succeed on their antitrust claims, the Gallagher plaintiffs must first demonstrate that they have suffered an "antitrust injury" as a result of the alleged conduct of Defendants and have standing to pursue a federal antitrust claim. *See In re Canadian Import Antitrust Litig.*, 470 F.3d 785, 791 (8th Cir. 2006). An "antitrust injury" is an "injury of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Defendants contend that the Gallagher plaintiffs lack antitrust standing because they have not suffered an antitrust injury.

Other than reciting the legal standard for antitrust standing and injury, the Gallagher plaintiffs devote a single sentence in their brief to their antitrust standing:

> In this case, the 82% more stringent code that the City applies to the private market landlords, and the failure to enforce its own code against its sister agency PHA, in light of the knowledge the City possesses with respect to the application of a more stringent code and the effect that it has on affordable housing providers, meets the factors discussed above as Plaintiffs have been injured in their business by the City's conduct.

This sentence is insufficient to raise a genuine issue of material fact as to antitrust standing or antitrust injury, particularly given the absence of evidence showing that the City's enforcement of its housing code has any impact on consumers of low-income housing or demonstrating that the City does not enforce its housing code against PHA. "Skeletal allegations, unsupported with specific facts or evidence, are insufficient to create a genuine issue of fact so as to preclude summary judgment." *Thomas v. Corwin*, 483 F.3d 516, 530 (8th Cir. 2007).

Further, the Gallagher plaintiffs make arguments with respect to the injury the City's housing code inflicts on "affordable housing providers." It is the consumers of low-income housing who are protected by the antitrust laws, not competitors. *See Brunswick*, 429 U.S. at 488. Injury to competitors is not an antitrust injury because it is not the type of injury the antitrust laws were intended to prevent. *See id.*

The Gallagher plaintiffs assert in their Complaint "both PHA and Plaintiffs are providing low income housing to a low income market and are competitors of each other for low income tenants in the City." The Gallagher plaintiffs also claim:

> If Defendants applied the same nature and volume of code enforcement operations against PHA that Defendants have directed, and continue[] to, direct against Plaintiffs and other similarly situated landlords, PHA would suffer short and long term adverse financial consequences, including an adverse effect on PHA's cash flow, forced sale of rental properties to make up cash short falls, increased layoffs of

> PHA employees, which would all result in an adverse impact on the protected class tenants renting from PHA.

Thus, the Gallagher plaintiffs base their antitrust claims on the fact that PHA has an economic advantage over them because PHA is subject to a lower level of code enforcement.

Although preferential treatment of PHA may concern the Gallagher plaintiffs, they have not shown an antitrust injury because they have shown no harm to consumers or competition. *See Juster Assoc. v. City of Rutland, Vt.*, 901 F.2d 266, 270 (2d Cir. 1990) (no antitrust injury when city subsidized new shopping mall even though it placed plaintiff at a disadvantage because no harm to consumers). The Gallagher plaintiffs therefore lack antitrust standing.

2. Local Government Antitrust Act

Defendants also contend that the Local Government Antitrust Act (LGAA), 15 U.S.C. §§ 34-36 (2000), provides them with immunity from antitrust damages. The LGAA prohibits recovery of damages, interest on damages, costs, or attorney's fees for damages from any local government, or official or employee acting in an official capacity as a result of a private antitrust action. 15 U.S.C. § 35(a). The City of St. Paul is a local government within the meaning of the LGAA. *See id.* § 34(1)(a). The Gallagher plaintiffs have not offered evidence showing that any City officials or employees exceeded their authority. The LGAA immunizes the City and the individual defendants, to the extent they were working in their

official capacities, from the Gallagher plaintiffs' suit seeking damages for antitrust violations. *See id.* § 35.

3. State Action Doctrine

To the extent that the Gallagher plaintiffs seek injunctive relief for Defendants' allegedly anticompetitive conduct, Defendants contend that that the state action doctrine articulated in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), bars the Gallagher plaintiffs' antitrust claim. Under *Omni*, a municipality's conduct is immune from antitrust scrutiny if the state granted the municipality both (1) the authority to regulate and (2) the authority to suppress competition. 499 U.S. at 372-73. To satisfy the second prong, the municipality's acts must be the "foreseeable result of the state authorization." *Id.*

The Minnesota Legislature has granted municipalities the following authority:

> For the purpose of promoting the public health, safety, morals, and general welfare, a municipality may by ordinance regulate on the earth's surface, in the air space above the surface, and in subsurface areas, the location, height, width, bulk, type of foundation, number of stories, size of buildings and other structures, the percentage of lot which may be occupied, the size of yards and other open spaces, the density and distribution of population, the uses of buildings and structures for trade, industry, residence . . . and may establish standards and procedures regulating such uses.

Minn. Stat. § 462.357, subd. 1 (2006). Minnesota Statutes § 462.362 (2006) authorizes municipalities to "enforce any provision of sections 462.351 to 462.364 or of any ordinance adopted thereunder by mandamus, injunction, or any other appropriate remedy in any court of competent jurisdiction."

In addition, the Minnesota Legislature grants city councils the "power to provide for . . . promotion of health, safety, order, convenience, and the general welfare by such ordinances not inconsistent with the Constitution and laws of the United States or of this state as it shall deem expedient," Minn. Stat. § 412.221, subd. 32 (2006), and requires residential landlords "to maintain the premises in compliance with the applicable health and safety laws of the state, and of the local units of government where the premises are located," *id.* .§ 504B.161, subd. 1(a)(4). Thus, the State of Minnesota has expressly authorized municipalities such as the City to enact zoning ordinances regulating the uses of "buildings and structures . . . for residence," to "establish standards and procedures regulating such uses," and to enforce those uses through ordinances or other appropriate remedies. The City's housing code, which is a standard regulating the use of residential property and promoting the health and safety of City residents, falls within this grant of legislative authority, thereby meeting the first *Omni* requirement.

With respect to the second prong of the *Omni* test, a grant of zoning authority has the foreseeable result of restricting competition. 499 U.S. at 373 ("The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition . . . .").

Further, the Minnesota Legislature expressly requires residential landlords to comply with the health and safety laws "of the local units of government where the premises are located." Minn. Stat. § 504B.161, subd. 1(a)(4). The housing code meets the second *Omni* requirement. The state action doctrine bars the Gallagher plaintiffs from seeking injunctive relief under the antitrust laws.

I. State Law Claims

Plaintiffs make three state law claims: (1) abuse of process, (2) tortious interference with contract, and (3) tortious interference with Plaintiffs' business expectancy. To succeed on an abuse of process claim, Plaintiffs must show that there was an ulterior purpose and that Defendants used the process to achieve something not within the scope of the proceedings. *Kittler & Hedelson v. Sheehan Props., Inc.*, 203 N.W.2d 835, 840 (Minn. 1973). To prevail on a tortious interference with contract claim, Plaintiffs must show (1) the existence of a contract; (2) Defendants' knowledge of the contract; (3) Defendants' intentional procurement of its breach; (4) without justification; and (5) damages resulting therefrom. *See Bouten v. Richard Miller Homes, Inc.*, 321 N.W.2d 895, 900 (Minn. 1982). Success on Plaintiffs' tortious interference with business expectancy claim requires a showing of (1) the existence of a reasonable expectation of economic advantage or benefit belonging to Plaintiffs; (2) that Defendants had knowledge of that expectation of economic advantage; (3) that Defendants wrongfully and without justification interfered with Plaintiffs' reasonable expectation of economic advantage or benefit; (4) that in the absence of the wrongful acts of

Defendants, it is reasonably probable that Plaintiffs would have realized their economic advantage or benefit; and (5) that Plaintiffs sustained damages as a result of this activity. *See Harbor Broad., Inc. v. Boundary Waters Broad., Inc.*, 636 N.W.2d 560, 569 (Minn. Ct. App. 2001).

Defendants contend that Plaintiffs have not have not shown any ulterior motive behind the City's code enforcement, that Defendants used the process to achieve something not within the scope of code enforcement proceedings, or that Defendants intentionally procured breaches of Plaintiffs' contracts with their tenants. Defendants additionally contend that Plaintiffs could not have had a reasonable expectation of economic advantage in renting properties that had housing code violations to low-income households. Plaintiffs cited the legal standard in response, but made no argument and offered no evidence in support of their state law claims. Because Plaintiffs fail to sustain their burden as to their state law claims, the Court grants Defendants summary judgment on all three claims.[23] *See Rodgers v. City of Des Moines*, 435 F.3d 904, 907-08 (8th Cir. 2006) ("Without some guidance, we will not mine a summary judgment record searching for nuggets of factual disputes to gild a party's arguments"); *Nw. Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662-63 (7th Cir. 1994) ("District judges are not archaeologists."); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per

---

[23] Defendants also contend that statutory and official immunities bar Plaintiffs' state law claims. Because Plaintiffs have not shown a genuine issue of material fact as to any of their state law claims, the Court need not decide whether Defendants are entitled to these immunities.

curiam) ("Judges are not like pigs, hunting for truffles buried in briefs."); *Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.*, 695 F.2d 839, 846-47 (5th Cir. 1983) ("Judges are not ferrets!").

Finally, the Court addresses the voluminous materials—four file boxes worth—submitted by Plaintiffs in opposition to Defendants' motions for summary judgment. The volume of documents submitted, of course, is not a dispositive factor in determining whether summary judgment is proper. The multitudinous documents filed by Plaintiffs increased the burdensomeness of the Court's task in deciding these motions, for Plaintiffs' failure to winnow out the relevant documents meant that the burden of doing so fell to the Court. In the immortal words of [perhaps] Mark Twain, "I'm sorry this letter is so long, but I did not have time to make it shorter."[24] However, the Court has carefully considered the documents submitted and the arguments made by the parties in making its decision, and determines that summary judgment is warranted.

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

---

[24] It appears that this quotation is properly attributed to seventeenth century French mathematician and philosopher Blaise Pascal, who wrote in 1656 "I have made this letter longer than usual only because I had not the time to make it shorter." *See* Ralph Keyes, The Quote Verifier: Who Said What, Where, and When 119-20 (2006).

1. Defendants' Motions for Summary Judgment [Docket No. 198 in Civil No. 04-2632, Docket No. 173 in Civil No. 05-461, and Docket No. 166 in Civil No. 05-1348] are GRANTED.

2. All Counts in Civil Nos. 04-2632, 05-461, and 05-1348 are DISMISSED WITHOUT PREJUDICE as to John Doe, Jane Doe, and Jane Roe.

3. Counts VI in Civil Nos. 04-2632, 05-461, and 05-1348 are DISMISSED WITHOUT PREJUDICE to the extent they are based on the right to freedom from the taking of property without just compensation under the Fifth Amendment to the U.S. Constitution.

4. Count VIII in Civil No. 05-1348 is DISMISSED WITHOUT PREJUDICE.

5. Except as stated in paragraphs 2-4, all remaining claims in Civil Nos. 04-2632, 05-461, and 05-1348 are DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 18, 2008

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed November 15, 2010]

No: 09-1209

Thomas J. Gallagher, et al.

Appellants

v.

Steve Magner, individually and as a supervisor of City of St. Paul's Department of Neighborhood Housing and Property Improvement, et al.

Appellees

No: 09-1528

Frank J. Steinhauser, III, et al.

Appellants

v.

City of St. Paul, a municipal corporation, et al.

Appellees

No: 09-1579

Sandra Harrilal

Appellant

Bee Vue and Lamena Vue

Steven R. Johnson, doing business as Market Group and Properties

Appellant

v.

Steve Magner, individually and as a supervisor of City of St. Paul's Department of Neighborhood Housing and Property Improvement, et al.

Appellees

Appeal from U.S. District Court
for the District of Minnesota - Minneapolis
(0:05-CV-01348-JNE)
(0:04-cv-02632-JNE)
(0:05-cv-00461-JNE)

ORDER

The petition for rehearing *en banc* is denied. The petition for rehearing by the panel is also denied.

COLLOTON, Circuit Judge, with whom RILEY, Chief Judge, LOKEN, GRUENDER and SHEPHERD, Circuit Judges, join, dissenting from denial of rehearing en banc.

The panel opinion in this case holds that the owners of rental property in St. Paul, Minnesota, have presented a submissible case that the City of St. Paul violated the Fair Housing Act ("FHA"), Title VIII of the Civil Rights Act of 1968, by aggressively enforcing the City's housing code. *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010). Even though there is insufficient evidence to infer that the City acted with intent to discriminate against any person in violation of the FHA, *id.* at 833, the panel reasoned that the City can be liable for its enforcement of the housing code, because enforcement of the housing code increased costs for property owners, the increased costs reduced the supply of "affordable housing" in the City, and the reduction of supply had a "disparate impact" on racial minorities. *Id.* at 835.

I would grant the City's petition for rehearing en banc. The petition raises important questions concerning whether "aggressive" enforcement of a housing code is the sort of facially neutral policy that can trigger disparate-impact analysis under the FHA, whether the plaintiffs have shown that particular aggressive enforcement practices actually caused a disparate impact on racial minorities seeking to rent property in St. Paul, and whether the property owners have presented sufficient evidence that a less aggressive enforcement program known as "PP2000" – which had a success rate of only seventy percent with the limited sample of properties included in the program (R. Doc. 219, Attach. 4, at 34-35) – would be

equally effective as, and no more costly than, the "heavy enforcement" and "code to the max" approach that was adopted citywide by the responsible policymakers and challenged by the property owners in this litigation. *See generally Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660-61 (1989); *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003); *cf. Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (concluding that *Wards Cove*'s pre-1991 explanation of disparate-impact analysis remains applicable to a statute with identical text as Title VII that was not amended along with Title VII in 1991).

In addition to these questions, the panel's expansive rationale raises significant threshold issues concerning the application of disparate-impact analysis in this context. These issues likely warrant supplemental briefing by the parties and careful consideration by the court.

First, it would be useful for the en banc court to examine the basis for disparate-impact analysis under the FHA. In applying disparate-impact analysis, the panel opinion never mentions the text of the governing statute. The provisions cited by the panel provide that:

> [I]t shall be unlawful –
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a)-(b).

The Supreme Court has not decided whether the FHA allows for recovery based on a disparate-impact theory. *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam). In 1974, a panel of this court, also without discussing the text of 42 U.S.C. § 3604, held that a plaintiff advancing a claim under the FHA need prove only that the conduct of a defendant had a "discriminatory effect," and thereby introduced disparate-impact analysis under the FHA. *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974). The court relied on the "purpose" of the FHA and reasoned by analogy to the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971), which applied disparate-impact analysis to a claim of employment discrimination under Title VII of the Civil Rights Act. *See Black Jack*, 508 F.2d at 1184.

Since then, the Supreme Court has acknowledged that the "opinion in *Griggs* relied primarily on the purposes of the Act." *Smith*, 544 U.S. at 235 (plurality opinion); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) (agreeing with all of the plurality's reasoning, but resolving the case based on deference to the reasonable views of the administering federal agency). Significantly, however, the Court explained that the holding in *Griggs* also "represented

the better reading of the statutory text," because the language of § 703(a)(2) of Title VII prohibits actions directed at employees that "deprive any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's race." *Id.* at 235 (plurality opinion) (internal quotations omitted); *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (concluding that subjective employment practices may be analyzed under the disparate-impact approach of Title VII because they "may be said to 'adversely affect [an individual's] status as an employee, because of such individual's race, color, religion, sex, or national origin'") (alteration in original) (quoting 42 U.S.C. § 2000e-2(a)(2)).[1]

In 2005, the Supreme Court held that a disparate-impact theory is cognizable under the Age

---

[1] Section 703(a) of Title VII provides as follows:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Discrimination in Employment Act ("ADEA"). The Court emphasized that § 703(a)(2) of Title VII at issue in *Griggs*, and § 4(a)(2) of the ADEA, include "identical text," namely, a prohibition on "limiting, segregating, or classifying employees in any way which would . . . adversely affect [an individual's] status as an employee, because of such individual's" race or age. *Smith*, 544 U.S. at 236 (plurality opinion). But the Court cited "key textual differences" between § 4(a)(1) of the ADEA, which makes it unlawful "to fail or refuse to hire . . . any individual . . . because of such individual's age," and does *not* encompass disparate-impact liability, and § 4(a)(2), which does authorize recovery based on disparate impact. *Id.* at 235-36 & n.6 (omissions in original) (internal quotations omitted).[2] The Supreme Court also has said that another important civil rights statute, Title VI of the Civil Rights Act, forbids only intentional discrimination, and does not prohibit actions taken

---

[2] Section 4(a)(1)-(2) of the ADEA provides as follows:

> It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(1)-(2).

with nondiscriminatory motive that have a disparate impact on racial groups. *See Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001). In contrast to Title VII and the ADEA, the text of Title VI does not proscribe activities that would "adversely affect" a person because of a protected characteristic. *See* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

The FHA likewise does not include text comparable to that relied on in *Smith* and appearing in § 703(a)(2) of Title VII and § 4(a)(2) of the ADEA. Rather, the text of 42 U.S.C. § 3604(a) makes it unlawful to "make unavailable or deny . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin." This language appears similar to § 4(a)(1) of the ADEA, which the Court in *Smith* said does not support a claim based on disparate impact alone. 544 U.S. at 236 n.6 (plurality opinion).

To be sure, most of the circuits have applied disparate-impact analysis under the FHA, and perhaps that approach is justified. Some district courts have ruled after the Supreme Court's decision in *Smith* that disparate-impact analysis remains applicable to the FHA. *E.g.*, *Nat'l Comm. Reinvestment Coalition v. Accredited Home Lenders*, 573 F. Supp. 2d 70, 77-79 (D.D.C. 2008). But there has been little consideration in this circuit of the textual basis for this theory of liability, and virtually no discussion of the matter by any court of appeals since the Court in *Smith* explained how the text of Title VII justified the decision in *Griggs*. The district court and the parties

understandably have taken disparate-impact analysis as a given under circuit precedent, but recent developments in the law suggest that the issue is appropriate for careful review by the en banc court.

Second, if disparate-impact analysis should be applied to claims under the FHA based on the "purpose" of the statute, *see Black Jack*, 508 F.2d at 1184, then it seems appropriate to consider whether the purpose of the statute extends to declaring a city liable for disparate impact caused by its "aggressive" enforcement of a housing code. The Seventh Circuit, while applying a disparate-impact theory to evaluate a city's refusal to rezone property when such refusal had the consequence of perpetuating segregation in housing, refused at the same time to conclude that every action that produces discriminatory effects is illegal. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977). "Such a per se rule," the court thought, "would go beyond the intent of Congress and would lead courts into untenable results in specific cases." *Id.*; *see Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1280 (7th Cir. 1995) (explaining that "disparate impact analysis is not appropriate in certain contexts"). The Tenth Circuit in *Reinhart v. Lincoln County*, 482 F.3d 1225 (10th Cir. 2007), "recognize[d] that one court has suggested that a disparate-impact claim based solely on increased costs is not cognizable under the FHA," *id.* at 1230 (citing *Hemisphere Bldg. Co. v. Vill. of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999)), but found it unnecessary to decide the point. This case appears to present that unresolved question.

This court has applied disparate-impact analysis in certain contexts under the FHA, such as where a city

adopted a zoning ordinance that prohibited the construction of any new multiple-family dwellings likely to be occupied by racial minorities, thus perpetuating a history of segregated housing, *see Black Jack*, 508 F.2d at 1184-85, and where a landlord refused to rent an apartment to a qualified minority applicant despite offering to rent the same type of unit to comparable white applicants. *See Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976). But whether the panel's application of disparate-impact analysis to a city's aggressive housing code enforcement is dictated by the purpose of the FHA is an important question of first impression.

For these reasons, I would grant the City's petition for rehearing en banc.

November 15, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans