No. 10-1032

# In the Supreme Court of the United States

**STEVE MAGNER, *ET AL.*,**
***Petitioners,***

v.

**THOMAS J. GALLAGHER, *ET AL.*,**
***Respondents.***

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

## BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

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## 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?

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## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For thirty years, Eagle Forum has consistently defended federalism and supported States' autonomy from federal intrusion in areas – such as the police power – that are of traditionally

[1] *Amicus* Eagle Forum files this brief with the consent of all parties; Petitioners' and Respondents' written letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

State or local concern. Accordingly, Eagle Forum has a direct and vital interest in the issues raised here.

## STATEMENT OF THE CASE

The respondents (collectively, "Plaintiffs") are landlords with properties that service the low-income market who sued petitioners as officials of the City of St. Paul (collectively, "St. Paul") to enjoin the enforcement of City housing codes. In the claim before this Court, the Plaintiffs allege that enforcing the housing code disproportionately impacts racial minorities – who make up a disproportionate amount of the market for low-income housing – in violation of the Fair Housing Act, 42 U.S.C. §3604(a) ("FHA"). The Plaintiffs do not allege and have not proved that St. Paul engaged in intentional, race-based discrimination. Rather, the Plaintiffs challenge the disparate impacts of a facially neutral city policy.

## SUMMARY OF ARGUMENT

Jurisdictionally, the landlord Plaintiffs lack standing to assert their tenants' anti-discrimination rights under the FHA (Section I). Nothing prevents the tenants themselves from bringing suit to enforce whatever rights the FHA provides them to avoid St. Paul's enforcement of its housing code.

As threshold matters, the Commerce Clause does not authorize Congress to exert a national police power over housing, which neither moves in interstate commerce nor substantially affects interstate commerce (Section II.A). If Congress had that power, this Court would need to overcome the presumption against preemption before inferring that the federal power's exercise here preempts St. Paul's historic police power over housing (Section

II.B). Finally, neither an existing interpretation nor a future regulation from the federal Department of Housing and Urban Development ("HUD") warrants deference on the question of whether the FHA allows disparate-impact claims (Section II.C).

On the merits, the FHA's "because of race" standard prohibits disparate race-based treatment (*i.e.,* intentional discrimination), not disparate race-correlated impacts (Section III). If it hold otherwise, this Court nonetheless should apply the presumption against preemption in determining the scope of the FHA's preemption of local police power (Section IV).

## ARGUMENT

### I. THE PLAINTIFFS' THEORY OF THE CASE CONFLICTS WITH ARTICLE III

It is troubling on several levels that the landlord Plaintiffs in this action seek to deflect enforcement of housing codes designed to protect tenants by relying on their tenants' anti-discrimination rights under the FHA. Even if it does not decide whether the landlords' action is *just,* this Court must decide whether their action is *justiciable.*

Article III, §2 confines federal courts to cases and controversies. U.S. CONST. art. III, §2. Because it goes to the federal courts' Article III power to hear a case, standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). Federal appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998), and "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record."

*Renne v. Geary,* 501 U.S. 312, 316 (1991). Parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990), "[a]nd if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.,* 523 U.S. at 94 (interior quotations omitted).

Generally, for a plaintiff to assert the rights of absent third parties, *jus tertii* (third-party) standing requires that the plaintiff have its own constitutional standing and a "close" relationship with the absent third parties and that a sufficient "hindrance" keeps the absent third parties from protecting their own interests. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio,* 499 U.S. 400, 411 (1991)). If St. Paul's enforcement of its housing code indeed injures the Plaintiffs' tenants, nothing prevents the tenants or the myriad interest groups associated with such tenants from bringing their own FHA action. Accordingly, this Court should not allow the landlord Plaintiffs to raise their tenants' FHA-granted rights.

On the other hand, *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 372-73 (1982), held that another FHA section created a right to information that Congress extended to the full limits of Article III, displacing the judiciary's merely prudential limits on standing. Because this Court's limits on third-party standing are prudential, this Court could find those limits displaced by *Havens Realty*. Given the widespread misunderstanding of *Havens Realty*

outside the FHA context, this Court should clarify that it has relied on the FHA's relaxation of prudential standing if it allows the landlord Plaintiffs to assert their tenants' rights without meeting the prudential tests for doing so.[2]

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[2] Several courts have misapplied *Havens Realty* to statutes that – unlike the FHA – have not removed this Court's prudential limits on standing. *See, e.g., Nat'l Taxpayers Union, Inc. v. U.S.,* 68 F.3d 1428, 1433-34 (D.C. Cir. 1995); *Rainbow/PUSH Coalition v. F.C.C.,* 396 F.3d 1235, 1240-41 (D.C. Cir. 2005); *Common Cause/Georgia v. Billups,* 554 F.3d 1340, 1350 (11th Cir. 2009). For example, searching for a limiting principle to *Havens Realty,* the D.C. Circuit has required that "defendant's practices 'perceptibly impaired' the plaintiff's ability to provide counseling and referral services," *Nat'l Taxpayers Union,* 68 F.3d at 1433-34, which is wholly unnecessary for statutes to which prudential limits apply and wholly inappropriate for the FHA. In the former case, the limiting principle typically will be that the plaintiff's services are not prudentially within the statute's zone of interests. In the latter case, the D.C. Circuit's limiting principle would deny a latter-day FHA plaintiff the right that Congress created if (unlike in 1982 Richmond) discriminatory landlords were not sufficiently prevalent to "perceptibly impair" the latter-day FHA plaintiff's FHA-related services. If it relies on relaxed standing rules under *Havens Realty,* the Court should expressly limit its holding to avoid lower courts' applying it outside the FHA.

## II. THE FHA CANNOT BE INTERPRETED TO ENCOMPASS DISPARATE-IMPACT CLAIMS

Before evaluating the FHA itself, *amicus* Eagle Forum identifies three threshold issues that undermine the Plaintiffs' disparate-impact theories. First, Congress lacks the authority to regulate purely intrastate private housing. Second, even if Congress had that authority, this Court nonetheless should apply the presumption against preemption in this area of traditionally local concern. Because Congress has not clearly and manifestly ordained the disparate-impact standard, the question here is not whether the Plaintiffs' position is arguable but whether St. Paul's position is untenable. Third, and finally, this Court owes no deference to HUD interpretations and, in any event, must evaluate the FHA under traditional tools of statutory construction before considering HUD's views.

### A. Congress Lacks Authority for the FHA

When it regulates state and local government conduct – as opposed to either private conduct or both public and private conduct – Congress can rely on the authority vested in Section 5 of the Fourteenth Amendment. U.S. CONST. amend. XIV, §5; *cf. U.S. v. Morrison,* 529 U.S. 598, 621-22 (2000) ("Fourteenth Amendment… prohibits only state action [and] erects no shield against merely private conduct, however discriminatory or wrongful") (interior citations and quotations omitted). Similarly, when it regulates conduct by public and private recipients of federal funds, Congress can rely on the contract-like nature of the Spending Clause to attach

reasonable conditions on the receipt of federal funds. U.S. CONST. art. I, §8, cl. 1; *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 58-59 (2006); *Barnes v. Gorman,* 536 U.S. 181, 186 (2002). Where, as here, it regulates under the Commerce Clause, Congress can regulate only within the limits of that clause.

As currently interpreted, the Commerce Clause encompasses three areas that Congress may regulate: (1) "the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, and persons or things in interstate commerce," and (3) "*activities* that *substantially* affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (emphasis added). Because housing real estate cannot move, congressional authority for the FHA must lie in the third prong, if at all.

Several courts of appeal have held that the Commerce Clause provides authority for the FHA. *See, e.g., Oxford House-C v. City of St. Louis,* 77 F.3d 249, 251 (8th Cir. 1996); *Morgan v. Secretary of Housing and Urban Development,* 985 F.2d 1451, 1455 (10th Cir. 1993); *Seniors Civil Liberties Ass'n, Inc. v. Kemp,* 965 F.2d 1030, 1034 (11th Cir. 1992). These decisions all rely on *Katzenbach v. McClung,* 379 U.S. 294, 301-02 (1964), which in turn relies on its companion case, *Heart of Atlanta Motel, Inc. v. U.S.,* 379 U.S. 241 (1964). *McClung* and *Heart of Atlanta* concern restaurants and motels, respectively, which Congress might reasonably find to qualify as intrastate activities that affect interstate commerce. Similarly, purely *intrastate* consumption of self-grown products nonetheless

might affect the *interstate* market for those products. *Wickard v. Filburn,* 317 U.S. 111, 118-19 (1942); *Gonzales*, 545 U.S. at 18. Here, however, there is no interstate market in real estate, which sits in one state, without moving. And unlike hotels or restaurants that interstate travelers might visit on their travels, homes do not "*substantially* affect interstate commerce."

### B. The Presumption against Preemption Precludes Interpreting the FHA to Preempt Local Police Power to Regulate Housing Conditions

Although the assertion of Commerce-Clause power over local housing would be troubling on federalism grounds generally, *Morrison,* 529 U.S. at 618-19 ("we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), that assertion of a federal police power would be even more troubling here because of the historic *local* police power that the federal power would displace.

As St. Paul catalogs, state and local government have a long history of regulating housing standards for the health and safety of the community. St. Paul Br. at 2-3.[3] In such fields traditionally occupied by

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[3] St. Paul traces modern housing codes back to the late nineteenth century, *id.,* which easily predates the FHA's enactment in 1968. PUB. L. NO. 90-284, Title VIII, 82 Stat. 83 (1968).

state and local government, courts apply a presumption *against* preemption under which they will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) (emphasis added). Even assuming *arguendo* that one could interpret the FHA to allow disparate-impact claims, *but see* Section III, *infra,* the presumption against preemption would prevent this Court's entertaining that interpretation to preempt St. Paul's police power if the intentional-discrimination interpretation was also viable:

> When the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption."

*Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). Thus, while neither St. Paul nor Eagle Forum concedes that the Plaintiffs' disparate-impact interpretation *is* viable, that is not the test. The burden is on the Plaintiffs to demonstrate that St. Paul's intentional-discrimination interpretation *is not* viable.

### C. HUD Lacks the Authority to Adopt – by Regulation or by Interpretation – a Disparate-Impact Standard under an Intentional-Discrimination Statute

In a recent notice of proposed rulemaking, HUD proposes to adopt a disparate-impact standard under the FHA. Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD, Implementation of the Fair Housing Act's

Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (2011). As St. Paul explains, the eventual rule itself cannot apply retroactively to the conduct challenged in this lawsuit. St. Paul Br. at 37; *Georgetown University Hospital v. Bowen,* 488 U.S. 204, 208 (1988). Nonetheless, under some of this Court's holdings on deference to agencies' non-rule *interpretations,* the Plaintiffs might claim deference *now,* based only on an already-extant interpretation.

At the outset, HUD's present-day claim that it "has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate," 76 Fed. Reg. at 70,921, does not recognize that previous Administrations took the opposite view. *See* Presidential Statement on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. Pres. Doc. 1141 (Sept. 13, 1988). Consistency of interpretation can increase deference, *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944), and inconsistency can decrease or nullify it. *Id.; Morton v. Ruiz,* 415 U.S. 199, 237 (1974). On the other hand, consistency alone cannot make an arbitrary position rational. *Judulang v. Holder,* 132 S.Ct. 476, 488 (2011) ("[a]rbitrary agency action becomes no less so by simple dint of repetition"). Thus, under whatever form of deference the Plaintiffs would claim for HUD's present position, the primary issue is whether HUD's position is consistent *with the FHA.*

As explained in Section III, *infra,* Congress enacted an intentional-discrimination statute, and HUD cannot change that by agency decree. The first step of any deference analysis is for the Court to

evaluate the issue independently. Thus, before considering HUD's position, this Court must employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 n.9 (1984). If that analysis reveals an intentional-discrimination statute, that is the end of the matter, regardless of HUD's position:

> [D]eference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history. Here, neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if [the agency] has attempted to create such an obligation itself, it lacks the authority to do so.

*Southeastern Cmty. Coll. v. Davis,* 442 U.S. 397, 411-12 (1979) (internal quotations and citations omitted). As explained in Section III, *infra,* the FHA prohibits intentional discrimination, not disparate impacts.

But even if HUD could promulgate a regulation to establish a disparate-impact analysis for intra-agency proceedings, such as administrative hearings or enforcement, that would not establish a right of action for the public to enforce those regulations outside of HUD. Only Congress can create rights of action:

> [I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been

> authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

*Alexander v. Sandoval,* 532 U.S. 275, 291 (2001). Here, Congress did not create a right of action against disparate impacts, and any HUD views to the contrary could apply only within HUD.

Of course, where Congress has created a right of action to enforce regulations or where the agency regulation defines the conduct governed by a statutory cause of action, an agency regulation will play a role in the statutory cause of action. *Id.; Wright v. City of Roanoke Development & Housing Authority,* 479 U.S. 418, 419-23 (1987). But unlike the determination in *Wright* that HUD's interpreting "rent" to include utilities could bring utility costs into a statutory action based on rent, the entire point of *Sandoval* is that an agency cannot define "discrimination" to include disparate impacts under intentional-discrimination statutes.

## III. THE FHA PROHIBITS DISPARATE TREATMENT, NOT DISPARATE IMPACTS

Consistent with this Court's rules, *amicus* Eagle Forum will not extensively brief the FHA's limitation to intentional discrimination because St. Paul covers the topic well. *See* St. Paul Br. at 20-37; S. Ct. Rule 37.1 (amicus briefs should focus on matters not already addressed by the parties). Simply put, statutes that prohibit discrimination *because of* race or other protected status prohibit only purposeful discrimination and disparate treatment, not disparate impacts (*i.e.,* actions *because* of the protected status, not merely *in spite of* that status),

*Sandoval,* 532 U.S. at 282-83 & n.2; *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979). In the limited instances where Congress has intended to prohibit disparate impacts, it has done so expressly. *See* St. Paul Br. at 20-26. Similarly, in the limited instances where Congress has abrogated a holding of this Court with respect to disparate impacts, Congress has done so with pinpoint precision to allow disparate-impact claims under the affected statute, *see* St. Paul Br. at 25, not under all statutes. Therefore, unless and until Congress specifies otherwise, "because" means "because."

## IV. IF THIS COURT FINDS THE FHA TO ALLOW DISPARATE-IMPACT CLAIMS, THE COURT SHOULD APPLY THE PRESUMPTION AGAINST PREEMPTION TO THE SCOPE OF SUCH CLAIMS

Although it cannot envision this Court's reaching the second question presented, on the contours of the FHA's disparate-impact regime, *amicus* Eagle Forum respectfully submits that the presumption against preemption would apply to limit that regime, even if the Court finds that the FHA preempts St. Paul's police power. Specifically, under *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), the presumption applies to determining the *scope* of preemption, even after a court finds a statute to preempt *some* state action.

Accordingly, if the Court finds the FHA to allow disparate-impact claims, the Court should adopt the disparate-impact analysis that best preserves St. Paul's police power. Although *amicus* Eagle Forum does not support *any* disparate-impact analysis here,

the analysis most deferential to St. Paul's police power presumably is the *Wards Cove* analysis that St. Paul defends. St. Paul Br. at 38-53 (discussing *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989)).

## CONCLUSION

For the foregoing reasons and those argued by St. Paul, this Court should reverse the Eighth Circuit's holding that the FHA allows disparate-impact claims.

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Respectfully submitted,

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