No. 10-1032

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

PETITIONERS' REPLY BRIEF

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

June 28, 2011

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents concede that an inter-circuit conflict exists. That conflict causes significantly different results among the circuits as evidenced by the very way this case has been litigated below. Certiorari should be granted to resolve this circuit split.

Further, to address this circuit split, the court must first address the threshold question of whether the Fair Housing Act (FHA) provides for a disparate impact claim. Respondents failed to convincingly address this closely related threshold issue of whether the FHA allows for recovery based on a disparate impact theory. Recent case law has seriously put this threshold issue into question. Certiorari should be granted.

I. THIS CASE PRESENTS A SUBSTANTIAL INTER-CIRCUIT CONFLICT.

The Courts of Appeals are divided as to what test applies to a FHA claim brought under the disparate impact theory. The Fourth and Seventh Circuits have adopted a four-pronged balancing factors approach. The Sixth and Tenth Circuits apply a modified three-pronged balancing factors approach, leaving out the "intent" prong of the four-pronged test. The Third, Eighth, and Ninth Circuits employ various burden shifting tests. The First and Second Circuits merged the burden shifting test with the balancing factors approach and developed a hybrid test.

Respondents concede that this inter-circuit conflict exists. They claim differing tests employed by the

circuits "overlap significantly" but provide no evidence that the tests would end in the same result. On the contrary, the parties' and the courts' reliance on various case law setting forth different tests confirms that the existing inter-circuit conflict is untenable.

The fact that three different tests exist is not an accident. The circuits have developed their own tests because they recognize that different tests yield different results. For example, the circuits vary drastically on the role that "intent" should factor into the analysis. The Sixth Circuit rejects any inclusion of "intent" in the analysis. *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986). In rejecting the "intent" prong of the test pronounced by the Seventh Circuit in *Arlington Heights II*, the court held that the intention was not to diminish the importance of a finding of "intent" but because, "plaintiffs-appellants should not receive 'half-credit' for discriminatory intent under their Fair Housing Act claim." *Id*. at 575. The case law confirms that there is a circuit split that leads to different outcomes in different circuits.

The procedural history of this case makes clear that the different approaches will lead to different results. In 2008, the City moved for summary judgment on Respondents' disparate impact claim. In support of its argument, the City relied upon hybrid burden shifting and balancing test cases in the Second Circuit.[1] Respondents did not rely upon any case law or apply

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[1] *Andrews v. City of New York*, No. CV-01-7333, 2004 U.S. Dist. LEXIS 30290 (E.D.N.Y. Nov. 22, 2004), *citing Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003). Defs' Summ. J. Mem. at 25, 26 (D. Minn., filed March 11, 2008).

any test to support their claim that the City's code enforcement had a disparate impact on protected class citizens. In its December 18, 2008, Order, the District Court granted the City's motion for summary judgment, and in doing so ignored the hybrid burden shifting and balancing test cases cited by the City, and instead relied upon *Reinhart v. Lincoln County*, 482 F.3d 1225, 1230 (10th Cir. 2007), a balancing factors approach case. Pet. App. 63a. In their brief to the Eighth Circuit Court of Appeals, Respondents explicitly disagreed with the holding in *Reinhardt*. Pls.-Appellants' Br. at 30 (8th Cir., filed May 5, 2009). In doing so, Respondents rejected the Tenth Circuit's balancing factors approach and the same test applied in the Sixth Circuit (and in effect rejected similar balancing factors tests applied in the Fourth and Seventh Circuits).

It is incorrect for Respondents to claim now that there is "no distinction between the circuits' burden-shifting and factor-balancing tests that would affect this case."[2] Opp'n Br. at 19. It is Respondents who

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[2] In support of their argument that the different tests are not outcome-determinative, Respondents cite two law review articles that discuss the inter-circuit conflict among the Second, Seventh, and Sixth Circuits. The subject of those articles is whether disparate impact claims are cognizable under the FHA in claims involving landlords who withdraw or decline to accept Section 8 vouchers. Specifically, the Second and Seventh Circuits do not recognize a claim based on disparate impact under the FHA for landlords who withdraw from Section 8, while the Sixth Circuit does recognize a claim. These articles on Section 8 vouchers do not detract from the City's arguments regarding city-wide code enforcement application. Furthermore, Respondents fail to mention that no circuit allows disparate impact claims under the FHA to be brought against landlords who decide before renting

sought reversal of the District Court order by rejecting the *Reinhart* holding. Respondents have defined their case and their success at the Eighth Circuit by challenging the balancing factors approach case law and seeking the more restrictive approach adopted by the Eighth Circuit.

Furthermore, the Eighth Circuit did not ignore case law in the other circuits. The panel cited case law from the Second Circuit (hybrid burden shifting and balancing test), from the Fourth, Seventh and Tenth Circuits (various tests involving the balancing factors approach) and the Eighth Circuit (burden shifting approach). Pet. App. 20a-23a. The circuit split was further addressed in the City's petition for rehearing *en banc* identifying cases in four different circuits applying disparate impact analysis to a FHA claim, and comparing those cases to the draconian interpretation of disparate impact analysis employed by the panel in the Eighth Circuit (burden shifting approach).

Respondents concede, through their disagreement with *Reinhardt*, that in Denver, or Salt Lake City, the evidence they have would not sustain a disparate impact claim under the FHA. Since the Tenth, Fourth, Sixth, and Seventh Circuits apply a balancing factors approach, Respondents can add several other comparable cities to that list. In these circuits

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out their properties for the first time not to accept Section 8 vouchers. The disagreement among the circuits on withdrawal claims and the complete exclusion for claims against landlords who have never accepted Section 8 vouchers supports the City's position that disparate impact claims should not be cognizable under the FHA.

landlords cannot avoid a municipality's housing code enforcement by claiming that they rent to protected class citizens, and if they are required to make their rental properties safe to live in, there will be a disparate impact on minorities. As the law stands, in Minneapolis and Los Angeles, the strict burden shifting approach applied by the Eighth and Ninth Circuits allows neglectful landlords to skirt those cities' minimum maintenance standards by bringing a FHA claim based on disparate impact.

There is no reason why landlords in Los Angeles should be allowed to avoid maintenance requirements by claiming the municipality, the very body enforcing minimum maintenance standards to keep residents safe, is in violation of the FHA. This is especially true when recognizing that in Milwaukee a landlord can make no such claim. The FHA should not be a vehicle to allow landlords to rent dilapidated and unsafe housing to minorities. Under the Eighth and Ninth Circuits' strict burden shifting test, when landlords are required to fix their property under a municipality's housing code, they can simply claim that this requirement violates the FHA. This result should not be allowed to stand and certiorari should be granted to harmonize the circuits.

II. THE QUESTIONS PRESENTED ARE OF EXCEPTIONAL IMPORTANCE.

Respondents do not deny that the questions presented are of exceptional importance. As *Amicus Curiae*, the International Municipal Lawyers Association, explained, their membership includes 3,500 local government entities. These members "regularly enact and enforce minimum standards

under property maintenance codes in order to ensure the health, safety, and general welfare of their citizens." *Amicus Curiae* Br. at ii. The inter-circuit split should be resolved by this Court so that there are "predictable and unmistakable boundaries within which municipalities can work to promote safe housing for all." *Id*. Three thousand five hundred local government entities await a final determination on these issues and the determination will in turn affect nearly the entire population of the United States.

Likewise, the five judge dissent recognized the important questions pressed and passed on below. "[T]he panel's expansive rationale raises significant threshold issues concerning the application of disparate-impact analysis in this context." Pet. App. 119a. The dissent questioned the Eighth Circuit's 1974 introduction of disparate impact analysis to the FHA in *United States v. Black Jack*, 508 F.2d 1179 (8th Cir. 1974). Now, in light of this Court's opinion in *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005), and the panel's decision here, this Court has a perfect opportunity to decide these questions of exceptional importance.[3]

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[3] Respondents attack the *en banc* dissenters' and the City's contention that *Smith* casts serious doubt on disparate impact's application to the FHA. Although Respondents' argument would be more appropriately argued in a brief on the merits, Respondents' analysis is simply incorrect. Respondents contend that the language of the FHA "or otherwise make unavailable or deny [] a dwelling" is "sufficiently generic" to be considered a "catch-all" phrase that should be interpreted in precisely the same manner as the "adversely affect" language found in Title VII. Opp'n Br. at 14, 15. Such an interpretation ignores the magnitude of the words "adversely affect" and the fundamental differences in the language. "In determining the scope of a statute [the Court]

III. THIS COURT HAS THE AUTHORITY AND SHOULD DECIDE THE ISSUE OF WHETHER DISPARATE IMPACT ANALYSIS APPLIES TO FAIR HOUSING ACT CLAIMS, AND, IF IT DOES, IF THAT ANALYSIS EXTENDS TO A MUNICIPALITY'S EQUALLY APPLIED HOUSING CODE ON PROPERTIES LOCATED WITHIN THE MUNICIPALITY.

Respondents oppose certiorari review by claiming that the issues were never pressed or passed on below. In doing so, they ignore the broad powers of this Court.

In *Forsyth v. Hammond*, 166 U.S. 506, 513 (1897), the Court recognized that:

> Unquestionably, the generality of this provision [authorizing review of federal appellate decisions by writ of certiorari] was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power.... It may be exercised before or after...any ruling or determination....

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must first look to its language." *Reeves v. Ernst & Young*, 507 U.S. 170, 178 (1993) (*quoting United States v. Tukette*, 452 U.S. 576, 580 (1981)). "Affect" is defined as "to act upon: a.: to produce an effect upon; b(1) to produce a material influence upon or alteration in 2: to have a detrimental influence on . . . ." *Webster's Third New International Dictionary* (1976). Affect in and of itself is an all inclusive word that implies an influence beyond the action taken. Whereas to "make unavailable or deny" are specific and tangible actions that have no such connotations, rather they are made in reference to the tangible actions listed by the statute.

It is incorrect for Respondents to claim that the issues of which the City seeks review were never raised or decided below. Opp'n Br. at 7. The District Court relied on cases from various circuits that employed different tests when applying disparate impact analysis to the FHA. *See* discussion *supra* Part I. Respondents, in their brief to the Eighth Circuit, specifically disagreed with the Tenth Circuit's holding, in effect recognizing that if the Tenth Circuit law is applied in the Eighth Circuit then Respondents' FHA claim fails.[4] Respondents argued that it would be "nearly impossible" to do the analysis required in the Tenth Circuit to show a disparate impact in Respondents' case. Pls.-Appellants' Br. at 31. There can be no better evidence that the issues have been pressed and passed upon below than Respondents' own admission to the Eighth Circuit that another circuit's holding is incorrect.

Respondents also incorrectly assert that the City's petition for rehearing *en banc* never questioned the availability of disparate impact under the FHA. This question of exceptional importance was posed to the *en banc* panel: Can a municipality be prevented from enforcing its housing code because protected class members may rent property subject to the housing code? *See En Banc* Pet. at 12, 13 (8th Cir., filed Sept. 15, 2010). In the petition for rehearing *en banc*, the City questioned the panel's disparate impact analysis under the FHA because its analysis resulted in

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[4] Respondents stated specifically to the Eighth Circuit in their briefing, "Plaintiffs disagree with the *Reinhart* holding and the District Court's conclusion that Plaintiffs' argument is insufficient to withstand summary judgment." Pls.-Appellants' Br. at 30.

municipalities being prevented from enforcing housing codes when there was a shortage of affordable housing and a minority population that relies on affordable housing. As the City explicitly stated, municipalities within the Eighth Circuit must be made aware of the significant departure from other circuits, a departure that involves a significant restriction on Eighth Circuit municipalities' powers in enforcing their housing codes.

If, however, this Court answers the threshold question in the negative – does disparate impact analysis apply to the FHA – the question regarding which test to apply need not be answered. Respondents seek to avoid certiorari review claiming this threshold issue was not argued below. Opp'n Br. at 8-9. However, Respondents acknowledge that it is appropriate for this Court to address a closely related issue even if it was not briefed and resolved in the lower court. Opp'n Br. at 10. There can really be no closer issue to what test should apply to disparate impact analysis than the threshold question of whether disparate impact analysis applies at all. Furthermore, this Court's "general rule . . . precludes a grant of certiorari when the question presented was 'not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 58 (1992) (Stevens, J., dissenting). The rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Id*. at 41 The Court has "never adhered" to a rule "limiting review to questions pressed by the litigants below." *Id*. at 42 n.2. This rule makes particular sense when the law, as is the case here, has been decided under circuit precedent. As recognized by the *en banc* dissent, the "district court and the parties understandably have

taken disparate-impact analysis as a given under circuit precedent. . . ." Pet. App. 123a-124a. But, the *en banc* court clearly identified this "significant threshold issue[]" created by the "panel's expansive rationale." Pet. App. 119a. The panel undoubtedly applied disparate impact to the FHA and therefore passed on this issue.

Furthermore, Respondents have it backward when they argue that certiorari need not be granted because the City will have a full and fair opportunity to persuade a jury to reject Respondents' claim – a result that would moot the need for review by this Court. Opp'n Br. at 7. If in fact the City tries the case before a jury on a FHA claim based on a disparate impact theory, the nation is no further along in the answer of whether or not disparate impact analysis applies to the FHA. Nor are we further along in answering the question that if it does, does a disparate impact theory of liability extend to a city's consistent and equal, yet aggressive, code enforcement of all properties within the City. A jury verdict does not moot the need for review by this Court but unnecessarily delays that which is properly before this Court.

The issues properly presented in the Petition for Writ of Certiorari are not fact bound at all. There are no facts specific to this case necessary to answer the question: does disparate impact analysis apply to the FHA? If it does, which of the various tests that are employed should be applied nationwide? The current state of law applying disparate impact analysis to the FHA, with distinct tests that lead to different results in the circuit courts, cannot stand. For the benefit of all American cities, and in light of *Smith*, the question of whether or not disparate impact applies to the FHA

at all must be answered. If it does apply, a uniform test for all circuits to follow must be advanced.

CONCLUSION

For the above reasons a writ of certiorari should issue.

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