No. 07-1894

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARVA JEAN SAUNDERS, *et al.*,

Plaintiffs-Appellants

v.

FARMERS INSURANCE EXCHANGE, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
SUPPORTING APPELLANTS AND URGING REVERSAL

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE* AND THE SOURCE OF ITS AUTHORITY TO FILE THIS BRIEF

The United States has authority to file this *amicus* brief under Federal Rule of Appellate Procedure 29(a).

This appeal presents the question whether the McCarran-Ferguson Act, 15 U.S.C. 1011-1015, bars plaintiffs from challenging alleged race-based insurance discrimination under the Fair Housing Act, 42 U.S.C. 3601 *et seq.* The Court's resolution of that question could affect the ability of the United States to enforce the Fair Housing Act's prohibition against insurance discrimination. The Department of Justice and the Department of Housing and Urban Development (HUD) have substantial responsibility for administering and enforcing the Fair

Housing Act. See 42 U.S.C. 3608-3612, 3614. Congress granted HUD authority to issue regulations implementing the statute. 42 U.S.C. 3614a. Pursuant to that authority, HUD promulgated a regulation in 1989 defining discrimination under the Fair Housing Act to include "[r]efusing to provide * * * property or hazard insurance for dwellings or providing such * * * insurance differently because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. 100.70(d)(4); 54 Fed. Reg. 3,285 (1989). In addition, the Department of Justice has authority to bring actions in federal court to enforce the Fair Housing Act, 42 U.S.C. 3614, and has filed suits under the Act challenging discrimination in the provision of homeowner's insurance.

Because of the federal government's role in enforcing the prohibition against insurance discrimination, the United States has a strong interest in ensuring that courts properly apply the McCarran-Ferguson Act to Fair Housing Act claims. Consistent with that interest, the federal government has filed briefs, including one in the Supreme Court, arguing that the McCarran-Ferguson Act does not bar Fair Housing Act claims alleging discrimination in the provision of property insurance. See Br. in Opp. at *17-*22, 1996 WL 33467677, *Nationwide Mut. Ins. Co.* v. *Cisneros*, 516 U.S. 1140 (1996) (No. 95-714); Appellee Br. at *15-*17, 1994 WL 1026038, *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351 (6th Cir. 1995) (No. 94-3296). The United States made the same argument as an *amicus* in *Canady* v. *Allstate Ins. Co.*, No. 96-CV-0174 (W.D. Mo.), a case closely related to the present litigation. See pp. 3-4, *infra*.

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether the district court erred in concluding that plaintiffs' Fair Housing Act claims, which allege racial discrimination in the provision of homeowner's insurance, would impair Missouri's regulation of insurance and are thus barred by the McCarran-Ferguson Act.[1]

STATEMENT OF THE CASE

1. In 1996, several African-American residents of Kansas City, Missouri, filed suit against 23 insurance companies alleging that they had engaged in racially discriminatory insurance practices in violation of the Fair Housing Act and 42 U.S.C. 1981, 1982, and 1985(3). *Canady*, *supra*; see App. 134-138.[2]

Defendants moved to dismiss the complaint on the ground that the McCarran-Ferguson Act barred plaintiffs' federal claims. App. 141. That statute provides, in relevant part, that

> [n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * *, unless such Act specifically relates to the business of insurance.

---

[1] Because the federal government does not enforce 42 U.S.C. 1981 or 1982, the United States will not address plaintiffs' claims under those statutes.

[2] This brief uses the following abbreviations: "App. __" for the page number of appellants' appendix; "Add. __" for the page number of the addendum to appellants' opening brief; and "Doc. __" for the number of the entry on the district court docket sheet.

15 U.S.C. 1012(b). The United States filed an *amicus* brief in *Canady* arguing that the McCarran-Ferguson Act did not bar plaintiffs' Fair Housing Act claims. The district court denied the motion to dismiss in relevant part, agreeing with the United States that the McCarran-Ferguson Act did not preclude plaintiffs from pursuing their federal claims. App. 141-148; Add. 6-7.

The district court later dismissed the complaint for lack of standing. *Canady* v. *Allstate Ins. Co.*, No. 96-CV-0174, 1997 WL 33384270 (W.D. Mo. June 19, 1997), aff'd, 162 F.3d 1163 (table), No. 97-3075, 1998 WL 403200 (8th Cir. July 6, 1998), cert. denied, 525 U.S. 1104 (1999).

2. In 1997, 16 of the *Canady* plaintiffs filed the present action against three insurance companies, raising essentially the same discrimination claims as in *Canady*. App. 1-2. On October 24, 2002, plaintiffs filed a Revised Second Amended Complaint, alleging that defendants had engaged in racial discrimination "with respect to the marketing, underwriting, sale and pricing of homeowners insurance in a single, contiguous black community in Kansas City." App. 58. Plaintiffs asserted that these insurance practices violated the Fair Housing Act; 42 U.S.C. 1981 and 1982; and the fair housing provisions of the Missouri Human Rights Act, Mo. Rev. Stat. 213.040. App. 59, 69-73. Plaintiffs requested a jury trial and sought injunctive relief, compensatory and punitive damages, and attorney's fees. App. 73-75.

One of plaintiffs' claims – the only one relevant to this appeal – alleged unlawful "price discrimination." Add. 4. With regard to that claim, plaintiffs

alleged that defendants charged individuals higher prices for homeowner's insurance if they lived in predominantly black neighborhoods than if they resided in predominantly white communities. App. 65, 67, 70, 72.

In 2005, the district court dismissed plaintiffs' complaint. Doc. 74 at 22. The court held that the so-called "filed rate" doctrine barred plaintiffs' price-discrimination claims and that plaintiffs lacked standing to raise their other claims. Doc. 74 at 2-22.

3. This Court affirmed in part, reversed in part, and remanded the case. The Court held that the filed rate doctrine did not bar plaintiffs' price-discrimination claims, but upheld the dismissal of their other claims. *Saunders* v. *Farmers Ins. Exch.*, 440 F.3d 940, 943-946 (8th Cir. 2006).

In its opinion, this Court raised the question whether the McCarran-Ferguson Act would bar plaintiffs' federal claims. *Saunders*, 440 F.3d at 945-946. At the outset, this Court concluded that the Fair Housing Act and 42 U.S.C. 1981 and 1982 do not "'invalidate' or 'supersede' the Missouri laws regulating insurance." *Id.* at 945. Thus, according to the Court, the relevant question under the McCarran-Ferguson Act "is whether enforcement of these federal statutes in the manner urged by plaintiffs would 'impair' the State's regulation of insurance." *Ibid.* This Court stressed that impairment of a state's regulatory scheme cannot be presumed. Rather, "a specific showing is needed." *Ibid.* The Court further explained that "the mere fact of overlapping complementary remedies under

federal and state law does not constitute impairment for McCarran-Ferguson Act purposes." *Id.* at 946.

Although stating that "[t]he requisite level of interference is certainly more than possible," this Court declined to decide the question because defendants had not raised it below or on appeal and because the record was not sufficiently developed on several key points necessary to resolve the "fact-intensive issue." *Saunders*, 440 F.3d at 945. Specifically, this Court found that "the record on appeal [did] not sufficiently delineate either the nature of plaintiffs' price discrimination claims, the specific relief they seek, or the extent of Missouri's insurance rate regulation to decide the McCarran-Ferguson Act impairment issue." *Id.* at 946. This Court also expressed uncertainty "whether insureds may bring an action in state court to challenge an insurance rate as discriminatory or unreasonable," or "whether the Missouri statutes permit judicial review of the agency's determination of these issues." *Ibid.*

4. On remand, the district court dismissed the complaint and entered final judgment in favor of defendants. Add. 1-20. The court held – contrary to its earlier ruling in *Canady* – that the McCarran-Ferguson Act barred plaintiffs' claims under the Fair Housing Act and Sections 1981 and 1982. Add. 6-19. The judge suggested that the Supreme Court's intervening decision in *Humana Inc.* v. *Forsyth*, 525 U.S. 299 (1999), which addressed the meaning of "impair" under the McCarran-Ferguson Act, required the court to reject its earlier holding in *Canady*. See Add. 6-7.

The court concluded that allowing plaintiffs' federal claims to proceed "would clearly frustrate Missouri's Administrative regime to regulate the insurance industry." Add. 18. The district judge focused primarily on two factors in reaching this conclusion. First, the judge reasoned that if plaintiffs were allowed to proceed with their federal claims, the court "would be forced to determine what a fair and non-discriminatory rate for the plaintiff's policies would have been" (*ibid.*) – a decision that the court suggested would unduly intrude upon the authority of state insurance regulators. Second, the court concluded that the availability of a private right of action for punitive damages under federal law would be incompatible with the state's regulatory scheme because (according to the court) Missouri "does not allow private citizens to bring suits to challenge the pricing determinations of insurers." *Ibid.*

SUMMARY OF ARGUMENT

The district court erred in concluding that the McCarran-Ferguson Act bars plaintiffs' insurance discrimination claims under the Fair Housing Act. The key error in the district court's analysis was its failure to consider the fair housing provisions of the Missouri Human Rights Act (MHRA) in deciding whether plaintiffs' federal claims would impair Missouri's regulation of insurance. The MHRA provides protection against insurance discrimination that is co-extensive with that of the Fair Housing Act, and victims who experience such discrimination have a private right of action for compensatory and punitive damages under state law. Because Missouri's insurance code does not bar such state law claims,

allowing plaintiffs to pursue analogous claims under federal law would not impair Missouri's regulation of insurance.

ARGUMENT

THE MCCARRAN-FERGUSON ACT DOES NOT BAR PLAINTIFFS' FAIR HOUSING ACT CLAIMS

The McCarran-Ferguson Act provides, in relevant part, that

> [n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

15 U.S.C. 1012(b). This Court has already concluded that the Fair Housing Act does not "'invalidate' or 'supersede' the Missouri laws regulating insurance." *Saunders* v. *Farmers Ins. Exch.*, 440 F.3d 940, 945 (8th Cir. 2006). The question to be resolved in this appeal is whether plaintiffs' Fair Housing Act claims would "impair" Missouri's regulation of insurance. *Ibid.* This Court should hold that no such impairment would occur and, therefore, that the McCarran-Ferguson Act does not bar plaintiffs' Fair Housing Act claims.

A. Other Courts Of Appeals Have Uniformly Rejected Arguments That The McCarran-Ferguson Act Bars Fair Housing Act Claims

Every court of appeals that has decided the issue has rejected attempts by insurance companies to invoke the McCarran-Ferguson Act as a bar to insurance-discrimination claims under the Fair Housing Act. See *Dehoyos* v. *Allstate Corp.*, 345 F.3d 290, 293-300 (5th Cir. 2003) (plaintiffs' Fair Housing Act claims, which alleged "racially discriminatory pricing practices," did not impair Florida or Texas

insurance law), cert. denied, 541 U.S. 1010 (2004); *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1360-1363 (6th Cir. 1995) (insurance-discrimination claims under the Fair Housing Act did not impair Ohio insurance law), cert. denied, 516 U.S. 1140 (1996); *United Farm Bureau Mut. Ins. Co.* v. *Metropolitan Human Relations Comm'n*, 24 F.3d 1008, 1016 (7th Cir. 1994) (same as to Indiana law); *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 293-297 (7th Cir. 1992) (Wisconsin law), cert. denied, 508 U.S. 907 (1993); *Mackey* v. *Nationwide Ins. Co.*, 724 F.2d 419, 420-421 (4th Cir. 1984) (North Carolina law);[3] see also *Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1219-1223 (11th Cir. 2001) (concluding that insurance-discrimination claims under 42 U.S.C. 1981 and 1982 did not impair Alabama insurance law), cert. denied, 535 U.S. 1018 (2002). This Court should reach the same conclusion with regard to plaintiffs' Fair Housing Act claims.

B. Plaintiffs' Fair Housing Act Claims Would Not Impair Missouri's Regulation Of Insurance

In the context of the McCarran-Ferguson Act, "impair" means "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." *Humana*, 525 U.S. at 309-310 (quoting *Black's Law Dictionary* 752 (6th ed. 1990)). Although "impair[ment]" can occur even if federal law does not directly conflict with a state's insurance laws, the Supreme Court has

[3] Accord *Nevels* v. *Western World Ins. Co.*, 359 F. Supp. 2d 1110, 1123 (W.D. Wash. 2004) (Fair Housing Act did not impair Washington insurance law); *Wai* v. *Allstate Ins. Co.*, 75 F. Supp. 2d 1, 5 (D.D.C. 1999) (same as to Maryland law).

refused to read the term "impair" in a manner that would "cede the field of insurance regulation to the States." *Humana*, 525 U.S. at 308-309. Moreover, the Court has rejected the argument that impairment occurs whenever a federal statute "imposes liability additional to, or greater than, state law." *Id.* at 309.
Instead, the Court has held that "[w]hen federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." *Id.* at 310.

As interpreted by *Humana*, the McCarran-Ferguson Act presents no barrier to plaintiffs' Fair Housing Act claims. The district court and defendants have acknowledged that the Fair Housing Act does not directly conflict with Missouri's insurance law. See Doc. 74 at 20 (court's conclusion that "there is no conflict between the Missouri insurance regulations and the Fair Housing Act" because "[b]oth the state statutes and the federal statute[] prohibit discrimination"); Doc. 70 at 2 (defendants' acknowledgment that "Missouri's Insurance Code is fully consistent with the protections of the Fair Housing Act"). Moreover, as we explain below, allowing plaintiffs to pursue their Fair Housing Act claims would neither frustrate declared state policy nor interfere with Missouri's administrative regime.

1. In Deciding Whether Impairment Would Occur, A Court Must Consider Not Only The Relief Authorized By The State's Insurance Code But Also The Remedies Available To Insurance Discrimination Victims Under Other State Laws

In *Humana*, the Supreme Court held that claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) did not impair Nevada's regulation of insurance and thus were not barred by the McCarran-Ferguson Act. 525 U.S. at 311-314. The Court pointed to several factors that supported its conclusion: (1) although Nevada's insurance commissioner had authority to enforce the state's insurance statute in administrative proceedings, victims of insurance fraud also had a private right of action for violations of that state law; (2) Nevada's insurance statute was "not hermetically sealed; it [did] not exclude application of other state laws, statutory or decisional"; (3) victims of insurance fraud could bring a private action against insurers in state court to remedy a breach of common-law duties; (4) victims of insurance fraud could seek compensatory and punitive damages in their state court actions; (5) the damages available in state court actions could exceed the treble damages available under RICO; (6) Nevada "filed no brief at any stage of [the] lawsuit urging that application of RICO to the alleged conduct would frustrate any state policy, or interfere with the State's administrative regime"; and (7) insurance companies themselves had sometimes relied on RICO when they were victims of fraud. *Ibid.* The Court did not suggest that any single factor was dispositive.

Humana makes clear that in determining whether federal claims would impair a state's regulation of insurance, courts should not focus solely on the state insurance code itself. Rather, the analysis must also take into account whether a state provides a private right of action to challenge insurance practices under *state laws other than the insurance code*. See *Humana*, 525 U.S. at 312-313. The availability of such private actions will weigh heavily against a finding that federal claims impair the state's regulation of insurance. Thus, the absence of a private right of action under the insurance code is not dispositive if other state laws allow private litigants to bring lawsuits to challenge the insurance matters that are the subject of the federal claims. See *BancOklahoma Mortgage Corp.* v. *Capital Title Co.*, 194 F.3d 1089, 1099-1100 (10th Cir. 1999) (concluding that RICO claims would not impair Missouri's regulation of insurance, even though insurance code itself did not provide a private right of action); *Weiss* v. *First Unum Life Ins. Co.*, 482 F.3d 254, 264-269 (3d Cir. 2007) (same conclusion regarding New Jersey insurance law); *American Chiropractic Ass'n* v. *Trigon Healthcare, Inc.*, 367 F.3d 212, 229, 232 (4th Cir.) (same under Virginia insurance law), cert. denied, 543 U.S. 979 (2004).

The Tenth Circuit's opinion in *BancOklahoma* is particularly relevant here because it is the only post-*Humana* appellate decision that has decided whether federal claims would impair Missouri's regulation of insurance. In rejecting a McCarran-Ferguson Act defense to a plaintiff's RICO claims, the Tenth Circuit emphasized that "[a]lthough Missouri does not provide a private cause of action

under its Unfair Trade Practice Act [which addresses certain insurance practices], it does allow causes of action under other state law." *BancOklahoma*, 194 F.3d at 1099. The court pointed specifically to Mo. Rev. Stat. 375.944(4), which provides that the state insurance director's administrative orders enforcing the Unfair Trade Practice Act shall not "in any way relieve or absolve any person affected by such order from any liability under any other laws of this state." *Ibid*.

This Court's decision in *LaBarre* v. *Credit Acceptance Corp.*, 175 F.3d 640 (8th Cir. 1999), is not inconsistent with the Tenth Circuit's holding in *BancOklahoma*. In *LaBarre*, this Court concluded that certain RICO claims would impair Minnesota's regulation of insurance. 175 F.3d at 643. Unlike *BancOklahoma*, the *LaBarre* opinion did not analyze Missouri law, and thus did not consider the significance of Mo. Rev. Stat. 375.944(4), the provision on which the Tenth Circuit relied so heavily.

At any rate, this Court's concern in *LaBarre* was that RICO's "extraordinary remedies" would frustrate the administrative enforcement scheme that Minnesota had created to handle insurance matters. 175 F.3d at 643. No such risk exists in the present case. As explained below, the relief available under the Fair Housing Act is no more extensive than the remedies that Missouri already makes available to victims of insurance discrimination under its own Human Rights Act. Consequently, insurance discrimination claims under the Fair Housing Act do not have any greater impact on Missouri's regulation of insurance than the state already permits under its own laws.

2. *The Missouri Human Rights Act And The Fair Housing Act Provide Identical Protections Against Insurance Discrimination*

The Fair Housing Act provides, in relevant part, that "it 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). HUD has promulgated a regulation that interprets these provisions of the Fair Housing Act to prohibit defendants from "refusing to provide * * * property or hazard insurance for dwellings or providing such * * * insurance differently because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. 100.70(d)(4). Both courts of appeals that have decided the issue have correctly upheld HUD's regulation as a valid interpretation of the Fair Housing Act. See *Nationwide*, 52 F.3d at 1355-1360; *American Family*, 978 F.2d at 297-301. As those courts concluded, HUD's insurance regulation is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Missouri Human Rights Act prohibits housing discrimination in language virtually identical to that of the Fair Housing Act. The fair housing provisions of the MHRA state, in relevant part, that "[i]t shall be an unlawful housing practice"

> (1) To refuse to sell or rent after the making of a bona fide offer, to refuse to negotiate for the sale or rental of, to deny or otherwise make unavailable, a dwelling to any person because of race, color, religion, national origin, ancestry, sex, disability, or familial status;
>
> (2) 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, national origin, ancestry, sex, disability, or familial status.

Mo. Rev. Stat. 213.040(1) & (2).

The MHRA should be interpreted to provide the same protections against insurance discrimination that are available under the Fair Housing Act. A number of factors support such an interpretation.

First, Missouri's fair housing law was "patterned after the federal Fair Housing Act," *Green* v. *Ten Eyck*, 572 F.2d 1233, 1238 (8th Cir. 1978),[4] and the text of Mo. Rev. Stat. 213.040 is substantively identical to that of 42 U.S.C. 3604(a) and (b), the portions of the Fair Housing Act that HUD and courts of appeals have interpreted as prohibiting insurance discrimination. Because the text of the MHRA mirrors that of the Fair Housing Act, state and federal courts have appropriately relied on federal case law interpreting the Fair Housing Act in construing the substantive protections and remedies available under the housing provisions of the MHRA. See *Green*, 572 F.2d at 1238; *Hodges* v. *Cottage Hill Apts.*, No. 05-CV-5060, 2007 WL 120586, at *5-*6 (W.D. Mo. Jan. 11, 2007); *Van*

[4] Disagreed with on other grounds by *Burnett* v. *Grattan*, 468 U.S. 42, 46 n.9 (1984).

Den Berk v. *Missouri Comm'n on Human Rights*, 26 S.W.3d 406, 411 & n.3 (Mo. App. 2000); *Joplin* v. *Missouri Comm'n on Human Rights*, 642 S.W.2d 370, 372, 375 (Mo. App. 1982).[5]

Second, HUD has determined, pursuant to 42 U.S.C. 3610(f), that the fair housing provisions of the MHRA are "substantially equivalent" to the protections of the Fair Housing Act (as they have been interpreted by HUD's regulations). HUD has certified the Missouri Commission on Human Rights, which handles administrative enforcement of the MHRA (see Mo. Rev. Stat. 213.030), as a "substantially equivalent" state agency.[6] In order to grant such certification to a state agency, the Secretary must determine that the agency administers a law that "on its face, provides rights and remedies for alleged discriminatory housing practices that are substantially equivalent to those provided in the [Fair Housing]

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[5] See also *Rowe* v. *Hussmann Corp.*, 381 F.3d 775, 782 (8th Cir. 2004) (noting, in a non-housing context, that "Missouri courts routinely follow federal law when interpreting MHRA"); *Walton* v. *McDonnell Douglas Corp.*, 167 F.3d 423, 426 n.4 (8th Cir. 1999) ("The MHRA is interpreted to mirror federal law."); *Missouri Comm'n on Human Rights* v. *Red Dragon Restaurant, Inc.*, 991 S.W.2d 161, 168 (Mo. App. 1999) ("When Missouri has not addressed an issue under the MHRA, Missouri courts may look to federal decisions interpreting similar civil rights laws."); *Sedalia No. 200 Sch. Dist.* v. *Missouri Comm'n on Human Rights*, 843 S.W.2d 928, 930 (Mo. App. 1992) ("In reviewing discrimination suits, Missouri courts have given deference to federal cases construing similar claims under federal law.").

[6] See http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm (last visited June 29, 2007) (listing the District of Columbia and 38 states, including Missouri, as having certified agencies); http://www.hud.gov/offices/fheo/partners/FHAP/equivalency.cfm (last visited June 29, 2007) (explaining certification process).

Act." 24 C.F.R. 115.204(a).[7] In making that determination, HUD must find that the state law provides "the same protections as those afforded by [42 U.S.C. 3604, 3605, 3606, and 3618], consistent with HUD's implementing regulations." 24 C.F.R. 115.204(a)(5).[8] As previously explained, the portion of the Fair Housing Act that HUD has interpreted as covering insurance discrimination is contained in 42 U.S.C. 3604. HUD's certification thus provides additional support for the conclusion that the MHRA covers insurance discrimination to the same extent as the Fair Housing Act.

Third, the Missouri legislature re-enacted the relevant language of Mo. Rev. Stat. 213.040 in 1998 (see S.B. 786, 89th Gen. Assem., 2d Reg. Sess. § A (Mo. 1998)) – long after HUD had issued its insurance regulation in 1989 and a few years after a number of federal courts, including two courts of appeals, had upheld the regulation as a valid interpretation of the Fair Housing Act. See *Nationwide*, 52 F.3d at 1355-1360; *American Family*, 978 F.2d at 297-301; *United Farm Bureau*, 24 F.3d at 1015; *Strange* v. *Nationwide Mut. Ins. Co.*, 867 F. Supp. 1209, 1214 (E.D. Pa. 1994). In construing a state statute, Missouri courts "presume the legislature was aware of the state of the law at the time of its enactment." *Matter of Nocita*, 914 S.W.2d 358, 359 (Mo. 1996) (en banc). If Missouri legislators

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[7] Prior to the recent amendments to HUD's regulations, see 72 Fed. Reg. 19,075-19,076 (2007), this provision was codified at 24 C.F.R. 115.202(a) (2006).

[8] As a result of such determination and ensuing certification, the HUD Secretary must refer certain discrimination complaints to state or local agencies. See 42 U.S.C. 3610(f).

opposed coverage of insurance discrimination under the MHRA, they could have included language to that effect when they re-enacted Section 213.040 in 1998. Instead, they readopted language identical to the portions of the Fair Housing Act that had been interpreted as covering insurance discrimination.

Finally, this Court "interpret[s] broadly the remedial purpose of the MHRA." *Varner* v. *National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), cert. denied, 519 U.S. 1110 (1997); *Karcher* v. *Emerson Elec. Co.*, 94 F.3d 502, 509 (8th Cir. 1996), cert. denied, 520 U.S. 1210 (1997). The Court therefore should construe the fair housing provisions of the MHRA to provide protections against insurance discrimination that are at least as broad as those found in the Fair Housing Act.

3. The Missouri Human Rights Act Provides A Private Right Of Action And Authorizes The Same Remedies, Including Punitive Damages, That Are Available Under The Fair Housing Act

The MHRA provides a private right of action for victims of housing discrimination. Mo. Rev. Stat. 213.111.1. In such an action,

> [t]he court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages, and may award court costs and reasonable attorney fees to the prevailing party.

Mo. Rev. Stat. 213.111.2. These remedies are identical to those available in a private action under the Fair Housing Act. 42 U.S.C. 3613(c).

Victims of discrimination who seek damages in an action under the MHRA have a state constitutional right to a jury trial. *State ex rel. Diehl* v. *O'Malley*, 95

S.W.3d 82, 84-92 (Mo. 2003) (en banc). Similarly, a litigant who pursues MHRA claims for damages in federal court has a Seventh Amendment right to a jury trial. *Karcher*, 94 F.3d at 510.

In sum, the remedies available in private actions under the MHRA – including the right to seek compensatory and punitive damages in a jury trial – are the same as those available to private litigants in Fair Housing Act cases.

4. Missouri's Insurance Code, Which Prohibits Certain Types Of Discrimination, Does Not Preempt Private Actions For Damages Under The MHRA

Missouri's insurance code prohibits some forms of discrimination. For example, it bars insurance companies from charging "unfairly discriminatory" rates. Mo. Rev. Stat. 379.318(4). For purposes of this provision,

> [u]nfair discrimination shall be defined to include, but shall not be limited to, the use of rates which unfairly discriminate between risks in the application of like charges or credits or the use of rates which unfairly discriminate between risks having essentially the same hazard and having substantially the same degree of protection against fire and allied lines.

Ibid. The parties and the district court assumed below that this ban on "unfairly discriminatory" rates would bar racial discrimination in the setting of insurance prices, at least under some circumstances. See Add. 16; App. 110-111; Doc. 74 at 12, 20; Doc. 70 at 2-3; Doc. 67 at 9. In addition, the state's insurance code prohibits insurers from cancelling, refusing to write, or refusing to renew a policy solely on account of race. Mo. Rev. Stat. 375.007. Another provision of the code prohibits "[u]nfair trade practice[s]," Mo. Rev. Stat. 375.934, which Missouri

defines to include "unfair discrimination." Mo. Rev. Stat. 375.936(11). "Unfair discrimination" includes cancelling a policy or refusing to insure individuals solely because of race. Mo. Rev. Stat. 375.936(11)(g).

Missouri law authorizes the state Director of Insurance to enforce these anti-discrimination provisions through administrative proceedings and to impose fines against insurers under certain circumstances. See Mo. Rev. Stat. 379.343, 379.346, 379.348, 379.361; Mo. Rev. Stat. 375.037, 375.938, 375.940, 375.942; *Farm Bureau Town & Country Ins. Co.* v. *Angoff*, 909 S.W.2d 348, 351 (Mo. 1995) (en banc) (explaining administrative enforcement scheme). Individuals may challenge discriminatory rates by filing an administrative complaint with the Director of Insurance. Mo. Rev. Stat. 379.348. Under some circumstances, aggrieved individuals may intervene in the administrative hearings. Mo. Rev. Stat. 375.940.2.

Individuals who are aggrieved by the insurance director's administrative decisions may seek judicial review. Mo. Rev. Stat. 375.037, 375.944, 375.945, 536.100, 536.140. In reviewing administrative decisions involving insurance decisions that qualify as unfair trade practices, courts may issue injunctions and impose monetary penalties. Mo. Rev. Stat. 375.945.2.

Aside from the judicial review provisions mentioned above, Missouri law does not appear to provide a private right of action to enforce violations of the state's insurance code. The Missouri insurance code states that "[n]othing in [the provisions prohibiting unfair trade practices] shall be construed to create or imply a

private cause of action." Mo. Rev. Stat. 375.930.2. Although the United States has found no case law addressing the question in the context of Section 379.318(4)'s ban on unfairly discriminatory rates, courts have held that no private right of action exists to enforce other provisions of the insurance code. See *BancOklahoma*, 194 F.3d at 1099; *R.L. Nichols Ins., Inc.* v. *Home Ins. Co.*, 865 S.W.2d 665, 666-667 (Mo. 1993) (en banc); *Shqeir* v. *Equifax, Inc.*, 636 S.W.2d 944, 946-949 (Mo. 1982); *Dierkes* v. *Blue Cross & Blue Shield*, 991 S.W.2d 662, 667-668 (Mo. 1999) (en banc). The reasoning of those decisions suggests that Missouri courts would conclude that no private right of action exists to enforce Section 379.318(4).

The absence of a private right of action to enforce the insurance code itself does not preclude victims of insurance discrimination from seeking relief under the MHRA. A number of statutory provisions and Missouri Supreme Court decisions confirm that the insurance code does not preempt MHRA claims.

Most importantly, Missouri law states that "[t]he provisions of [the MHRA] shall be construed to accomplish the purposes thereof and *any law inconsistent with any provision of [the MHRA] shall not apply*." Mo. Rev. Stat. 213.101 (emphasis added). This Court has relied on Section 213.101 to conclude that, although Missouri's worker compensation statute preempts certain common-law claims, it cannot bar private actions for damages under the MHRA. *Varner*, 94 F.3d at 1212-1213; *Karcher*, 94 F.3d at 509; accord *Pollock* v. *Wetterau Food Distrib. Group*, 11 S.W.3d 754, 769-770 (Mo. App. 1999).

In addition, the state insurance code contains two provisions indicating that Missouri did not intend the administrative remedies for unlawful insurance practices to preclude relief under other statutes. The first provision explains that monetary penalties imposed by the state's insurance director for "unfairly discriminatory" insurance rates and other unlawful insurance practices "may be in addition to any other penalty provided by law." Mo. Rev. Stat. 379.361.1. The other provision states that an administrative order imposing penalties for unfair trade practices shall not "in any way relieve or absolve any person affected by such order from any liability under any other laws of this state." Mo. Rev. Stat. 375.944(4). As previously explained, the Tenth Circuit in *BancOklahoma* relied heavily on Section 375.944(4) in concluding that RICO claims would not impair Missouri's regulation of insurance. 194 F.3d at 1099; p. 13, *supra*.

The decision in *Dierkes*, 991 S.W.2d at 667-668, further confirms that the state's insurance code does not bar private rights of action under the MHRA. In that case, the Missouri Supreme Court held that the administrative enforcement scheme under the state insurance code did not preclude plaintiffs from bringing an action for compensatory and punitive damages to remedy an insurer's violations of common-law duties. See *id.* at 664, 668-669. The court reached that conclusion even though Missouri's Department of Insurance had already brought an administrative enforcement action and reached a settlement with the insurer related to the same conduct that was the subject of the plaintiff's common-law claims. *Id.* at 665-666. *Dierkes* illustrates that Missouri permits individuals to bring private

lawsuits involving insurance matters if the cause of action is based on a law other than the insurance code.

Finally, the Missouri Supreme Court's decision in *Williams* v. *National Cas. Co.*, 132 S.W.3d 244 (Mo. 2004), provides additional evidence that the state's insurance code does not bar private actions involving insurance matters. In *Williams*, the plaintiff filed suit against his insurance company, alleging breach of contract and seeking nearly $60,000 in expenses for prostate cancer treatment. 132 S.W.3d at 245; *Williams* v. *National Cas. Co.*, No. 25461, 2003 WL 22159034, *2 (Mo. App. Oct. 16, 2003), case transferred, 132 S.W.3d 244 (Mo. 2004). The Missouri Supreme Court ruled in plaintiff's favor, concluding that Mo. Rev. Stat. 375.995, a provision of the insurance code prohibiting sex discrimination in certain insurance decisions, invalidated a clause in plaintiff's insurance policy excluding coverage for diseases of the prostate. *Williams*, 132 S.W.3d at 245, 249.

5. Because Missouri Law Authorizes Private Rights Of Action And Damage Awards For Victims Of Insurance Discrimination, Allowing Plaintiffs To Pursue Analogous Claims Under The Fair Housing Act Would Not Impair Missouri's Regulation Of Insurance

The district court erred in concluding that plaintiffs' Fair Housing Act claims would "clearly frustrate" Missouri's administrative regime for regulating the insurance industry. Add. 18. As explained above, Missouri's insurance code does not preclude a victim of discriminatory insurance practices from bringing a state-court action to recover compensatory and punitive damages under the MHRA. Because the substantive protections and remedies available to victims of

insurance discrimination under the MHRA are coextensive with those of the Fair Housing Act, allowing plaintiffs to pursue their Fair Housing Act claims will not upset the balance that Missouri has struck between its system of insurance regulation and its own Human Rights Act.[9] See *Weiss*, 482 F.3d at 265 (the ability of victims of insurance fraud to bring private actions for damages under state laws other than the insurance code undercuts the argument that federal claims would impair the state's regulation of insurance).

In justifying dismissal of the complaint, the district judge expressed concern that plaintiffs' Fair Housing Act claims would force the court "to determine what a fair and non-discriminatory rate for the plaintiff's policies would have been," thereby impermissibly intruding upon the authority of state insurance regulators. Add. 18. That reasoning is flawed. Adjudicating Fair Housing Act claims would not require judges to delve into these insurance matters to any greater extent than would be necessary if courts were deciding analogous insurance-discrimination claims under the MHRA.

The district court also concluded that the availability of a private right of action for punitive damages under federal law would be incompatible with the administrative scheme that Missouri had established to enforce its insurance code.

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[9] The impairment question under the McCarran-Ferguson Act properly focuses on the substantive protections and remedies generally available under state law for victims of the type of discrimination that is the subject of the Fair Housing Act claims. The analysis does not turn on whether the litigants in any particular lawsuit are actually pursuing state law claims.

Add. 18. That conclusion ignores the fact that the MHRA provides the same remedies as the Fair Housing Act. Consequently, the availability of punitive damages claims under the federal statute would have no greater impact on the state's administrative scheme than Missouri already allows under its own Human Rights Act.

The Supreme Court's reasoning in *Humana* confirms that plaintiffs' Fair Housing Act claims would not impair the operation of Missouri's insurance law. Like the Nevada statute at issue in *Humana*, Missouri's insurance law is "not hermetically sealed; it does not exclude application of other state laws, statutory or decisional." *Humana*, 525 U.S. at 312. In rejecting a McCarran-Ferguson Act defense to the RICO claims in *Humana*, the Supreme Court emphasized that victims of insurance fraud in Nevada could bring state court actions for compensatory and punitive damages. *Id.* at 311-312. Similarly, victims of insurance discrimination in Missouri may bring private actions under the MHRA to recover both compensatory and punitive damages – the same relief that is available under the Fair Housing Act. And, as in Nevada (see *id.* at 312-313), plaintiffs in Missouri may bring common-law claims involving insurance practices even when such matters are also regulated by the state's insurance code. See *Dierkes*, 991 S.W.2d at 665-666, 668-669; *Williams*, 132 S.W.3d at 245, 249.

In addition, even though this litigation is nearly a decade old, Missouri has not intervened or otherwise participated in this case to argue that the Fair Housing Act claims would impair the state's regulation of insurance. App. 116. The state's

silence over the years further undermines the district court's finding of impairment. See *Humana*, 525 U.S. at 313 (noting that Nevada had "filed no brief at any stage of [the] lawsuit urging that application of RICO to the alleged conduct would frustrate any state policy, or interfere with the State's administrative regime"); accord *Moore*, 267 F.3d at 1222; *American Family*, 978 F.2d at 297.

These factors confirm that the Fair Housing Act "does not directly conflict with [Missouri's] state regulation," and that "application of the federal law [in this case] would not frustrate any declared state policy or interfere with [Missouri's] administrative regime." *Humana*, 525 U.S. at 310. Consequently, the McCarran-Ferguson Act does not preclude plaintiffs from pursuing their insurance-discrimination claims under the Fair Housing Act.[10]

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[10] This Court previously stated that Judge Easterbrook's opinion in *American Family*, 978 F.2d at 290-291, and Judge Jones' dissent in *Dehoyos*, 345 F.3d at 300-302, provided "powerful reasons why the relief requested in a disparate impact pricing claim under the Fair Housing Act could impair comprehensive state regulation of insurance rates." *Saunders*, 440 F.3d at 945. This Court can decide the impairment issue in this case without addressing the questions about the disparate-impact theory that Judges Easterbrook and Jones raised in their opinions. As explained, the Missouri Human Rights Act provides remedies and protections against insurance discrimination identical to those available under the Fair Housing Act. See pp. 14-19, *supra*. For that reason, insurance-discrimination claims under the Fair Housing Act do not have any greater impact on Missouri's regulation of insurance than Missouri already permits under its own Human Rights Act.

At any rate, plaintiffs have alleged intentional discrimination, in addition to disparate impact. App. 63-66. Thus, even if the McCarran-Ferguson Act barred plaintiffs from pursuing their claims under a disparate-impact theory, the district court should not have dismissed their complaint. "A motion to dismiss for failure to state a claim should be granted only if it is clear that no relief could be granted under any set of facts, construing the allegations of the complaint favorably to the

(continued...)

CONCLUSION

This Court should reverse the district court's holding that the McCarran-Ferguson Act bars plaintiffs' Fair Housing Act claims.

Respectfully submitted,

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[10](...continued)
pleader." *County of St. Charles* v. *Missouri Family Health Council*, 107 F.3d 682, 684 (8th Cir.), cert. denied, 522 U.S. 859 (1997). Consequently, at this stage of the litigation, this Court must assume that plaintiffs can prove their allegation that defendants engaged in intentional discrimination. See *Federer* v. *Gephardt*, 363 F.3d 754, 757 (8th Cir. 2004) ("We must accept the plaintiff's material factual allegations as true, putting all skepticism aside.").

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using WordPerfect 12 and contains 6,812 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I also certify that the electronic version of this brief is an exact copy of what has been submitted to the Court in written form. I further certify that this electronic copy has been scanned with the most recent version of Trend Micro Office Scan (version 7.3) and is virus-free.

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July 2, 2007

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2007, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL, along with a disk containing an electronic copy of the same brief, were served by Federal Express, next business day delivery, on each of the following counsel of record:

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I further certify that on July 2, 2007, the original and 10 hard copies of the BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL, along with a disk containing an electronic copy of the same brief, were sent by Federal Express, next business day delivery, to the United States Court of Appeals for the Eighth Circuit.

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