No. 07-1903

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COLEMAN MCCLAIN, *et al.*,

Plaintiffs-Appellants

v.

SHELTER GENERAL INSURANCE COMPANY;
SHELTER MUTUAL INSURANCE COMPANY,

Defendants-Appellees

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

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

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The United States submits this reply brief to respond to two arguments that appellees Shelter General Insurance Company, *et al.* (collectively Shelter) make in their answering brief.

1. Shelter contends (Shelter Br. 37 & n.24)[1] that this Court should refuse to consider the United States' arguments about the Missouri Human Rights Act

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[1] This brief uses the following abbreviations: "Shelter Br. __" for the page number of Shelter's brief as appellee; "US *Amicus* Br. __" for the page number of the United States' opening *amicus* brief; "App. __" for the page number of the parties' joint appendix; and "Add. __" for the page number of the addendum to appellants' opening brief.

(MHRA) because they were not presented in the district court. Contrary to Shelter's assertion, the United States' arguments are properly before this Court.

The arguments in the United States' opening *amicus* brief are encompassed within the issues raised in the district court. One of the key issues on remand was "whether insureds may bring an action in state court to challenge an insurance rate as discriminatory or unreasonable." *Saunders* v. *Farmers Ins. Exch.*, 440 F.3d 940, 946 (8th Cir. 2006). Plaintiffs argued below that Missouri law permitted such a private right of action (App. 167-170), an argument the district court rejected (Add. 12-15). The United States' discussion of the MHRA addresses this very issue. As the United States explained in its opening *amicus* brief, Missouri law allows an individual to bring a private action in state court under the MHRA to challenge alleged insurance discrimination. US *Amicus* Br. 14-23.

Thus, rather than injecting a new issue into this case, the United States is simply providing additional support for an argument that plaintiffs made below. See *Universal Title Ins. Co.* v. *United States*, 942 F.2d 1311, 1314 (8th Cir. 1991) (rejecting contention that government's arguments could not be considered on appeal; explaining that "it would be in disharmony with one of the primary purposes of appellate review were [the Court] to refuse to consider each nuance or shift in approach urged by a party simply because it was not similarly urged below") (citation omitted). This is an entirely appropriate role for an *amicus*. Indeed, *amicus* briefs are most helpful to the Court when they do not merely duplicate the points made by the parties. See *Voices for Choices* v. *Illinois Bell*

Tel. Co., 339 F.3d 542, 545 (7th Cir. 2003) (*amicus* brief ideally should "assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs") (Posner, J., in chambers); see also *Massachusetts Food Ass'n* v. *Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999) ("a court is usually delighted to hear additional arguments from able amici that will help the court toward right answers"), cert. denied, 529 U.S. 1105 (2000).

At any rate, this Court may consider a new issue on appeal if it "is purely legal and requires no additional factual development." *Rittenhouse* v. *UnitedHealth Group Long Term Disability Ins. Plan*, 476 F.3d 626, 630 (8th Cir. 2007) (quoting *Orr* v. *Wal-Mart Stores, Inc.*, 297 F.3d 720, 725 (8th Cir. 2002), cert. denied, 541 U.S. 1070 (2004)); accord *Estate of Vak* v. *Commissioner of Internal Revenue*, 973 F.2d 1409, 1412 (8th Cir. 1992). This principle applies to new arguments raised in *amicus* briefs. See *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (plurality) (addressing legal question even though it had been raised only by *amicus*); *Mapp* v. *Ohio*, 367 U.S. 643, 646-660 & n.3 (1961) (overruling an earlier decision even though only an *amicus* had advocated that result); *Bridges* v. *City of Bossier*, 92 F.3d 329, 335 n.8 (5th Cir. 1996) (addressing "purely legal issue" raised by *amicus*, even though plaintiff did not make the argument to the district court or in his opening appellate brief), cert. denied, 519 U.S. 1093 (1997).

The United States' argument about the MHRA is a purely legal question of statutory interpretation, and thus may properly be considered by this Court

regardless of whether it was raised below. Consideration of this legal issue is particularly appropriate because the Court's decision in this appeal may have an impact far beyond the parties to this case.

2. Shelter asserts (Shelter Br. 38 n.25) that HUD's certification of the MHRA as substantially equivalent to the Fair Housing Act occurred before HUD promulgated its regulation interpreting the Fair Housing Act to prohibit insurance discrimination. Shelter's assertion about the timing of the HUD certification is incomplete and misleading.

In fact, HUD certified the MHRA as substantially equivalent to the Fair Housing Act *after* HUD had interpreted the Fair Housing Act to prohibit insurance discrimination. Since at least 1978, HUD has construed the Fair Housing Act to cover insurance discrimination. *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1354 (6th Cir. 1995), cert. denied, 516 U.S. 1140 (1996); *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 300 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993); *Dunn* v. *Midwestern Indemnity Mid-Am. Fire & Cas. Co.*, 472 F. Supp. 1106, 1109 & n.7 (S.D. Ohio 1979). It was not until nine years later, in 1987, that HUD first certified the MHRA as substantially equivalent to the federal statute. See 52 Fed. Reg. 15,304 (1987); 52 Fed. Reg. 41,419 (1987).

Missouri's original certification expired in 1992. See 42 U.S.C. 3610(f)(4); 24 C.F.R. 115.6(d) (1989); 58 Fed. Reg. 39,562-39,563 (1993). As explained below, HUD later re-certified Missouri's fair housing law as substantially equivalent to the Fair Housing Act.

In 1988, Congress amended the Fair Housing Act in several important respects. In light of those amendments, Congress required HUD to re-evaluate its previous certification of state laws. Congress provided that states, such as Missouri, that were certified at the time of the 1988 amendments could temporarily retain their old certifications for no more than four additional years – *i.e.*, until September 13, 1992, at the latest. 42 U.S.C. 3610(f)(4); see also 24 C.F.R. 115.6(d) (1989); 53 Fed. Reg. 44,993, 45,019 (1988). After that time, states would lose their certifications unless re-certified by HUD using the new certification procedures and standards implemented after 1988. See 58 Fed. Reg. 39,563 (1993). Congress further mandated that HUD must re-evaluate, at least every five years, whether a state continues to qualify for certification. 42 U.S.C. 3610(f)(5).

In 1989, HUD promulgated regulations to interpret and implement the Fair Housing Act, as amended in 1988. See 54 Fed. Reg. 3232 (1989). Consistent with the position it had taken since at least 1978, HUD issued a regulation interpreting the Fair Housing Act to prohibit insurance discrimination. 24 C.F.R. 100.70(d)(4); 54 Fed. Reg. 3285 (1989). At the same time, HUD adopted regulations prescribing new standards and procedures for certifying state laws as substantially equivalent to the Fair Housing Act. See 54 Fed. Reg. 3276-3278, 3311-3316 (1989); 24 C.F.R. pt. 115 (1989).

After issuing its insurance regulation and its new regulations regarding certification, HUD re-certified the MHRA as substantially equivalent to the Fair Housing Act. HUD granted interim certification to Missouri in December 1992,

see 58 Fed. Reg. 39,564 (1993), and, in late 1994, announced that it had made an "initial determination" that Missouri's fair housing law "provide[s], on [its] face, substantive rights and remedies for alleged discriminatory housing practices that are substantially equivalent to those provided in the Fair Housing Act." 59 Fed. Reg. 56,088 (1994). After soliciting public comments on the issue, see *id.* at 56,088-56,089, HUD later made a final determination that Missouri's fair housing law "provide[s], in operation, substantive rights and remedies for alleged discriminatory housing practices that are substantially equivalent to those provided by the Fair Housing Act." 61 Fed. Reg. 53,381 (1996).

Since then, HUD has re-evaluated and renewed Missouri's certification. See 42 U.S.C. 3610(f)(5) (requiring re-evaluation at least every five years). Missouri is currently one of many states whose fair housing laws are certified as substantially equivalent to the Fair Housing Act. See http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm (last visited Sept. 12, 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 Sept. 12, 2007) (explaining certification process).

As this chronology demonstrates, HUD certified the MHRA as substantially equivalent to the Fair Housing Act *after* HUD had interpreted that federal statute as prohibiting insurance discrimination. Consequently, HUD's certification strongly supports the conclusion that the MHRA provides the same protection against insurance discrimination as the Fair Housing Act. See US *Amicus* Br. 14-23.

CONCLUSION

For the reasons set forth in this reply brief and in the United States' opening *amicus* brief, 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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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 1,554 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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September 13, 2007

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2007, two copies of the foregoing REPLY 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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