No. 07-1897

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARVA JEAN SAUNDERS, *et al.*,

Plaintiffs-Appellants

v.

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendant-Appellee

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 three arguments that Appellee American Family Mutual Insurance Company (American Family) makes in its answering brief.

1. American Family contends (AF Br. 46-48)[1] that this Court should refuse to consider the United States' arguments about the Missouri Human Rights Act (MHRA) because they were not presented in the district court. Contrary to

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[1] This brief uses the following abbreviations: "AF Br. __" for the page number of American Family's brief as appellee; "US *Amicus* Br. __" for the page number of the United States' opening *amicus* brief; "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.

American Family'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. 106-107), an argument the district court rejected (Add. 13-14). Indeed, American Family acknowledged in the district court that "plaintiffs contend that Missouri law contemplates private causes of action for conduct related to insurance." App. 121. 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. In support of its argument that the MHRA does not prohibit insurance discrimination, American Family relies on Mo. Rev. Stat. 213.045, a provision of the MHRA prohibiting certain real-estate-related lending discrimination. See AF Br. 51-52, 54 n.36. American Family suggests that by explicitly mentioning insurance companies in Section 213.045, Missouri implicitly intended to exclude them from coverage under other portions of the MHRA, including the anti-discrimination provisions of Mo. Rev. Stat. 213.040. That reasoning is flawed.

To understand the error in American Family's logic, it is helpful to compare the structure of the MHRA with that of the Fair Housing Act. The portion of the Fair Housing Act that has been interpreted to prohibit insurance discrimination is 42 U.S.C. 3604. See 24 C.F.R. 100.70(d)(4); US *Amicus* Br. 14. The state-law analog to Section 3604 is Mo. Rev. Stat. 213.040, which prohibits discrimination using language virtually identical to that of Section 3604. US *Amicus* Br. 14-15. The Fair Housing Act contains a separate section – 42 U.S.C. 3605 – that prohibits, among other things, certain types of real-estate-related lending discrimination. The state-law analog to Section 3605 is Mo. Rev. Stat. 213.045, the provision on which

American Family relies in disputing the United States' interpretation of the MHRA.[2]

American Family's reasoning is analogous to the unsuccessful arguments that some insurance companies have made in attacking the Department of Housing and Urban Development's (HUD's) insurance regulation. Specifically, some insurers have pointed to 42 U.S.C. 3605 as evidence that Congress intended 42 U.S.C. 3604 to be construed narrowly to exclude coverage of insurance discrimination. Two courts of appeals have properly rejected that reasoning in upholding HUD's regulation. See *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1357-1358 (6th Cir. 1995), cert. denied, 516 U.S. 1140 (1996); *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993); accord *National Fair Housing Alliance, Inc.* v. *Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 56-57 (D.D.C. 2002); but see *Mackey* v. *Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984) (concluding, prior to

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[2] The language of Section 213.045 tracks, virtually verbatim, the version of 42 U.S.C. 3605 that was in effect in 1986, when Section 213.045 was originally enacted. Compare Mo. Rev. Stat. 213.045 with 42 U.S.C. 3605 (1982) ("it shall be unlawful for any bank, building and loan association, *insurance company* or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans" to engage in certain types of lending discrimination) (emphasis added). Congress subsequently amended Section 3605 to replace the list of covered entities with a more general term: "any person or other entity whose business includes engaging in residential real estate-related transactions." 42 U.S.C. 3605(a). That general term includes insurance companies and other entities that make housing-related loans. See 42 U.S.C. 3605(b)(1) ("residential real estate-related transaction" includes "[t]he making * * * of loans * * * for purchasing, constructing, improving, repairing, or maintaining a dwelling").

HUD's promulgation of its insurance regulation, that Section 3605 supported a narrow reading of 42 U.S.C. 3604 to exclude coverage of insurance redlining). As the Sixth and Seventh Circuits have correctly concluded, "§§ 3604 and 3605 overlap and are not mutually exclusive." *Nationwide*, 52 F.3d at 1357; accord *American Family*, 978 F.2d at 298. In other words, Sections 3604 and 3605 both cover insurance companies.

Analogous reasoning should apply in construing the MHRA. The prohibition against lending discrimination in Section 213.045 (the Missouri analog to 42 U.S.C. 3605) does not undermine the conclusion that Section 213.040 (the state-law analog to 42 U.S.C. 3604) prohibits insurance discrimination. Whereas Section 213.045 applies to certain insurance companies (along with other entities, such as banks) when they make real-estate-related *loans*, Section 213.040 covers insurance companies when they engage in the business of providing housing-related *insurance coverage*.[3]

3. American Family contends (AF Br. 55 & n.37) that HUD's certification of the MHRA as substantially equivalent to the Fair Housing Act is irrelevant to this case because the certification occurred before HUD promulgated its regulation interpreting the Fair Housing Act to prohibit insurance discrimination. American

[3] American Family's contention that Mo. Rev. Stat. 213.040 should be interpreted differently from the Fair Housing Act is inconsistent with its position below that the MHRA's protections are substantively identical to those of the Fair Housing Act. See Doc. 61 at 18 & n.15.

Family's assertions about the timing of the HUD certification are 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*, 52 F.3d at 1354; *American Family*, 978 F.2d at 300; *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 2,272 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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I further certify that on September 13, 2007, the original and 10 hard copies of the 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 sent by Federal Express, next business day delivery, to the United States Court of Appeals for the Eighth Circuit.

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