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

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 Farmers Insurance Exchange, *et al.* (collectively Farmers) make in their answering brief.

1. Farmers contends (Farmers Br. 52)[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 Farmers' assertion, the United States' arguments are properly before this Court.

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[1] This brief uses the following abbreviations: "Farmers Br. __" for the page number of Farmers' 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; and "Add. __" for the page number of the addendum to appellants' opening brief.

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. 105-106, 111-115), an argument the district court rejected (Add. 13-15). 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. In support of its argument that the MHRA does not prohibit insurance discrimination, Farmers relies on Mo. Rev. Stat. 213.045, a provision of the MHRA prohibiting certain real-estate-related lending discrimination. See Farmers Br. 53 & n.8. Farmers 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 Farmers' 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 Farmers relies in disputing the United States' interpretation of the MHRA.[2]

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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

(continued...)

Farmers' 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 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."

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[2](...continued)
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").

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*.

In sum, Farmers has presented no convincing justification for interpreting Section 213.040 more narrowly than 42 U.S.C. 3604. Consequently, this Court should reject Farmers' argument and hold 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 1,525 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.

/s/ Gregory B. Friel
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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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