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January 29, 2010

Ms. Molly C. Dwyer
Clerk, United States Court of Appeals
for the Ninth Circuit
James R. Browning Courthouse
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Ojo* v. *Farmers Group, Inc., et al.*, No. 06-55522 (en banc)

Dear Ms. Dwyer:

This letter brief is submitted by the United States as amicus curiae in response to the Court's Orders of November 16, 2009, and November 18, 2009, and pursuant to Rule 29(a), Federal Rules of Appellate Procedure.

INTEREST OF THE UNITED STATES

The United States has substantial responsibility for the enforcement of the Fair Housing Act, 42 U.S.C. 3601 *et seq.* The Attorney General is responsible for all federal court enforcement of the Act by the United States. 42 U.S.C. 3614. The Secretary of the Department of Housing and Urban Development (HUD) is charged with administration and enforcement of the Act in administrative proceedings, as well as the promulgation of regulations to implement the Act. See

42 U.S.C. 3608-3612, 3614a. The Secretary's implementing regulations state that the Fair Housing Act prohibits discrimination in the provision of property or hazard insurance for dwellings. The resolution of this case will affect the enforcement programs of both the Secretary and the Attorney General.

QUESTIONS PRESENTED

This Court has ordered the parties to address the following questions:

1. Whether the ban on racial discrimination in the Fair Housing Act, 42 U.S.C. 3604, applies to homeowner's insurance.

2. Whether the McCarran-Ferguson Act, 15 U.S.C. 1012(b), deprives federal courts of subject-matter jurisdiction to hear claims brought under federal statutes, or merely instructs courts how to construe federal statutes.

STATEMENT

1. Plaintiff filed a class action complaint on August 10, 2005, asserting claims under the Fair Housing Act, 42 U.S.C. 3601 *et seq*., and California state law. E.R. 1-14.[1] Plaintiff alleged that in January 2004, defendants increased the premiums for his homeowner's and casualty insurance policy, based upon unfavorable credit information, and that defendants' use of an automated credit

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[1] Citations to "E.R. __" refer to pages in the Appellant's Excerpts of Record. Citations to "Slip Op. __" refer to pages in the panel opinion in this appeal.

scoring system in underwriting and pricing of homeowner's insurance policies has a disparate impact on minorities, in violation of the Fair Housing Act. E.R. 2-5, 8-9, 11-12.

Defendants moved to dismiss the plaintiff's complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. E.R. 15-17. The district court ruled that plaintiff's Fair Housing Act claim was barred by the McCarran-Ferguson Act, 15 U.S.C. 1012(b), and granted defendants' motion.[2] E.R. 93-138. The court did not specify whether it was granting the motion under Rule 12(b)(1), for lack of jurisdiction, or under Rule 12(b)(6), for failure to state a claim, but it appeared to rule that the complaint should be dismissed for lack of jurisdiction. See E.R. 106 (summarizing defendants' "three arguments as to why the court lacks subject matter jurisdiction to hear this case"); E.R. 135-138 (ruling that the court lacked jurisdiction over plaintiff's state law claims).

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[2] The McCarran-Ferguson Act provides, in pertinent part:

> No 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).

A divided panel of this Court reversed. The panel majority ruled that the district court erred, first, by interpreting plaintiff's complaint to challenge the practice of credit scoring *per se*, and second, by ruling that the Texas Insurance code "permit[s] disparate impact race discrimination that results from credit scoring, thereby triggering McCarran-Ferguson reverse-preemption." Slip Op. 5702. The majority concluded that a Texas statute permitting insurers to use credit scores prohibits disparate impact as well as disparate treatment discrimination, and thus is in harmony with the Fair Housing Act. Slip Op. 5712-5722.

The dissent disagreed, stating that the Texas Insurance Code permits the use of credit scoring even where it results in a "disparate impact on racial minorities, so long as race is not used as a criteria in computing the credit scores." Slip Op. 5723. Because plaintiff had not alleged that race was a factor in defendant's credit scoring, according to the dissent, he had not asserted a disparate treatment claim, and could not establish a violation of Texas law. Slip Op. 5723. Thus, the dissent concluded, the application of the Fair Housing Act to plaintiff's claims "would invalidate, impair, or supersede Texas law," and the district court correctly ruled "that Texas law reverse preempts the claims Ojo makes under federal law, and was correct in dismissing the case for lack of federal jurisdiction." Slip Op. 5723.

Both the panel majority and the dissent understood the district court to have dismissed the complaint for lack of subject matter jurisdiction. See Slip Op. 5702 n.3, 5723.

2. Sections 3604(a) and (b) of the Fair Housing Act declare it 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.A. 3604(a) & (b) (emphasis added).

Since at least 1978, the Department of Housing and Urban Development (HUD) has interpreted Section 3604 to prohibit discriminatory practices in connection with homeowner's insurance. In a memorandum to the Assistant Secretary for Equal Opportunity, HUD's General Counsel advised that insurance redlining violates Section 3604(a) by making housing unavailable:

> Adequate insurance coverage is often a prerequisite to obtaining financing. Insurance redlining, by denying or impeding coverage makes mortgage money unavailable, rendering dwellings "unavailable" as effectively as the denial of financial assistance on other grounds.

Aug. 25, 1978, Memorandum from Ruth T. Prokop to Chester C. McGuire at 2 (copy attached).

In 1988, the Fair Housing Act was amended to give HUD significant new authority to enforce the Act administratively. Under the Fair Housing Act as enacted in 1968, the Secretary's enforcement authority was limited to receiving, investigating, and seeking to conciliate complaints of discrimination from aggrieved persons. 42 U.S.C. 3610, 3611 (1976). Under the 1988 Amendments, if HUD determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the agency is required to issue a charge on behalf of the aggrieved person. 42 U.S.C. 3610(g). The matter is then referred to an administrative law judge for a hearing and resolution (42 U.S.C. 3612(b)-(g)), or, if either the complainant or the respondent elects, to the Department of Justice for litigation in federal district court (42 U.S.C. 3612(o)). Decisions by administrative law judges are subject to review by the Secretary before becoming final. 42 U.S.C. 3612(h). Review and enforcement of final orders may be obtained in the courts of appeals. 42 U.S.C. 3612(i)-(n).

In accordance with HUD's new adjudicative responsibilities, the 1988 Amendments authorized HUD to issue implementing regulations. 42 U.S.C.

3614a.[3] HUD promulgated its implementing regulations in January 1989, after publication and opportunity for comment. 53 Fed. Reg. 44,992 (Nov. 7, 1988) (Proposed Rule); 54 Fed. Reg. 3232 (Jan. 23, 1989) (Final Rule). Subpart B of the regulations, promulgated in 1989, sets forth "the Department's interpretation of conduct that is unlawful housing discrimination under section [3604] and section [3606] of the Fair Housing Act." 24 C.F.R. 100.50(a). Section 100.70(d)(4) of the regulations defines "other prohibited sale and rental conduct" to include:

> Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

See also 53 Fed. Reg. 44,997 (Nov. 7, 1988) (preamble to proposed regulations stating that "discriminatory refusals to provide municipal services or adequate property or hazard insurance as well as discriminatory appraisal and financing practices, has been interpreted by the Department and by courts to render dwellings unavailable").

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[3] Section 815 of the Fair Housing Act, 42 U.S.C. 3614a, provides:

> The Secretary may make rules * * * to carry out this title. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.

The Fair Housing Act also directs the Secretary to certify state and local agencies authorized to enforce state or local fair housing laws that are "substantially equivalent" to the Fair Housing Act as to the substantive rights protected, procedures followed, remedies provided, and judicial review available. 42 U.S.C. 3610(f)(3)(A); 24 C.F.R. Pt. 115. Once a state or local agency is certified as substantially equivalent, HUD refers complaints within the jurisdiction to the agency for investigation and processing, including litigation, on HUD's behalf, and HUD pays the agency for these services. 42 U.S.C. 3610(f)(1); 24 C.F.R. 115.300.

The Texas Fair Housing Act was enacted to "provide rights and remedies substantially equivalent to those granted under federal law." Tex. Prop. Code 301.002(3). HUD has certified the Texas Workforce Commission Civil Rights Division, which enforces the Texas Fair Housing Act, as a "substantially equivalent" agency. 57 Fed. Reg. 48,803-02 (Oct. 28, 1992) and 58 Fed. Reg. 39,561-01 (July 23, 1993); see Tex. Prop. Code 301.0015. Like HUD's regulations, the regulations implementing the Texas Fair Housing Act expressly define discrimination to include "refusing to provide * * * property or hazard insurance for dwellings or providing such services or insurance differently based on" a prohibited basis. 40 Tex. Admin. Code 819.124(b)(4). If the Texas

legislature amends or otherwise changes the fair housing law, or a state court interprets the law, the Commission is obligated to notify HUD of such change within 60 days. 24 C.F.R. 115.211(a)(1). This obligation extends to any "amendment, adoption, or interpretation of any related law that bears on any aspect of the effectiveness of the agency's fair housing law." 24 C.F.R. 115.211(a)(2). These notifications help inform HUD as to whether or not an agency's continued certification is warranted. The Texas Workforce Commission has not informed HUD of any limitation on the enforcement of the Texas Fair Housing Act in light of the credit scoring provision contained in the Texas insurance code.[4]

ARGUMENT

I

THE FAIR HOUSING ACT PROHIBITS DISCRIMINATION IN THE PROVISION OF PROPERTY OR HAZARD INSURANCE FOR DWELLINGS

1. As set forth above, the Fair Housing Act declares it unlawful to "make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin," and "[t]o discriminate against any person * * *

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[4] Information provided by Kenneth J. Carroll, Director of HUD's Fair Housing Assistance Program Division.

in the provision of services or facilities in connection" with the sale or rental of a dwelling. 42 U.S.C. 3604(a), (b). HUD's regulations declare that the conduct prohibited by these provisions includes discrimination in the provision of property or hazard insurance for dwellings. 24 C.F.R. 100.70(d)(4).

Relying in part on HUD's regulation, both the Sixth and the Seventh Circuits have ruled that the Fair Housing Act prohibits discriminatory practices relating to the provision of property or hazard insurance for dwellings. *NAACP* v. *American Family Mutual Ins. Co.*, 978 F.2d 287, 297-301, cert. denied, 508 U.S. 907 (1993); *Nationwide Mutual Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1355-1360 (6th Cir. 1995), cert. denied, 516 U.S. 1140 (1996). In *Mackey* v. *Nationwide Ins. Cos*, 724 F.2d 419, 423-425 (4th Cir. 1984), however, the Fourth Circuit ruled that the Fair Housing Act does not cover insurance.

Notably, *Mackey* was decided before the Fair Housing Act was amended and HUD's implementing regulations were promulgated. Indeed, at least one district court has held that, in light of the regulations' explicit coverage of insurance, *Mackey* is no longer binding precedent, even within the Fourth Circuit. *Fuller* v. *Teachers Insur Co.*, No. 5:06-CV-00438-F, 2007 WL 2746861, at *3-7 (E.D.N.C. Sept. 19, 2007).

2. The Supreme Court set forth the steps to be taken by a court in evaluating "an agency's construction of the statute which it administers" in *Chevron U.S.A., Inc*. v. *Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-843 (1984) (footnotes omitted). When "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 842-843 (footnotes omitted). In these circumstances, "Congress entrusts to the [agency], rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the [agency] adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner." *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977); see also *Rust* v. *Sullivan*, 500 U.S. 173, 184 (1991) (regulation should be upheld "if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent"); *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) (citation omitted) ("When Congress, through express delegation

or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited."); *American Family*, 978 F.2d at 300 ("Courts should respect a plausible construction by an agency to which Congress has delegated the power to make substantive rules."); see *Cisneros*, 52 F.3d at 1359-1360.

Chevron analysis is fully applicable even where a court has reached a different conclusion about the interpretation of a statute prior to the agency's pronouncement. "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *National Cable & Telecomm. Ass'n* v. *Brand X Internet Serv.*, 545 U.S. 967, 982-983 (2005). Of course, *Mackey* is not binding on this Court. But even its persuasive authority is limited in light of Congress's delegation to HUD of the authority to issue implementing regulations and the agency's promulgation of regulations expressly applying the Act to discriminatory insurance practices. While *Mackey* concluded that the Fair Housing Act does not apply to insurance discrimination, it did not hold that the language of the statute "unambiguously forecloses" a contrary conclusion. *Brand X*, 545 U.S. at 983; see *Fuller*, 2007 WL 2746861, at *6.

Rather, as *Fuller* explained, *Mackey* "used the tools available to the court in 1984 to interpret the silence in the [Fair Housing Act] on the issue of insurance practices [and] could not anticipate that in 1988 Congress would allocate to HUD the authority to fill the gaps created by its legislative silence" in the Act. *Fuller*, 2007 WL 2746861, at *6. As the Seventh Circuit correctly concluded, "[e]vents have bypassed *Mackey*." *American Family*, 978 F.2d at 301; see *Fuller*, 2007 WL 2746861, at *4-7.

"Congress has not directly addressed the precise question" (*Chevron*, 467 U.S. at 843) whether the Fair Housing Act prohibits discriminatory insurance practices. See *American Family*, 978 F.2d at 298; *Cisneros*, 52 F.3d at 1356-1357. When it directed HUD to issue regulations to implement the Fair Housing Act, Congress authorized the agency to define the types of conduct prohibited by the Act, including the broad "otherwise make unavailable or deny" language of Section 3604(a), and the term "services * * * in connection" with the sale or rental of a dwelling in Section 3604(b). Therefore, the proper inquiry is whether HUD's regulation is "based on a permissible construction" of the Fair Housing Act. *Chevron*, 467 U.S. at 843; *American Family*, 978 F.2d at 301 ("[T]he question today is whether the Secretary's regulations are tenable.").

3. HUD's interpretation of the Act is both "permissible" (*Chevron*, 467 U.S. at 843), and "reasonable" (*id*. at 844-845; see *American Family*, 978 F.2d at 298, 300-301; *Cisneros*, 52 F.3d at 1359-1360). As HUD's General Counsel concluded in 1978, obtaining homeowner's insurance is an integral part of the process of buying and owning a home. Denial of such insurance "make[s] [housing] unavailable" in a quite direct way. Mortgage lenders require prospective borrowers to obtain insurance on their property, and to maintain it through the life of the loan. Thus, obtaining and maintaining such insurance is an essential prerequisite to obtaining a mortgage to purchase a dwelling and to complying with the terms of the mortgage throughout its life. Where an insurance company cancels or refuses to sell insurance policies to minority homebuyers, or cancels or refuses to sell policies in predominantly minority areas, it makes housing unavailable on the basis of race and/or national origin, in violation of Section 3604(a). See *Dunn* v. *Midwestern Indem., Mid-American Fire & Cas. Co.*, 472 F. Supp. 1106, 1109 (S.D. Ohio 1979). Similarly, charging minority homeowners higher rates may make owning a home so expensive as to make housing unavailable.

This Court and others have interpreted the term "otherwise make unavailable or deny" in Section 3604(a) to cover a variety of discriminatory

practices that are not expressly mentioned in the statute. As the Seventh Circuit explained, "Courts have applied this subsection to actions having a direct impact on the ability of potential homebuyers or renters to locate in a particular area, and to indirectly related actions arising from efforts to secure housing." *Southend Neighborhood Improvement Ass'n* v. *County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984); see, *e.g.*, *Keith* v. *Volpe*, 858 F.2d 467, 482-484 (9th Cir. 1988) (municipal refusal to permit construction of low income housing), cert. denied, 493 U.S. 813 (1989); *Metropolitan Hous. Dev. Corp*. v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (municipal refusal to rezone land to permit construction of low-income housing), cert. denied, 434 U.S. 1025 (1978); *United States* v. *City of Parma*, 661 F.2d 562 (6th Cir. 1981) (imposition of building height limitations to exclude housing project for racial reasons), cert. denied, 456 U.S. 926 (1982); *Kennedy Park Homes Ass'n, Inc*. v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (refusal to permit sewer hookup), cert. denied, 401 U.S. 1010 (1971); *United States* v. *American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977) (discrimination by real estate appraisers), appeal dismissed, 590 F.2d 242 (7th Cir. 1978); *Heights Cmty. Congress* v. *Hilltop Realty, Inc*., 774 F.2d 135, 140 (6th Cir. 1985) (real estate steering), cert. denied, 475 U.S. 1019 (1986).

What these apparently diverse actions have in common is that all interfere with the process of providing or acquiring residential property. The term "otherwise make unavailable or deny" is broad enough to encompass all such actions, including discriminatory insurance practices. As the Sixth Circuit wrote, "[t]he purpose of the Fair Housing Act as a whole is 'to eliminate the discriminatory business practices which might prevent a person economically able to do so from purchasing a house regardless of his race.'" *Cisneros*, 52 F.3d at 1359 (quoting *Dunn*, 472 F. Supp. at 1109). Thus, "HUD's interpretation of the Fair Housing Act is reasonable in light of the direct connection of availability of property insurance and ability to purchase a home." *Ibid.*

Similarly, because the acquisition and maintenance of insurance coverage is so closely connected to home ownership, discrimination in the terms and conditions of property insurance constitutes discrimination "*in the provision of services* * * * *in connection*" with the sale of a dwelling, in violation of Section 3604(b). *American Family*, 978 F.2d at 297, 300-301. This is so whether the discrimination occurs at the time of purchase or during the course of ownership of the dwelling. Cf. *Committee Concerning Cmty. Improvement* v. *City of Modesto*, 583 F.3d 690, 711-715 (9th Cir. 2009) (Fair Housing Act applies to post-acquisition conduct) (petition for rehearing pending); *Bloch* v. *Frischholz*, 587

F.3d 771, 779-781 (7th Cir. 2009) (en banc) (Section 3604(b) applies to certain post-acquisition conduct relating to the initial terms of sale).

Mackey's reasons for its conclusion that the Fair Housing Act does not reach discriminatory insurance practices are unpersuasive, particularly in light of HUD's regulation. First, according to *Mackey*, construing Section 3604 to encompass actions such as discriminatory insurance practices would render superfluous Section 3605 of the Act, which explicitly addresses discrimination in actions relating to the financing of housing, but does not expressly prohibit discriminatory insurance practices.[5] The language and construction of the Act

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[5] At the time of the decision in *Mackey*, Section 3605 prohibited "[d]iscrimination in the financing of housing," and declared it 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 deny a loan or other financial assistance to a person applying therefore for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of [race].

42 U.S.C. 3605 (1982). As amended in 1988, Section 3605 declares it "unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction." 42 U.S.C.

(continued...)

disproves this contention; Sections 3604(a) and 3605 are overlapping in their coverage. See *American Family*, 978 F.2d at 298.

Section 3605 is both more specific and broader in its application than the "otherwise make unavailable or deny" language of Section 3604(a). As it existed at the time of the decision in *Mackey*, Section 3605 applied only to certain types of transactions, and only to commercial entities. At the same time, it prohibited discrimination, not only in making loans, but also in the terms and conditions of such transactions. The "otherwise make unavailable" clause of Section 3604(a), on the other hand, applies to any person not otherwise exempt from the Act, and governs a broad range of activities. It prohibits only such discrimination,

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[5](...continued)
3605(a). Section 3605(b) defines the term "residential real estate transaction" to mean:

> (1) The making or purchasing of loans, or providing other financial assistance –
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> (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or
>
> (B) secured by residential real estate.
>
> (2) The selling, brokering, or appraising of residential real property.

42 U.S.C. 3605(b).

however, that makes housing unavailable. The overlap in coverage by Section 3604(a) and Section 3605 is even clearer under the current version of Section 3605, which applies to those engaged in "in residential real estate-related transactions" and prohibits activities that also are expressly prohibited by Section 3604(a), such as discrimination in the sale of a dwelling. See note 5, *supra*.[6]

Mackey also found it significant that Congress had rejected efforts to amend the Fair Housing Act to explicitly cover insurance. 724 F.2d at 424. But, as the Seventh Circuit recognized, these failed efforts did not mean that Congress disagreed with the merits of the legislation. *American Family*, 978 F.2d at 299. "Proposed legislation can fail for many reasons." *Ibid.* Thus, "the Supreme Court repeatedly reminds us that unsuccessful proposals to amend a law, in the years following its passage, carry no significance." *Ibid.* It is more telling that Congress did amend the Act in 1988 to give HUD the authority to issue

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[6] Indeed, many provisions of the Act are overlapping in their coverage. In a real estate steering case, for example, the same conduct may violate Sections 3604(a), (b), and (d), and 3605. When a real estate agent informs white, but not African-American homeseekers about houses for sale in certain areas, he makes those dwellings unavailable to the African Americans in violation of Section 3604(a), discriminates in the provision of his services in violation of Section 3604(b), and misrepresents the availability of housing in violation of Section 3604(d). See *Village of Bellwood* v. *Dwivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990). His actions would also constitute discrimination in the "selling [or] brokering * * * of residential real property" in violation of Section 3605.

implementing regulations, knowing that, since 1978, HUD had interpreted the Act to apply to homeowner's insurance. *Id.* at 300.

Next, *Mackey* suggested that Congress might have omitted insurance from coverage under the Fair Housing Act because "[t]he insurance industry has traditionally classified risks. If insurance premiums are to remain at reasonable levels for most householders, some insurers must be permitted to reject risks which are perceived to be excessively high, while charging higher premiums on some risks than upon others." 724 F.2d at 423. The element of risk, however, cannot justify disparate treatment on the basis of race where Congress has prohibited it. *American Family*, 978 F.3d at 298 ("Nothing in the nature of insurance implies that hazard insurers need to engage in disparate treatment, to draw lines on the basis of race rather than risk."); cf. *City of Los Angeles* v. *Manhart*, 435 U.S. 702, 709 (1978) ("Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful. Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex. But a statute that was designed to make race irrelevant in the employment market could not reasonably be construed to permit a take-home-pay differential based on a racial classification.") (citation and footnote omitted). Nor does *Mackey*'s reasoning preclude the application of disparate

impact analysis to claims of insurance discrimination. For even in a disparate impact case such as this one, where plaintiff challenges defendants' use of credit scores, the insurer will have a full opportunity to defend the business justifications for its policies. See *Affordable Hous. Dev. Corp*. v. *City of Fresno*, 433 F.3d 1182, 1194 (9th Cir. 2006) ("[A] defendant may rebut a plaintiff's showing of disparate impact by supplying a legally sufficient, nondiscriminatory reason") (internal citation and quotation marks omitted); cf. *Dehoyos* v. *Allstate Corp.*, 345 F.3d 290, 298 n.5 (5th Cir. 2003) ("In engaging in the unremarkable task of determining whether specific conduct falls within the ambit of federal civil rights law, a court would no more become a 'super actuary' than the court becomes a 'super entrepreneur' each time the court must determine whether a discriminatory practice constitutes a business necessity."), cert. denied, 541 U.S. 1010 (2004); but see *American Family*, 978 F.3d at 291, 298-299 (questioning whether disparate impact analysis would apply to claim of insurance discrimination under the Fair Housing Act).

This Court, therefore, should hold that the Fair Housing Act prohibits discriminatory practices in the provision of property or hazard insurance for dwellings. See 24 C.F.R. 100.70(d)(4).

II

McCARRAN-FERGUSON REVERSE PREEMPTION DOES NOT DEPRIVE COURTS OF JURISDICTION OVER THE FEDERAL CLAIM

The district court erred when it assumed that the McCarran-Ferguson Act deprived it of jurisdiction to hear this case. In making this assumption, the district court improperly conflated the question whether a complaint states a claim with whether the court had subject matter jurisdiction to adjudicate the claim.

The general federal question jurisdiction statute, 28 U.S.C. 1331, provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[7] "A plaintiff properly invokes § 1331 jurisdiction when she pleads a colorable claim 'arising under' the Constitution or laws of the United States." *Arbaugh* v. *Y & H Corp*. 546 U.S. 500, 513 (2006) (citing *Bell* v. *Hood*, 327 U.S. 678, 681-685 (1946)). Plaintiff here has pled a colorable claim arising under the Fair Housing Act. Therefore, the district court had and this Court has subject matter jurisdiction over that claim, whether or not the claim is barred by McCarran-Ferguson.

This Court previously has recognized that McCarran-Ferguson reverse preemption does not deprive federal courts of subject matter jurisdiction. *United*

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[7] Plaintiff in this case asserted jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1343(a)(4), or 42 U.S.C. 3613(a). See E.R. 2.

States v. *Robertson*, 158 F.3d 1370, 1371 (9th Cir. 1998). The Second, Fifth, and Eighth Circuits have agreed. *Dexter* v. *Equitable Life Assur. Soc. of United States*, 527 F.2d 233, 236-237 (2d Cir. 1975); *United States* v. *Cavin*, 39 F.3d 1299, 1305 (5th Cir. 1994); *United States* v. *Blumeyer*, 114 F.3d 758, 768 (8th Cir. 1997).

In *Gilchrist* v. *State Farm Mutual Automobile Insurance Co.*, 390 F.3d 1327, 1329 -1330 (11th Cir. 2004), the Eleventh Circuit treated McCarran-Ferguson preemption as jurisdictional. Much like the district court in this case, however, it did so without any analysis. *Gilchrist*, then, is the sort of "unrefined disposition[]" that the Supreme Court has characterized as a "'drive-by jurisdictional ruling[]' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh*, 546 U.S. at 511 (quoting *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 91 (1998)).

There is no doubt that plaintiff's claim in this case "aris[es] under" the Fair Housing Act. Section 3613(a) expressly authorizes civil actions by individuals alleging violations of the Act. 42 U.S.C. 3613(a). And plaintiff's claim, however the McCarran-Ferguson issue is resolved, asserts a colorable claim under the Act. His claim therefore meets the plain jurisdictional requirements of Section 1331.

Moreover, nothing in the McCarran-Ferguson Act indicates any intention to deprive district courts of jurisdiction even where it operates to preempt the application of another federal statute. To the contrary, McCarran-Ferguson provides 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." 15 U.S.C. 1012(b) (emphasis added). By its terms, the McCarran-Ferguson Act governs the construction of other federal statutes, not the jurisdiction of federal courts to adjudicate colorable claims arising under those statutes.

CONCLUSION

This Court should rule that the ban on discrimination in the Fair Housing Act, 42 U.S.C. 3604, applies to homeowner's insurance; and that the McCarran-Ferguson Act does not deprive federal courts of subject-matter jurisdiction to hear claims brought under federal statutes, but rather merely instructs courts how to construe federal statutes.

Respectfully submitted,

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Addendum

File

GEE-10240
-1.440

25 AUG 1978

MEMORANDUM TO: Chester C. McGuire
Assistant Secretary for
Equal Opportunity, E

SUBJECT: Title VIII of the Civil Rights Act of 1968

In connection with Departmental consideration of the issuance of substantive regulations interpreting Title VIII you have requested our views on the applicability of the Federal Fair Housing Act or property insurance activities.

Specifically, you asked for advice on whether a failure or refusal to provide property insurance on dwellings based upon race, color, sex, religion or national origin violates Title VIII.

Section 804(a) of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. Section 3604(a), makes it unlawful 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 or national origin.

The question whether insurance redlining is covered by Section 804(a) has not been addressed by the courts. The provisions of the Fair Housing Act of 1968 have, however, been construed broadly by the courts. The Act has been described as a "detailed housing law, applicable to a broad range of discriminatory practices," Jones v. Mayer Co., 392 U.S. 490, 417 (1968), and is to be accorded a "generous" construction so that it can accomplish the "enormous" task which Congress contemplated for it. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211-212 (1972).

Further, coverage under the Fair Housing Act is not limited to those who sell, rent, or finance real estate. "The Act has been applied not only to persons selling or renting dwellings, but also to newspapers carrying advertisements, to registrars or deeds containing racially restrictive covenants, and to municipalities engaging in zoning or discriminatory land use practices." United States v. Hughes Memorial Home, 396 F. Supp 544 (W.D. Va. 1975) (citations omitted).

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Section 804(a) has also been construed expansively:

> "Section 804(a) not only makes it unlawful to 'refuse to sell or rent...' a dwelling for racial reasons, but also makes it unlawful to 'otherwise make unavailable or deny a dwelling to any person because of race, color, religion, [sex] or national origin.' (Emphasis in decision.) This catch-all phraseology may not be easily discounted or de-emphasized. Indeed it 'appears to be as broad as Congress could have made it, and all practices which have the effect of denying dwellings on prohibited grounds are therefore unlawful." United States v. Youritan Constr. Co., 370 F. Supp. 643. (United States v. City of Parma, P.H.E.O.H. Reptr. para 13,616, at p. 14015 (Ohio 1973))

Indeed, Section 804(a) has been construed to prohibit conduct much broader than that constituting a refusal to sell or rent. The statutory language proscribing conduct that "otherwise make[s] [dwellings] unavailable" has been applied to a variety of discriminatory conduct distinguishable from refusals to sell or rent, including refusal to make a mortgage loan because of the race of persons living in the area where the home was located, Laufman v. Oakley Bldg. and Loan Co., supra, Harrison v. Heinzeroth, 414 F. Supp 67 (N.D. Ohio 1976), racial steering by real estate agents, Zuch v. Hussy, 366 F. Sup 553 (E.D. Mich 1976); adoption of exclusionary ordinances by a municipality, United States v. Parma, supra; and discriminatory rejection by an orphanage of minority orphans, United States v. Hughes Memorial Home, 396 F. Supp. 544 (W.D. Va. 1975).

The rationale of these decisions indicates that any discriminatory action which, as a practical matter, makes a dwelling "unavailable," is violative of Section 3604(a). This rationale was best articulated by the Laufman court in the context of lender redlining:

> The cost of housing being what it is today, a denial of financial assistance in connection with a sale of a home would effectively "make unavailable or deny" a dwelling. When such denial occurs as a result of racial considerations, Section 3604(a) is transgressed. Laufman v. Oakley Building & Loan Co., 408 F. Supp. 489 (S.D. Ohio 1976).

Adequate insurance coverage is often a prerequisite to obtaining financing. Insurance redlining, by denying or impeding coverage makes mortgage money unavailable, rendering dwellings "unavailable" as effectively as the denial of financial assistance on other grounds.

> "Insurance is essential to revitalize our cities. It is a cornerstone of credit. Without insurance, banks and other financial institutions will not - and cannot - make loans."

(Report by the President's National Advisory Panel on Insurance, Meeting the Insurance Crisis of Our Cities 1 (1968).)

In instances where maintenance of appropriate hazard or property insurance on the premises is required as a condition of financing for the purchase of the dwelling refusal to issue insurance policies or imposition of provisions which make it more difficult to obtain such insurance, when based on the racial religious, sex or ethnic origin of the applicant or similar concerns about a community, which would result in the denial of the mortgage makes the dwelling "unavailable" within the meaning of Section 804(a). Since this type of insurance redlining is within the parameters of Title VIII we are also of the opinion that issuance of Title VIII regulations is appropriate.

In the McCarran-Ferguson Act, 15 U.S.C. Section 1011-1012, the Congress declared:

> "that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Further, the Act provides that no act of Congress "shall be construed to invalidate, impair or supersede any law enacted by any state regulating the business of insurance." (15 U.S.C. 1012(b)).

While the McCarran Act has been held to exempt the business of insurance from Federal antitrust Acts if such is regulated by the State where the alleged actions occurred, Commander Leasing Co. v. Transamerica Title Ins. Co., 447 F. 2d 77, 83 (10th Cir. 1973), the Supreme Court has indicated that "[i]nsurance companies may do many things which are subject to paramount federal regulations..." SEC v. National Securities, Inc., 393 U.S. 453 89 S. Ct., 21 L. Ed. Fd 668 (1969).

It may be argued that this Congressional mandate exempts insurance activities from Federal legislation in the area of Civil Rights including the Fair Housing Act. However, although there is no legislative history under Title VIII in this area and there have been no judicial decisions we are of the opinion statutes such as Title VIII which are designed to protect constitutional rights are not limited by the McCarran-Ferguson Act.

In the only case which has addressed this issue, the McCarran-Ferguson Act was held not to bar suit against insurance companies for alleged violations of the Civil Rights Act of 1866 (42 U.S.C. Section 1982) Ben v. General Motors Acceptance Corp., 374 F. Supp. 1199 (D. Colo. 1974). The Ben court stated that:

> "There is no indication in the background and history of the McCarran Act or its application that the McCarran Act was intended to deprive a citizen of access to the Federal Courts to obtain redress for violations of his civil rights and require him to report to the state courts as the sole forum for redress. If such were the intent of Congress, it is highly questionable that Congress had the power under the Constitution to do so."

Based upon the above we are of the opinion that the McCarran-Ferguson Act does not exempt insurance companies from the coverage of the Federal Housing Act.

Ruth T. Prokop

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cc: GEE, RF & Chron 10240
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G-30942

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Date	8/15/78	8/16/78	8/17/78	8/17	8/21/78	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect X4 and contains 5,219 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

/s/ Linda F. Thome
LINDA F. THOME
Attorney

Date: January 29, 2010

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by regular, first class mail, to the following non-CM/ECF participant:

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