

InfoBytes Special Alert:

Petitioners Withdraw Major Fair Housing Case Pending Before U.S. Supreme Court

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On February 10, the parties in a major fair housing case under review by the U.S. Supreme Court requested that the Court dismiss the case. [As reported previously by BuckleySandler](#), the City of St. Paul, Minnesota withdrew its petition in *Magner v. Gallagher*, No. 10-1032, due to concerns that "a victory could substantially undermine important civil rights enforcement throughout the nation." A Supreme Court decision in *Magner* likely would have definitively decided whether disparate impact claims are cognizable under the Fair Housing Act (FHA), and if they are, the applicable legal standards for such claims. Under the disparate impact theory of discrimination, a plaintiff can establish "discrimination" based solely on the results of a neutral policy, without having to show any intent to discriminate. The result of the Supreme Court review would have had profound impact both in private litigation and government enforcement actions, and as such had drawn significant attention from civil rights groups, state attorneys general, and financial services trade groups. The withdrawal of *Magner* means that these important questions will remain open.

In *Magner*, the City had asked the Supreme Court to consider whether the FHA permits disparate impact claims. Private landlords, seeking to limit the City's "aggressive" enforcement of its housing code, sued the City for violating the FHA. The landlords argue that the City's attempts to close housing that violates its housing code reduces the amount of affordable housing available to minority renters. The landlords claim that as a result, the City's enforcement efforts have a disparate impact on minority renters in violation of the FHA. Although the District Court ruled for the City, the Eighth Circuit reversed, holding that the landlords had stated a cognizable claim under the FHA. The City petitioned the Eighth Circuit for rehearing en banc, but the court denied the petition. [As previously reported](#), the U.S. Supreme Court granted the City's petition for certiorari on November 7, 2011. The parties and numerous amici had submitted briefs to the Court, and oral argument was scheduled for February 29.

Magner was the Supreme Court's first opportunity to evaluate whether disparate impact claims can exist under the FHA since *Smith v. City of Jackson*, 544 U.S. 228 (2005). In *City of Jackson*, the Court held that disparate impact claims are grounded in Title VII's statutory text, not merely in the broader purpose of the legislation. Since *City of Jackson*, the courts of appeals have offered almost no guidance as to whether the FHA permits disparate impact claims. Reviewing parallel language in the Equal Credit Opportunity Act in *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006), the D.C. Circuit stated in dicta that "[t]he Supreme Court has held that this ["effects"] language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA. ECOA contains no such language."

[The City issued a statement](#) explaining its unusual decision to withdraw its petition at this late stage, explaining that if the City prevailed, the decision "would undercut important and necessary civil rights cases throughout the nation. The risk of such an unfortunate outcome is the primary reason the city has asked the Supreme Court to dismiss the petition." The City has stated that it will continue to pursue the case in federal district court in

Minnesota.

In a separate attempt to resolve through federal agency action the question of whether the FHA permits disparate impact claims, on November 15, 2011, the U.S. Department of Housing and Urban Development (HUD) [issued a proposed rule](#) interpreting the FHA as authorizing disparate impact claims, and proposing the applicable standards for such claims. HUD has yet to promulgate a final rule. The absence of a decision in *Magner* will focus substantial additional attention on HUD's rulemaking process and decisions, and in particular the standards and associated burdens of proof HUD asserts apply to disparate impact claims. [Click here](#) for BuckleySandler's previous reporting on the HUD proposed rule.

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