



Talking About *Magner v. Gallagher*

Fair Housing, Disparate Impact and Equal Opportunity

February 24, 2012

On February 10th, the City of St. Paul, MN withdrew its petition to the U.S. Supreme Court in *Magner v. Gallagher*, a potentially important fair housing case. Under Supreme Court rules, this action should soon result in an order ending the case and reinstating the decision below by the U.S. Court of Appeals for the 8th Circuit. In its now-withdrawn petition, St. Paul had argued that the Fair Housing Act outlaws only intentionally discriminatory housing practices, but not policies that unnecessarily discriminate in practice. The 8th Circuit Court of Appeals disagreed, as has every court of appeals to have considered the question. And a range of state attorneys general, fair housing groups, civil rights organizations, and housing industry leaders had submitted briefs on the other side, arguing that prohibiting both kinds of discrimination is what Congress intended, and is crucial to equal opportunity in America. In changing its position, the City of St. Paul now agrees; its public statement declared that if the Supreme Court were to have ruled too broadly in its favor, the result would have been to “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.”

Public Opinion on Equal Opportunity and Housing:

While there is little opinion research specific to the subject of fair housing, a large body of polling and focus groups¹ on race, equal opportunity, and housing points to several persistent trends:

- ▶ Americans believe strongly in the value of equal opportunity, but are frequently skeptical that inequality of opportunity and, particularly, discrimination still exist — with white Americans being most skeptical on average, and African Americans the least skeptical.
- ▶ Americans of all races and ethnicities tend to start from the perspective of personal responsibility and the “self-made person,” and assume that unequal outcomes are largely the result of differences in individual effort and personal decisions.
- ▶ The public’s default understanding of discrimination relates to overt, individual bigotry; structural and institutional barriers to fair housing are largely invisible to most Americans.
- ▶ Americans are increasingly comfortable and desirous of living in racially and ethnically diverse communities, but are still resistant to integration with immigrants. And different groups prefer different levels of diversity.
- ▶ The values and themes of opportunity, interconnection, ingenuity, and the common good tend to be especially resonant across audiences when it comes to civil rights remedies.

This is an important moment to praise St. Paul’s decision as the right one, and to reinforce why the Fair Housing Act properly prohibits the full range of housing discrimination in America. This memo recommends ways of talking about this case that can build understanding and support for robust fair housing enforcement that prohibits unnecessary discriminatory effects. It is aimed at talking to “persuadable” audiences who are not yet fixed in their opinion. Our advice draws on existing public opinion research, analysis of media coverage, and communications experience.

¹ A fuller analysis of opinion research on housing and the American Dream can be found at: http://opportunityagenda.org/public_opinion_opportunity_and_american_dream_homeownership_and_housing_0



I. Framing and Narrative

We believe this case and its resolution should be framed in terms of America's interest in **protecting equal opportunity** and **freedom from discrimination** for everyone, a responsibility that benefits all of us and is shared by cities and states around the country. We should describe as common sense the notion that all forms of avoidable housing discrimination should be set aside to allow more fair and effective solutions. And we should make visible the structural and institutional barriers to fair housing, like unreasonable zoning restrictions that limit the options of all working Americans while especially excluding people of color.

Magner was a case in which landlords were trying to provide affordable housing to a diverse range of working-class tenants. They claimed that the city (St. Paul, MN) was hampering their efforts through extreme and allegedly false code enforcement, motivated by a predisposition against multi-family housing. *If* their story is accurate — a question that will now be determined at trial — then the city's actions do violate the Fair Housing Act. Policies that serve no important purpose, yet discriminate in practice, should fail under the Fair Housing Act.

Opponents will try to describe the disparate impact standard as affirmative action (which it is not), as well as “racial bean counting” and closet “quotas.” With the public and the media, it is important to *avoid* arguing within that frame, but rather, to use our own frame of protecting fair housing and equal opportunity for all.

For example:

- ✓ “This case was about the obligation of cities and towns to protect equal opportunity in housing. That includes avoiding unnecessary policies that discriminate in practice, as well as those that are intentionally discriminatory. St. Paul did the right thing by embracing that responsibility.”
- ✓ “If a policy unnecessarily excludes people of a particular racial or ethnic group, or families with children, for example, it's common sense that it should be set aside in favor of one that accomplishes the same goal fairly, effectively, and without discrimination. That's been the law for over forty years, and it's appropriate that it will continue to be the law.”
- ✓ “Governments have a responsibility to ensure equal opportunity and freedom from discrimination for everyone. That requires watching how different policies play out on the ground. When a city or town has evidence that a particular policy — like a zoning ordinance or uneven enforcement of housing codes — is likely to be discriminatory, it has a responsibility to reexamine or abandon that process and find one that's fair and effective.”

A longer-form narrative along these lines might include the following:

“Equal opportunity is a bedrock American principle, and critical to our national success. But despite the progress we've made as a nation, significant obstacles to equal opportunity still exist, particularly when it comes to housing and homeownership. There are still some real estate agents, landlords, and others who practice intentional discrimination against people of color, families with children, people with disabilities, and other Americans. But more often these days, local governments and real estate corporations engage in unjustified and unnecessary practices with the *practical effect* of discriminating against well-qualified Americans. Some cities and towns, for example, prohibit the building of smaller homes or apartments that working people could afford, which in many places excludes most people of color. That means certain Americans are unfairly and unnecessarily cut off from opportunities like quality schools, jobs, and business possibilities. That's bad for all of us, and we applaud St. Paul — and every court of appeals that's considered the question — for helping to uphold protection against that harm.



II. Recommended Do's and Don'ts

Research and experience provide some **Do's and Don'ts** for talking about the case with media and public audiences:

Do lead with values, particularly:

- ▶ *Opportunity* — Everyone deserves a fair chance to live in the neighborhood of his or her choice, free of unnecessary barriers.
- ▶ *Equality* — What you look like or where you come from should not determine the housing you have access to.
- ▶ *Fairness* — Unnecessarily excluding Americans of a particular racial group from a town or neighborhood is unfair as well as unwise.
- ▶ *The Common Good* — Protecting fair housing strengthens our communities and our nation.

Don't use jargon or legalistic language, like:

- ▶ “Shifting burdens of proof,” “strict scrutiny”
- ▶ “Validity,” “standard deviations,” “metropolitan statistical area”

Do use plain language and straightforward ideas that all audiences can understand:

- ▶ “Equal opportunity”
- ▶ “Setting aside policies that are unfair and unnecessary”
- ▶ “Fair and effective”

Don't imply that disparate impact discrimination is somehow a lesser violation, less harmful, or of less concern than is intentional discrimination.

Do acknowledge the progress America has made toward equal opportunity, while documenting today's remaining barriers and obstacles.

Don't talk with general audiences in terms of the rights of any one group — e.g., African Americans, Latinos, people with disabilities — making the case an “us vs. them” proposition.

Do talk about equal opportunity and fair housing *for all*, the importance of rooting out unfair and unnecessary barriers to equal opportunity, and the shared benefits of fair housing and inclusive communities.



III. Possible Answers to Frequently Asked Questions

Q: Why is resolution of the case important?

A: This positive resolution of the case is important because overcoming unnecessary and unequal barriers to housing is crucial to ensuring equal opportunity for all and to building strong communities. Thanks to St. Paul's action, we can be confident that that progress will continue.

One of the reasons why the Fair Housing Act's full reach is so important is that it's the primary tool to hold banks and subprime lenders accountable for abusive lending practices. The lending industry knows this, and that's why the biggest banking organizations in the country signed briefs asking the Court to narrow the Act's reach. The positive resolution of this case means that subprime lenders and other exploitative actors can be held accountable for racial discrimination.

Q: What is disparate impact?

A: Disparate impact is the idea that some policies have the practical effect of discriminating based on race, family status, or some other category, and are unnecessary or unjustified.

When a policy has a discriminatory effect *and* it is unjustified or unnecessary, the disparate impact approach says it must be set aside in favor of a policy that is both fair and effective. But if the policy has a solid reason behind it, and no other policy could achieve the same goal with a less discriminatory effect, then the challenged policy stands, even though it excludes more people from one group than another.

An example is when a city decides to keep out all housing that would be affordable to working-class people, and that has the effect of excluding most or all people of color, who are more likely to be in that category. If the city could not show an important reason for its policy, or if a more fair and effective alternative were available, then the policy would have to be set aside under the disparate impact approach.

Another example would be if a rental company decided to rent only to people from a particular zip code, and that zip code included very few people of color or families with children, compared with the larger community. If the company could not justify its policy, or if a less discriminatory approach could accomplish the same goal, then the Fair Housing Act would require a change.

Q: What were the facts of the *Magner* case?

A: The plaintiffs in the case were building owners in St. Paul, Minnesota who rent their properties to working-class people, including many African Americans. They claimed that the city was trying to push them and other rental owners out of town, in favor of owner-occupied housing, with the practical effect of excluding many African Americans from any housing in the city.

Q: Shouldn't a city be able to enforce safety and cleanliness standards?

A: Cities and towns should be able to enforce fair and legitimate safety and sanitation standards. The claim here was that the *enforcement* of those standards was both discriminatory in practice and unnecessary in fact. If the plaintiff apartment owners can't prove those two things at trial, then they ought to lose their fair housing claim. But if their claims have merit, they should win.