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Supreme Court of Texas.
Patrick O. Ojo, on behalf of himself and all others similarly situated
v.
Farmers Group, Inc.; Fire Underwriters Association; Fire Insurance Exchange;
Farmers Underwriters Association; Farmers Insurance Exchange.
No. 10-0245.

October 14, 2010.

Appearances:

Sanford Svetcov of Robbins Geller Rudman & Dowd LLP, for petitioner.
Harriet S. Posner of Skadden, Arps, Slate, Meagher & Flom LLP, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10, matter 245, Patrick Ojo v. Farmers Group and others.

MARSHAL: May it please the Court, Mr. Svetcov will present argument for the appellants. Appellants have reserved five minutes for rebuttal.

ORAL ARGUMENT OF SANFORD SVETCOV ON BEHALF OF THE PETITIONER

ATTORNEY SANFORD SVETCOV: Good morning, Your Honor, Sandy Svetcov from San Francisco. I think Ms. Posner and I greatly appreciate the Court accepting the certification of this interesting issue. Let me start off by stating the issue. The issue is certified, which appears to be an issue of first impression in Texas is does Texas law authorize insurers to price insurance using credit factors that cause racially dispirit impacts? And let me start off by saying dispirit impact discrimination is no stranger to the Texas Courts or the Texas Legislature. In three of your codes, the Labor Code Section 22051, the Property Code 301021, and the Insurance Code 544.002, the legislature defined prohibited race discrimination in jobs and housing and insurance using the term,

because of race. In two of those codes, the Texas Legislature specifically adopted federal law. In 1983, the Texas Legislature enacted Labor Code, Section 22001 to enforce the provisions of Title VII. In 1989 Texas adopted the FHA to enforce the Federal Fair Housing Act.

CHIEF JUSTICE WALLACE B. JEFFERSON: So you're making the point that the legislature knows how expressly to provide for dispirit impact claims.

ATTORNEY SANFORD SVETCOV: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: But they didn't do so here as they have in other statutes in those same particular words. And doesn't that cut against your--

ATTORNEY SANFORD SVETCOV: No. Let me explain why. In the third code, the Texas Insurance Code used, defined unfair discrimination using the terms because of race. Those are the exact words in both the Federal Fair Housing Act, Title VII, the State Fair Housing Act, and your labor code. Because of race in all three codes is the terms used. And when the Texas Insurance Code enacted Section 544.002, it knew that that language had been interpreted by both the Federal and State Courts to encompass dispirit impacts, even though the word dispirit impact was not in the statute.

JUSTICE DAVID M. MEDINA: How's the results of this credit check because of race?

ATTORNEY SANFORD SVETCOV: Pardon?

JUSTICE DAVID M. MEDINA: How's this discriminatory because of race? It seems to me that an insurance company, like any other creditor has a right to check a credit report to see if they want to extend credit to somebody, so how is this any different?

ATTORNEY SANFORD SVETCOV: Justice Medina, the Texas statute itself, while it authorizes credit scoring, states except for factors that constitute unfair discrimination. So the Texas Legislature understood that not all credit factors were kosher. Not all credit factors were good credit factors. There were those that were specifically prohibited by your Texas Insurance Code in the credit scoring provisions that were enacted authorizing insurers to use credit scoring. Now, it is our submission that we are not challenging credit scoring per se. We are challenging the credit factors that constitute unfair discrimination. And let me step back a second. Our opponent has tried to pigeonhole us into a theory of challenging credit scoring per se. But the Ninth Circuit, both the panel decision and the enbanc Court unanimously recognized that it was our complaint. It's viewed in our favor not only under Federal Law, but under Texas Law. And our complaint does not challenge credit scoring per se and the Federal Courts have now unanimously recognized that we do not. And they posed the question in terms of the credit factors. Texas insurance companies can price insurance using credit scoring, but they can't put their thumb on the scale and use credit factors that constitute unfair discrimination. And so that's the distinction, Judge Medina.

JUSTICE DAVID M. MEDINA: What impact, if any, does a letter from former commissioner, Jose Montemayor have on this?

ATTORNEY SANFORD SVETCOV: I read that letter and we fully briefed a response to that, Justice Medina. Our response to that is we think that the insurance commissioner misconstrued the statutes. He understood unfair discrimination to be the kind of discrimination defined in Texas Insurance Code, Section 544052; discrimination based on differences in hazard and risk. He over, and then he said the other kind of discrimination is overt discrimination, pointing to 54.002. But 54.002 doesn't say overt discrimination; it also says unfair discrimination because of race. And that puts you back into the series of statutes in Texas and in the federally system in which because of race has been construed since Griggs v. Duke Power to encompass dispirit impact discrimination.

JUSTICE DALE WAINWRIGHT: The textural argument it seems to me for either side is not that straightforward. The Texas Department of Insurance and, as I recall, in some of the legislative history, the parties, the legislators discussed intentional discrimination and dispirit impact was even mentioned. Yet in the final bill, the final statute, neither one of those words is used. So I'm not sure it's such a straight line for either side on the textural basis.

ATTORNEY SANFORD SVETCOV: Actually, I think it is, Justice Wainwright, and let me walk you through it, if I might.

JUSTICE DALE WAINWRIGHT: Well you would acknowledge that the legislature could have said we ban intentional discrimination.

ATTORNEY SANFORD SVETCOV: Exactly.

JUSTICE DALE WAINWRIGHT: They could have said we ban discrimination that occurs based on racial impact, but it said neither one.

ATTORNEY SANFORD SVETCOV: Well, but see here's the point. In 544003, Subdivision C, the legislature said a person does not violate 544.002 if the refusal limitation nor charge is authorized by law or regulatory mandate. So if the Texas Legislature was going to authorize as a lawful practice dispirit impacts, it had to say so specifically. And the Texas Legislature didn't say we authorize dispirit impact discrimination and neither, but on the other hand, did it specifically say we only ban intentional discrimination. It said neither of those.

JUSTICE DALE WAINWRIGHT: I'm not following the logic of your argument. Why must the legislature have said specifically? I mean your argument under 003 Sub C, I don't follow that.

ATTORNEY SANFORD SVETCOV: If they're going to authorize a form of discrimination, Justice Wainwright, don't you think it's plausible to conclude that the legislature ought to speak specifically about that? And if it's going to limit the scope of what is prohibited, don't you think the legislature.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, they may not think that there's a problem. They may not think there's a dispirit impact problem. They conducted a study and perhaps I mean there's an argument that it was inconclusive or just not really an issue in Texas.

ATTORNEY SANFORD SVETCOV: But the legislative debates do not mention either dispirit impacts or intentional discrimination. The legislative debates that I saw, the question posed to the sponsors were are you including both article 21216 and 21218?

CHIEF JUSTICE WALLACE B. JEFFERSON: The legislature--

ATTORNEY SANFORD SVETCOV: Both kinds of unfair discrimination.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well the legislature asked the commissioner to study, among other things, "any disproportionate impact on any classes of individuals including race resulting from the use of credit".

ATTORNEY SANFORD SVETCOV: And according to the amicus brief submitted to this Court by the insurance industry, there's a document or the first report, it's at page 8, footnote 25 that the insurance industry submitted. That report shows that there is a dispirit impact. If you look at page 13 of that report, which is cited in the amicus brief, it says that minority African-Americans and Hispanics on average have lower credit scores to up to 35 percent.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes. So you would think if that's so and if that were really strong, then the legislature should have expressly provided for dispirit impact and didn't. So the other argument could be made that the legislature wasn't persuaded.

ATTORNEY SANFORD SVETCOV: Well, but the legislature was persuaded at least, Justice Jefferson, to prohibit factors that constitute unfair discrimination. And unfair discrimination is defined in 544.002 as charging a different rate because of race. So they incorporated the very same language from the Texas Insurance Code banning race discrimination, that it's also in your Labor Code and it's also in your Property Code.

CHIEF JUSTICE WALLACE B. JEFFERSON: But again, the Labor Code provides expressly for dispirit impact claims and it's not done here. So we're I mean just trying to compare. We know what the legislature does when it expressly wants to provide for those claims.

ATTORNEY SANFORD SVETCOV: But, Justice Jefferson, your Labor Code did not expressly provide for dispirit impact.

CHIEF JUSTICE WALLACE B. JEFFERSON: How about in Section 21.122 which is where the burden of proof is?

ATTORNEY SANFORD SVETCOV: Yes, but that was enacted 20 years after Griggs. By common law decision, both in the Federal Courts and the State Courts, before that burden of proof statute was enacted both in the Federal Courts and in the State Courts, the construction was of the words, because of race by the Courts, not expressly by the legislature. So neither Congress nor the State Legislature ever used those words until 1991 and they did it only for one reason; because of the U.S. Supreme Court decision in Wards Cove v. Antonio, which had flip-flopped the burden of proof in a way that Congress didn't agree with. So Congress amended the Title VII in 1991 to make the burden of proof for dispirit impact claims explicit. And Texas followed suit shortly thereafter. But for 20 years, it was all common law. It was Court decision interpreting the words, because of race. And so what I'm saying to you, Justice Jefferson--

JUSTICE DALE WAINWRIGHT: Why? I mean you-- your argument presumes that the legislature knows the difference between intentional discrimination and conduct that has a dispirit impact on different races, yet the legislature rather than saying that indirectly suggested it by using words that have historical significance and significance in other statutes. You think that still not withstanding that makes your case very easy and very clear-cut?

ATTORNEY SANFORD SVETCOV: We're here in the Texas Supreme Court. No case is easy or clear-cut. But, when the Texas Legislature uses because of in the Labor Code and uses because of race in the Property Code and then uses it later in the Insurance Code, it's reasonable to conclude that it didn't intend to have those have different meanings in the different codes unless it said so expressly.

JUSTICE DALE WAINWRIGHT: Well, let's talk about a related point. The Insurance Code does prohibit under 544.002 this credit scoring if it's because of an individual's race. Then under 544.003 C, a person doesn't violate the provision I just mentioned if it's authorized or required by law.

ATTORNEY SANFORD SVETCOV: Correct.

JUSTICE DALE WAINWRIGHT: And the Insurance Code further says it's not a violation if the credit scoring actually is supported by actuarial and legitimate business reasons.

ATTORNEY SANFORD SVETCOV: I don't think that's correct, Justice Wainwright, with respect. In the same legislation in which credit scoring was enacted, what appears to me to be to clarify the test for what is an unfair-

ly discriminatory rate. Section--

JUSTICE DALE WAINWRIGHT: Well, let me read 560.002 C1, C3. The purpose of this section, the rate is unfairly discriminatory if the rate is not based on sound actuarial principles.

ATTORNEY SANFORD SVETCOV: And read on. And does not bear a reasonable relation to expected loss or is based wholly or partly on the race, creed, color, or ethnicity. The statue is constructed in the disjunctive. So, even.

JUSTICE DALE WAINWRIGHT: That still leads us back to the question of whether the statute is intended to bar intentional discrimination or actuarially based credit scoring factors being considered if they have a dispirit impact. We still are left with that question.

ATTORNEY SANFORD SVETCOV: Yes, but here's how I understand it would work. In a dispirit impact case, we would have the burden of showing statistical, significant statistical disparities in outcome due to a specific credit factor. If that occurs, it would be the defendant's burden under your law and under federal law to show business necessity. One way to show business necessity, Justice Wainwright, would be to show actuarial justification. If the defendant showed actuarial justification, the burden switches back to the plaintiff to show there are less discriminatory alternative factors that would accomplish the same thing. By putting actuarial justification into the mix, the legislature understood I think how this would work because actuarial justification and business necessity under your statutes are not a defense to intentional discrimination. They're only a defense to dispirit impacts, so there would be no need for those words in the statute unless it was understood that dispirit impacts were implicated. Look at your Labor Codes. Section 21123 says business necessity is not a defense to intentional discrimination in labor cases. I take it that this Court would construe that as applicable to all dispirit impact cases in housing, in jobs, and insurance because it would not make sense to do so otherwise. How could actuarial justification make due for a constitutional violation because, after all, intentional discrimination violates the 14th Amendment? So by putting actuarial justification in correlation to risk as alternatives in the credit scoring provision, I think the Texas Legislature maybe they may, Justice Wainwright, it may well be that the Texas Legislature wanted to authorize dispirit impacts. And I was here yesterday and I heard Justice Lehrmann ask well why didn't they say so, in another context of course, Justice. Why didn't they say so? If the Texas Legislature wanted to outright say dispirit impacts are okay, all it had to do was say so and it didn't. And by the same token, if the Texas Legislature wanted to only prohibit intentional discrimination it could have said so and yet it used unfair.

CHIEF JUSTICE WALLACE B. JEFFERSON: And that's why you're here.

ATTORNEY SANFORD SVETCOV: And that's why I'm here.

CHIEF JUSTICE WALLACE B. JEFFERSON: Alright. Thank you, Counsel. Your time has expired.

ATTORNEY SANFORD SVETCOV: Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: We'll hear from you on rebuttal, and the Court is ready to hear argument from the appellees.

MARSHAL: May it please the Court, Ms. Posner will present argument for the appellees.

ORAL ARGUMENT OF HARRIET S. POSNER ON BEHALF OF THE RESPONDENT

ATTORNEY HARRIET S. POSNER: Good morning.

CHIEF JUSTICE WALLACE B. JEFFERSON: Morning.

ATTORNEY HARRIET S. POSNER: Like Mr. Svetcov, I appreciate the opportunity to present argument before this Court. And the Ninth Circuit has appropriately asked this Court to consider the question of whether the use of race neutral factors, including credit data and credit information to develop insurance rates that result in a dispirit impact on minority insured's violates Texas law. It's important to have a little context to understand the context in which the question is being asked and understand what the case is about and importantly, what it is not about. While both the allegations of the complaint and the rhetoric of some of the briefing use language reminiscent of dispirit treatment or intentional discrimination claim, that is not the claim before the Ninth Circuit or this Court. Mr. Ojo is not alleging that his race was considered in setting his insurance rate and he is not alleging that his race was one of the factors used in deriving his credit score. Indeed, the credit scoring models under the Texas Insurance Code must be filed with the Texas Department of Insurance and are publicly available. And if race were one of the factors in models, those models would not be approved by the Texas Department of Insurance.

JUSTICE DALE WAINWRIGHT: Let me ask you something there, Counsel. I thought I saw something in the briefing that said the factors are undisclosed.

ATTORNEY HARRIET S. POSNER: That's the appellant's briefing. The factor, the credit scoring models have to be filed on a regular basis with the Texas Department of Insurance.

JUSTICE DALE WAINWRIGHT: Are the factors used in that model public?

ATTORNEY HARRIET S. POSNER: Yes, the entire algorithm that's used to derive the score is public and filed with the Department of Insurance so that they can review the factors that are used. Instead, Mr. Ojo has brought a dispirit impact claim under the Federal Fair Housing Act. The nature of a dispirit impact claim is a challenge to race neutral practice or policy. So what Mr. Ojo is challenging is the use of race neutral information in underwriting and rate making, which he alleges has a dispirit impact on minority insured's. The Ninth Circuit, in order to analyze whether the McCarran- Ferguson Act preempts Mr. Ojo's Fair Housing Act claim needs an answer to the question of whether a dispirit impact claim exists under the Texas statutes authorizing and regulating the use of credit information in setting insurance rates. The McCarran- Ferguson Act precludes application of a federal statute, such as the Fair Housing Act, in the face of a state law enacted for the purpose of regulating the business of insurance, such as the Texas Insurance and Credit Scoring Statures, if the federal measure does not specifically relate to the business of insurance and would invalidate, impair, or supersede the state law regulating insurance. Clearly, the Federal Fair Housing Act does not relate to the business of insurance. And at issue here are the Texas Statutes enacted for the purpose of authorizing and regulating the business of insurance, specifically the use of credit information.

JUSTICE DALE WAINWRIGHT: Ms. Posner, let me jump in here. An amicus points to some several studies; one involving 2.7 million auto policies with the finding according the amicus, "a consumer's credit-based insurance score is directly connected to an insured's likelihood of filing a claim, an insurance claim." And in other studies, it cites to support that conclusion. In fact, the studies according to the amicus conclude that credit-based insurance scores are among the three most important risk factors for auto insurance coverage. And I guess their argument is that it would be similar in this area of insurance.

ATTORNEY HARRIET S. POSNER: That's correct.

JUSTICE DALE WAINWRIGHT: What I'm wondering is why? Why does credit information affect filing your propensity to file an insurance claim? I didn't see that question answered?

ATTORNEY HARRIET S. POSNER: Well, I think it's a question that there's no clear answer to, Your Honor. It's just that as an indicator of risk, credit information, a credit score is among the, as they say, the most highly

predictive indicators. So it assists insurance companies in correctly grouping people and setting premiums, so people who have, the combination of factors that are used to set a premium because obviously credit score is not the only thing in property insurance. It would be claims made on the property, claims made by the insured, availability to fire departments, services, etc. It just is very predictive and allows people to be paying the appropriate price for their insurance.

JUSTICE DALE WAINWRIGHT: But you have not seen an explanation of why that's the case?

ATTORNEY HARRIET S. POSNER: No.

JUSTICE DALE WAINWRIGHT: I haven't either and maybe it's out there.

ATTORNEY HARRIET S. POSNER: We've studied this a lot and I don't think in anything that I've seen that that question is answered. But a lot of study has been done about the accuracy and predictiveness of this particular information.

CHIEF JUSTICE WALLACE B. JEFFERSON: The phrases, because of race or based on race have become terms associated pretty closely with dispirit incident discrimination and some circuits have found that to be so. So why can't we take that language, compare it with its use and some of our other statutes, and conclude that that was the legislature's intent here?

ATTORNEY HARRIET S. POSNER: Well, I think that because of and based on having some instances been found to create dispirit impact claims. In others they have not. So there are the Supreme Court jurisdiction.

CHIEF JUSTICE WALLACE B. JEFFERSON: Texas law or in construing Texas statutes?

ATTORNEY HARRIET S. POSNER: There is actually no Texas case law that we found that construes that language. There's a Texas case, the Texas Parks and Wildlife case, that deals with similar issues that were dealt with in the Supreme Court case in Smith. There's no analysis of whether, that's used in the insurance statutes [inaudible]--

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay, so in other circuits, the Seventh Circuit case as an example, that language has been associated with dispirit impact. So why wouldn't we find that here?

ATTORNEY HARRIET S. POSNER: Because the Seventh Circuit cases are cases dealing with the Federal Fair Housing Act, which has a different legislative purpose behind it, much like Title VII that was examined in the Griggs case and the Age Discrimination Employment Act that was examined in the Smith case by the Supreme Court. Those statutes have different language that accompanies the because of or based on race. That's an important distinction in analyzing whether a dispirit impact claim lies when you use that language. There are other statutes that the Supreme Court has analyzed and some other State Courts that find, for example, in 1981 and 1982 claims in Title Two claims which are public accommodation claims and in claims under the due process and equal protection clauses that in those statutes, the intent of the in those cases Congress was directed at the motivation of the action as opposed to effects. That's not the case with Title VII or the ADAEA or the FHA. So using the Supreme Court jurisprudence and its progeny is important in determining whether in a statute like the credit scoring statutes that we're discussing here where the because of and based in wholly and partly on race are by themselves and don't use any other language, such as in Title VII, which says or otherwise tends to deprive or otherwise affect his or her employment. Those are the kind of textual things that were found important. And the Supreme Court in analyzing those statutes went beyond the text and looked at congressional intent and what was discussed by Congress. The Supreme Court also found persuasive the views of the agencies tasked with either regulating or implanting the statutes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Would you give any weight at all to the fact that the legislature

was obviously concerned about dispirit impact and had studies performed on it and conclusions drawn from those studies or is that irrelevant and we're bound to only the text?

ATTORNEY HARRIET S. POSNER: No, I think that the studies that were authorized and the results of those studies can give comfort to this Court in concluding that the Texas Legislature in enacting these very specific statutes authorizing use of credit information did not intend for there to be dispirit impact claims. It was not a surprise. It was discussed, it was studied, and the Texas Legislature and the Texas Insurance Commissioner decided these statutes should go forward and not include dispirit impact claims. Just to complete the sort of background on the Texas statutory framework that's at issue here, Texas does have a comprehensive statutory scheme governing the business of insurance within its borders. And in 2003, the legislature amended the insurance code to include this chapter authorizing and regulating insurer's use of credit scoring in underwriting and rate-making. 559.051 made it permissible to use credit scoring, except for factors that constitute unfair discrimination. The credit scoring chapter is comprehensive and includes, among other things, measures that were directed to deal with potential consumer issues, such as notice and disclosure requirements, guidelines regarding the factors insurer's may and may not use in evaluating credit information, and competing credit scores, and the requirement that insurer's as a said file their credit scoring models with the Texas Department of Insurance. It also includes 559.052, which prohibits an insurer from using a credit score that is computed using factors that constitute unfair discrimination. At the same time that that chapter was enacted, the legislature enacted Insurance Code Section 560.002.

JUSTICE DAVID M. MEDINA: What would be the impact if on the insurance carriers and on the public if you lose this argument?

ATTORNEY HARRIET S. POSNER: Well, if the credit scoring is found to give rise to dispirit impact claims, then that will cause, I would assume, in addition to this litigation, other litigation regarding whether dispirit impact has been caused by the use of credit scores, which then leads to the other. There are several factors that give rise to the [inaudible] showing of a dispirit impact and then the burden switched to the insurer to show that there's a legitimate business reason for using it, i.e., it's predictive, and then the burden shifts back to the plaintiff. So I think there will be a lot of litigation. If you're asking what would happen if credit scoring were not available to be used by the insurance industry, I think the Texas Insurance Commissioner noted in his studies that it would cause a great displacement and going back to basically homogenizing, and there have been other Courts that have commented on this; homogenizing the setting of insurance premiums without really good ability to place people in the proper premium groups. The unfair discrimination has been defined twice. As I said, there was a section added at the time that the credit scoring chapter was enacted that says a rate is unfairly discriminatory if it's not based on sound actuarial principles, it does not bear reasonable relationship to expected loss and a expense among risk, or C, is based wholly or partly on the race, creed, color, ethnicity, or national origin of the policyholder or an insured. That joined a preexisting insurance statute which also defined unfair discrimination and provided that a person may not refuse to insure or provide coverage to an individual or charge an individual rate that is different from the rate charged to other individuals for the same coverage because of the individual's race, color, religion, or national origin. Taken together, the Texas Insurance statutes allow insurance rates that have a dispirit impact on a group of customers so long as the rate is reasonably associated with risk is actuarially sound and does not use race or other prohibited categories as a factor. There is none of the broad prohibitory language in either of those sections as I said, that you find in Title VII or the ADAEA or in the legislative history of the FHA that has led the Supreme Court in the instances of Title VII and ADAEA and some other Federal courts in the instance of the FHA to find that dispirit impact claims exist.

JUSTICE DALE WAINWRIGHT: What is your strongest textural argument for the position that a legislature intended to authorize use of credit information that may have a dispirit impact?

ATTORNEY HARRIET S. POSNER: I think the strongest textural argument is the use of the because of or based wholly or partly on race.

JUSTICE DALE WAINWRIGHT: So the same language that your opposing Counsel uses, but you interpret it the opposite?

ATTORNEY HARRIET S. POSNER: Yes, based on the case law that's applicable to how Courts, including the Supreme Court and other Federal Courts have interpreted that language.

CHIEF JUSTICE WALLACE B. JEFFERSON: Not that it's our role, but what's the policy justification for allowing dispirit impact claims like these in the insurance context? I mean disallowing the claims. Why would the legislature say we don't want to bother ourselves with the fact that this credit scoring may have a huge impact on a specific minority population? Who cares because we're dealing only with insurance? Why would they do that?

ATTORNEY HARRIET S. POSNER: Well I think, by the way, the Texas Insurance Commissioner when he studied this did not find that it had a huge impact--

CHIEF JUSTICE WALLACE B. JEFFERSON: But assume, let's assume, I'm assuming that that impact would be present and we sort of have to assume it I think for purposes of this, the construction of this argument. So why would, what's the policy rationale for letting that occur?

ATTORNEY HARRIET S. POSNER: I think the policy rationale is that this is an unintended consequence of using a factor that is extremely and highly predictive that allows people of all races and backgrounds to have the most accurate and appropriate credit, insurance rate that they possibly can.

JUSTICE DEBRA H. LEHRMANN: Why would intent matter?

ATTORNEY HARRIET S. POSNER: Why would intent matter in these kind of cases?

JUSTICE DEBRA H. LEHRMANN: If the result is as th Chief suggested?

ATTORNEY HARRIET S. POSNER: Well, intentional discrimination is absolutely barred, so there is no, you cannot intentionally discriminate in the use of these credit factors by either considering race or having one of the factors be race.

JUSTICE DEBRA H. LEHRMANN: Well, I understand tha.

ATTORNEY HARRIET S. POSNER: So what I was trying to say is that the policy reason is that these are highly predictive, very well studied information that allows the most accurate and fair rate to be set for somebody buying insurance.

JUSTICE DAVID M. MEDINA: Intentional discrimination is easy to see, but I think someone said that clever men are able to hide their true intentions. So it's the subtle discrimination that perhaps is more significant here, obviously. And maybe that's what we have here.

ATTORNEY HARRIET S. POSNER: Well, the very nature of a dispirit impact claim though is that the policy being challenged is race neutral and not that there's some secret consideration of race. So by the very nature of the claim that the plaintiff appellant has brought, it is a challenge a race neutral policy or practice or consideration.

CHIEF JUSTICE WALLACE B. JEFFERSON: But you would accept that if we agree with you and in the next five to 10 years it's demonstrated, it's race neutral, but it is absolutely demonstrated that this has a hugely disproportionate impact on minorities that that is just, policy-wise that that can be justifiable based on the close relationship between credit scoring and the accuracy of insurance rates.

ATTORNEY HARRIET S. POSNER: Well I guess it would depend on how far you get along on that spectrum, but as the law is currently written, yes I think that that's the result. Just to address briefly the references to the Texas Labor Code, the Texas Labor Code is fashioned on the law that the Supreme Court in Griggs and in Smith found to encompass dispirit impact and the federal law was amended to specifically include dispirit impact claim as opposed to just relying on the case law indeed after the Wards Cove case. But the Texas Labor Statutes are not the Texas Insurance Code Statutes. The Texas Insurance Code Statutes are very specific, deliberately intended to regulate the business of insurance. And a lot of thought was put into the credit scoring statute and what protection to be put in place and what it was meant to include and what it wasn't meant to include. So I don't think that the Texas Labor Code Statutes are useful in determining whether the Texas Insurance Code Statutes give rise to a dispirit impact claim. I just want to spend one minute on the Texas Fair Housing Act, which has been a big point that Appellant has raised both in this Court and in the other courts in which we've been litigating this case. And there's been discussion that the Texas Fair Housing Act in the briefing that it should be interpreted similarly to the Federal Fair Housing Act. And that is true as far as it goes except that the Texas Fair Housing Act includes an important difference that the Federal Fair Housing Act doesn't, which is the carve-out that's found in Section 301.044B, which says that this chapter does not affect a requirement of nondiscrimination in any other state or federal law. That's a very important difference. Particularly in light of the carve-out, it does not seem appropriate under principles of statutory construction that a later enacted statute in this case, the credit scoring statute specifically dealing with a particular subject matter could be invalidated by a prior general statute. So unless, oh I just finished my time, unless there are any further questions.

JUSTICE DALE WAINWRIGHT: One final point of clarification. It's actually the Ninth Circuit panel opinion, 565 F3d 1175 that says nowhere in Texas law does it requires insurers to reveal specific factors used in credit scoring. If you see that differently, if you could clarify that I'd appreciate it.

ATTORNEY HARRIET S. POSNER: Yes, I can submit the exact section of the credit scoring statute that requires the submission of those models.

CHIEF JUSTICE WALLACE B. JEFFERSON: We'd appreciate that. Thank you. Thank you, Counsel. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF SANFORD SVETCOV ON BEHALF OF PETITIONER

JUSTICE DON R. WILLETT: Would you agree or disagree that the factors that are used to determine a credit score are public and known or are they non-disclosed?

ATTORNEY SANFORD SVETCOV: Okay, this case was filed in 2005 and the allegation and the complaint is the factors were undisclosed. Ms. Posner has represented to you that those factors have been disclosed to the commissioner. That's not in this record. That's what she says is required by law, but there's nothing in the record to show whether they've been disclosed or not. We're here on a motion to dismiss, so all we have is the complaint.

JUSTICE DALE WAINWRIGHT: Disagree with the legal point though?

ATTORNEY SANFORD SVETCOV: The statute requires a disclosure to the commissioner. It doesn't require a disclosure to the insured or the policyholder.

JUSTICE DON R. WILLETT: So is that-- okay-- so you agree the statute requires disclosure to the commissioner?

ATTORNEY SANFORD SVETCOV: Of the models and I'm not sure what that means and what is disclosed,

whether that means that they are disclosing factors. And this record doesn't show that one way or another. The statute does require a form of disclosure. The scope of that disclosure is beyond the scope of this record, and we're here on a complaint. I wish the record was broader; I wish they weren't disclosed. And if we can get access to them we'd be delighted to do that.

CHIEF JUSTICE WALLACE B. JEFFERSON: If they were disclosed do you lose?

ATTORNEY SANFORD SVETCOV: No.

ATTORNEY SANFORD SVETCOV: To the public, to the insured?

ATTORNEY SANFORD SVETCOV: The question disclosure has nothing to do with the legal issues in the case. It's just a question of whether they're disclosed or not.

JUSTICE DON R. WILLETT: Texas law authorizes specifically, the use of credit scores, correct?

ATTORNEY SANFORD SVETCOV: Correct.

JUSTICE DON R. WILLETT: And the Insurance Code also says that an insurer does not violate 544.002, the discrimination provision, if that refusal is authorized by law. And, of course, credit scores are authorized by law.

ATTORNEY SANFORD SVETCOV: Right. But, Judge Willett--

JUSTICE DON R. WILLETT: But? Keep going.

ATTORNEY SANFORD SVETCOV: But except for factors that constitute unfair discrimination.

JUSTICE DON R. WILLETT: But it says that a person does not violate 544.002 if the refusal is authorized by law and credit scores are authorized by law. The question is well, did race factor into their credit score?

ATTORNEY SANFORD SVETCOV: Well, but Judge, the credit scoring statutes do not authorize any and all credit scoring. They authorize credit scoring that is not unfairly discriminatory and the Texas Insurance Code and the other codes have defined that over the years.

JUSTICE PHIL JOHNSON: Counsel, is that 560.002(C) that you're talking about?

ATTORNEY SANFORD SVETCOV: Correct, that I was discussing with Justice Wainwright earlier.

JUSTICE PHIL JOHNSON: And under three it says it's unfairly discriminatory if it's not based on sound actuarially principles.

ATTORNEY SANFORD SVETCOV: Correct.

JUSTICE PHIL JOHNSON: That's not your position. You're not contesting that it's based on sound actuarially principles.

ATTORNEY SANFORD SVETCOV: We're not testing that.

JUSTICE PHIL JOHNSON: Or B that says does not bear reasonable relationship. You're under C that says it's based, it's based.

ATTORNEY SANFORD SVETCOV: Or based wholly or partly on race, correct.

JUSTICE PHIL JOHNSON: Wholly or partly on race. And so your position is narrowed, seems to be narrowed down to that. This is based that the rate is based wholly or partly on race. Not on actuarial, but on race itself.

ATTORNEY SANFORD SVETCOV: That's the argument. Now, Justice Johnson, if we were writing on a clean slate, the words based on and because of, if we were back in 1970 could be construed.

JUSTICE PHIL JOHNSON: Well, let's leave the cause out because we're talking the statute says it's unfairly discriminatory if it's based on race and that's what the statute says.

ATTORNEY SANFORD SVETCOV: That's what 560 says, but 544.002 says because of. And I would suggest to Your Honor that because of and based on have been treated by this Court as interchangeable terms. And I'm pleased to call to your attention your case, AutoZone v. Race which is cited in the briefs at 272 SW 3d at 592 where in describing the Texas Labor Code use of because of race color, this Court interestingly enough said under the Texas Commission on Human Rights Act, an employer may not discriminate against an employee, and this is not in the quote, based on and then the quote, race. So this Court, this Court used based on as an interchangeable term for because of. And guess what? So does your Labor Code and so does Title VII because when those codes were amended in 1991 Congress had no trouble concluding that that must mean the same thing. And that's been true since 1970. And guess what? You know we've been talking about the Texas Insurance Commission all morning. There's another commission in Texas that has spoken to this issue. It's the Texas Workforce Commission and its Civil Rights Division is operating under your Property Code. The Property Code in 301002 says provide rights and remedies substantially equivalent to those granted under federal law. 301.062 tells the Workforce Commission that it shall adopt substantive rules that are the same as provided in federal housing regulations. And the Texas Workforce Commission has adopted rule 819.124 of Title 40 and it says that refusing to provide municipal services or property or housing insurance for dwellings or providing them differently based on race, color, religion, and sex is prohibited. Its speaking about dwelling insurance; the subject of this case. And that is based on the CFR provision that says providing insurance, dwelling insurance differently because of race is considered dispirit impact. Federal FHA and this, and the Texas Workforce Commission is supposed to do the same thing and they have. And that is the best indication. If you, I think the two commissions wash each other out here and go back to the plain language and we win on the plain language because if they wanted to condone dispirit impacts they should have said so and they didn't.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you.

ATTORNEY SANFORD SVETCOV: I think it's Farmers' role to go back to the legislature and fix it and not try to get this Court to fix it for them. Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. Any further questions? We appreciate both Counsels' presence. Thank you for a good argument. That completes the arguments for this morning and the Marshall will now adjourn the Court.

MARSHAL: All rise.

2010 WL 4135507 (Tex.)

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