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Are Disparate Impact Claims Cognizable under the Fair Housing Act: Texas Department of Housing and Community Affairs v. Inclusive Communities Project

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Are Disparate Impact Claims Cognizable Under the Fair Housing Act?

CASE AT A GLANCE

The Fair Housing Act (FHA) makes it illegal to refuse to sell or rent or to "otherwise make unlawful or deny" housing to a person because of a protected characteristic, including race. See 42 U.S.C. § 3604(a). This case asks the Court to determine whether the FHA covers disparate impact claims, where a plaintiff alleges discrimination based on the disparate impact that a defendant's facially neutral practice has on members of a group who share a protected characteristic.

Texas Department of Housing and Community Affairs v. Inclusive Communities Project
Docket No. 13-1371

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From: The Fifth Circuit

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INTRODUCTION

Under the Fair Housing Act (FHA), it is illegal to refuse to sell or rent or to "otherwise make unlawful or deny" housing to a person because of a protected characteristic, including race. See 42 U.S.C. § 3604(a). The FHA also prohibits discrimination in residential real estate transactions, which includes providing financial assistance for the purchase or construction of a dwelling, because of race. See 42 U.S.C. § 3605.

Disparate impact theory allows a plaintiff to allege discrimination based on the disparate impact that a defendant's facially neutral practice has on members of a group who share a protected characteristic. Liability can be avoided under this theory if the challenged practice is determined to have a manifest relationship to legitimate, nondiscriminatory policy objectives and is necessary to attain those objectives, and if there is no other practice which can achieve the same results without causing the disparate impact. The Supreme Court first recognized disparate impact theory in *Griggs v. Duke Power,* 401 U.S. 424 (1971), an employment discrimination case in which a unanimous Court held that Title VII of the Civil Rights Act of 1964 "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Subsequent district courts and courts of appeal have allowed claims to be brought under this theory in FHA cases, although these courts vary somewhat in the framework they use to analyze those claims. The Supreme Court has never ruled on whether disparate impact claims are cognizable under the FHA.

In February 2013, the Department of Housing and Urban Development (HUD), which is authorized to issue regulations implementing the FHA, promulgated a final rule stating "[l]iability may be established under the [FHA] based on a practice's discriminatory effect … even if the practice was not motivated by a discriminatory intent." 24 C.F.R. § 100.500.

The Court has granted certiorari on the issue of disparate impact theory and the Fair Housing Act twice in recent years, in 2011 for *Magner v. Gallagher,* 132 S. Ct. 548, and in 2013 for *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.,* 133 S. Ct. 2824. Both cases settled and were dismissed before oral argument.

ISSUE

Are disparate impact claims cognizable under the Fair Housing Act?

FACTS

Federal law offers a tax subsidy in the form of Low Income Housing Tax Credits (LIHTC) to developers who build qualified low-income housing. LIHTCs are distributed by designated state agencies. This case arose out of a challenge to the LIHTC allocations made by one such agency, the Texas Department of Housing and Community Affairs (the Department), in the Dallas metropolitan area.

The plaintiff, Inclusive Communities Project, Inc., is a nonprofit organization whose mission is to further racial and socioeconomic integration in the Dallas metropolitan area. In 2004, it was appointed to be the fund administrator and housing mobility provider in order to implement the remedy in a Dallas public housing desegregation case, *Walker v. HUD,* 734 F. Supp. 1289 (N.D.Tex. 1989). In particular, Inclusive Communities assists low-income predominantly black families who are eligible for the Dallas Housing Authority's Housing Choice Voucher Program (commonly referred to as "Section 8" vouchers) in finding affordable housing in predominantly white suburban neighborhoods. A development that receives a LIHTC cannot refuse to accept tenants because of their use of Section 8 Vouchers. As a result, a LIHTC development's location within the Dallas metropolitan area is important to Inclusive Communities.

Competition for LIHTCs is fierce, and in Texas the program has historically been oversubscribed by a ratio of 2:1. The Department awards LIHTCs according to a complex formula governed by both state and federal statutes. For the most desirable LIHTC, the 9 percent credit, federal law requires that designated agencies adopt a Qualified Allocation Plan (QAP) that includes particular selection criteria and preferences. Texas state law requires the Department to first determine whether an application satisfies the threshold criteria in the QAP. Then it must use a point system in order to score and rank qualifying applications, specifically by prioritizing eleven statutory criteria (referred to as "above-the-line" criteria) in descending order. The Department may use additional "below-the-line" criteria to supplement its decision making, but none of these criteria may outweigh any "above-the-line" factors.

Inclusive Communities brought a disparate impact claim against the Department in 2008, alleging that the Department disproportionately approved LIHTCs in minority concentrated neighborhoods and disproportionately disapproved them in predominantly white neighborhoods. Inclusive Communities alleged that from 1995 to 2009, the Department did not allocate any LIHTC for units in predominantly white census tracts within Dallas. As a result, by 2008 more than 92 percent of LIHTC units in Dallas were located in minority census tracts. When looking at the metro area as a whole, from 1999–2008 the Department approved tax credits for 49.7 percent of proposed units in areas that were at least 90 percent minority, but only approved 37.4 percent of proposed units in areas that were at least 90 percent white. Thus, according to Inclusive Communities, the Department's allocation practices caused low-income housing to be concentrated in minority areas and less available in white areas, which in turn maintains and perpetuates segregated housing patterns.

The Department countered that any statistical disparity in LIHTC allocation arose directly from federal and state laws that required the Department to use fixed criteria, some of which are correlated with race, in its decision making. Specifically, federal law requires the state's QAP to give preference to projects built in low-income areas, and these areas contain a disproportionately high number of minority residents. The district court assumed that the Department's interest in complying with the law was legitimate and bona fide, but concluded that the Department failed to prove the absence of any alternative that would reduce the statistical disparity in allocation rates. Specifically, the court suggested that the Department could add "below-the-line" criteria or otherwise adjust its scoring formula to achieve greater parity in LIHTC allocation.

After the trial, while the district court was considering an injunctive remedy, it granted permission to Frazier Revitalization, Inc. (FRI), to intervene to represent the interests of developers and other organizations seeking to revitalize low-income neighborhoods. FRI is a nonprofit organization formed to implement a revitalization plan for the Frazier Courts neighborhood in Southern Dallas. Frazier is a predominantly black neighborhood that has experienced significant decline. The Frazier Neighborhood Plan calls for more than $270 million in new development in order to create a mixed-income neighborhood with affordable housing and a full range of basic services. FRI depends upon LIHTC allocations to fund these efforts. It argued that requiring the Department to increase its allocation of tax credits to projects in more affluent white areas would reduce the amount of credits available to Frazier and other low-income minority neighborhoods. Thus, FRI filed briefs in support of the Department.

The issue was appealed to the Fifth Circuit Court of Appeals, which affirmed the finding of disparate impact liability.

CASE ANALYSIS

Textual Arguments

The bulk of the Department's arguments focus on the text of the FHA, which the Department contends does not allow for disparate impact theory. The Department begins by arguing that the text of the FHA prohibits only purposeful discrimination. The relevant provisions of the FHA are 42 U.S.C. § 3604(a), which makes it unlawful to "refuse to sell or rent …, or otherwise make unavailable or deny, a dwelling to any person because of race" and § 3605, which forbids anyone involved in residential real estate transactions "to discriminate against any person … because of race." The Department argues that this language suggests that any covered action must be taken for a particular, conscious, and deliberate reason. It does not support an additional prohibition on actions that discriminate based on factors that just happen to be correlated with race or other protected characteristics.

Inclusive Communities disagrees with this characterization of the language in § 3604(a) and § 3605. In particular, Inclusive Communities points to the phrase "otherwise make unavailable," arguing that nothing in this phrase requires an action with a discriminatory intent. Rather, "make unavailable" describes an action and the effect of an action, not the motivation of the actor. Finally, Inclusive Communities points out that these parts of the statute contain no references to the words "intent" or "intentional" when describing prohibited conduct. There are other specific portions of the FHA that do contain references to intent, but these should be read as only applying to those discrete sections.

The Department argues that textual differences between Title VII and the FHA justify treating the two statutes differently when it comes to disparate impact analysis. Title VII contains two relevant provisions: § 703(a)(1), which makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual … because of" protected characteristics; and § 703(a)(2), which makes it unlawful for an employer "to limit, segregate, or classify his employees … in any way which would deprive or tend to deprive … any individual of employment opportunities or otherwise adversely affect his status as an employee" because of a protected characteristic. The Department contends that the second provision, with its reference to the effects of an employer's actions, is the only part of the statute that encompasses disparate impact claims. The Department further argues that *Griggs,* which recognized the disparate impact cause of action in Title VII cases, should be read only as applying to § 703(a)(2) and identical language in other statutes, and that any attempt to extend it beyond this language is textually unsound.

As support, the Department points to *Smith v. City of Jackson,* 544 U.S. 228 (2005), in which the Court was called upon to interpret two almost identical provisions in the Age Discrimination in Employment Act (ADEA): Section 4(a)(1) of the ADEA prohibits discrimination "because of" age, and § 4(a)(2) prohibits actions which "adversely affect" employees because of age. In *Smith,* a

plurality of the Court held that § 4(a)(2) supports disparate impact theory because of its similarity to § 703(a)(2) in its reference to discriminatory effects. The justices all appeared to reject the notion that § (4)(a)(1) allowed for disparate impact claims.

The Department argues that §§ 3604(a) and 3605 of the FHA are analogous only to § 703(a)(1) of Title VII and § 4(a)(1) of the ADEA. These sections, the Department contends, focus on the defendant's motivation for the challenged conduct rather than the effect of the conduct on the plaintiff. Significantly, they contain no mention of "effects" or actions that "adversely affect" others. Without any provision comparable to Title VII's § 703(a)(2) or the ADEA's § 4(a)(2), with their references to adverse effects, there is nothing in the FHA that provides for a disparate impact cause of action, concludes the Department.

Inclusive Communities argues the *Smith* decision does not undermine the use of disparate impact in housing because the overwhelming weight of authority has upheld the application of *Griggs* to the FHA. Most of the cases to do so did not rely strictly on the textual similarities in the statutes, but on the "otherwise make unavailable" language, as well as the FHA's legislative history and uniquely broad mandate (discussed in the next section).

Legislative History and Purpose
Inclusive Communities spends a good deal of time discussing the context and structure of the FHA, in particular arguing that the statute has always had two primary goals: (1) to eliminate discrimination in housing, and (2) to combat the perpetuation of segregation. Inclusive Communities describes how centuries of widespread government-sponsored discrimination in housing have led directly to the segregated patterns of today. It points to multiple places within the legislative history of the FHA, from the Congressional Record to the Attorney General's 1968 brief for Congress, in which supporters of the statute make clear that it was meant to eliminate the effects of prior government discrimination. In particular, there are many ways in which governmental actors can pursue facially neutral policies that retrench segregated patterns, and the FHA was intended to reach those, as well as more deliberate acts of discrimination.

Inclusive Communities notes that the statute contains a unique introductory provision, 42 U.S.C. § 3601, which states that "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." No other civil rights statute has a provision with such a broad scope. The Supreme Court has interpreted this language to require a broad and generous construction of the FHA as a remedial statute, and has recognized that "the reach of the [FHA] was to replace the ghettos by truly integrated and balanced living patterns." *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205 (1973). Inclusive Communities contends that this is clear evidence that the FHA was meant to reach actions, whether deliberate or not, that serve to perpetuate segregation, and points to a number of courts of appeals that have specifically so held.

The Department argues that the historical context and development of the FHA cannot alter the meaning of the unambiguous statutory text that Congress enacted in 1968. It also points out that the statute was amended in 1988, well after the Supreme Court had first recognized disparate impact theory in *Griggs,* yet the amendments did not include any reference to disparate impact or adverse effects. Moreover, if the amendments had explicitly authorized disparate impact theory, the amendments would have never been signed by then president Reagan.

Agency Arguments
Inclusive Communities notes that HUD, the agency with authority for administering and enforcing FHA claims, recently passed a relevant regulation; Inclusive Communities urges the Court to apply *Chevron* deference to the regulation. The regulation, passed after notice and comment rulemaking, states that the FHA should be interpreted to include disparate impact claims. It follows a long history of HUD's recognizing disparate impact theory in formal adjudications as well as in various guidance and interpretive documents. The Department argues that granting deference to HUD on this issue would contribute to a dangerous precedent of agencies that overreach in their enforcement of antidiscrimination laws. The Department also points out that even if the FHA did allow for disparate impact liability (which, of course, the Department does not concede), nothing in the text permits HUD to unilaterally determine exceptions to this liability.

Constitutional Issues
The Department identifies a potential constitutional problem that could arise from applying disparate impact theory in this context, arguing that exposing entities to disparate impact liability for otherwise neutral decisions will compel them into race-conscious decision making. This is unacceptable under modern Equal Protection jurisprudence, which requires color-blind government. The Department cites as support recent cases about race-conscious decision making by municipalities, such as *Parents Involved v. Seattle School District,* 551 U.S. 701 (2007) (invalidating race-conscious school assignment plans), and *Ricci v. DeStefano,* 557 U.S. 557 (2009) (preventing a city from disregarding the results of firefighter employment exams which had a disparate impact on minorities). The Department concludes that, taken to its logical extreme, disparate impact theory could actually impede government programs that are specifically designed to assist minority communities.

Inclusive Communities distinguishes this situation from the ones at issue in *Parents Involved* and *Ricci.* It argues that the government may constitutionally consider race as part of a voluntary compliance effort to avoid perpetuating racial segregation. Moreover, in order to ensure that the federal government stopped perpetuating racial segregation, Congress passed 42 U.S.C. § 3608(d) and (e), which require that HUD programs be administered in a manner that affirmatively furthers the goals of fair housing. Local governments voluntarily assume these obligations when they participate in these programs, including the LIHTC program.

SIGNIFICANCE

The question of whether disparate impact claims are cognizable is of great significance to fair housing law. For decades there has been a strong consensus among lower courts that FHA cases can be brought pursuant to disparate impact theory. Indeed, whole areas of fair housing case law—such as challenges to exclusionary zoning laws, overly strict occupancy standards, apartment complex policies

that burden members of protected groups, and mortgage lending practices—have been developed based on this assumption.

Advocates have long regarded disparate impact theory as an important enforcement tool, because contemporary discrimination is likely to take a subtle form. Those who wish to discriminate are usually savvy enough to mask it through the use of policies that are neutral on their face but discriminatory in their effect. Disparate impact theory provides an evidentiary mechanism to "smoke out" such discrimination. In other situations, institutional actors may be unaware of or indifferent to the discriminatory impact of policies that they choose. This all occurs against a backdrop of long-standing patterns of segregation and housing inequality—which are themselves the products of decades of overtly discriminatory local, state, and federal housing policy. Unless policymakers are required to consider the effects of their actions, it will be all too easy for them to unwittingly perpetuate or exacerbate these patterns.

Because disparate impact claims focus on policies and practices that affect groups of people rather than just individuals, such cases also have the potential for much farther-reaching effect. Similarly, disparate impact claims are particularly likely to be brought against "big defendants" such as municipal governments and financial institutions (which explains the presence of a number of insurance companies, banks, and financial services providers as amici for the Department). Practices such as loan or insurance underwriting and zoning inevitably produce disparate impacts on different groups. Even if a legitimate nondiscriminatory reason constitutes a valid defense, the availability of the disparate impact cause of action creates a high-level exposure for municipalities and financial institutions that are simply carrying out basic aspects of their jobs.

As the discussion of Title VII and the ADEA indicates, this case is also one in a recent line of cases in which the Supreme Court is asked to examine whether theories and analyses that have been developed with respect to one civil rights statute—typically Title VII—are applicable to others, where the wording is similar but not identical. Cases in this line include *Smith* (evaluating disparate impact theory under the ADEA), *Gross v. FBL Financial Services, Inc.,* 129 S. Ct. 2343 (2009) (requiring a different standard for causation under the ADEA than under Title VII), and *Alexander v. Sandoval,* 532 U.S. 275 (2001) (rejecting disparate impact theory under Title VI). Just as *Smith* looms large in the parties' arguments here, any ruling in this case may well affect how other civil rights statutes are interpreted in future cases.

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PREVIEW of United States Supreme Court Cases, pages 148–152.

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