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Lauren Carasik

Western New England University School of Law, lcarasik@law.wne.edu

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Supreme Court should not gut fair housing protections

Disparate-impact claims provide a critical weapon against systemic segregation

February 6, 2015 2:00AM ET

by [Lauren Carasik](#) [@LCarasik](#)

On Jan. 21, the U.S. Supreme Court heard arguments in a challenge to the Fair Housing Act (FHA) that is poised to erode a key protection against housing discrimination. The court will determine whether housing policies that do not emanate from intentional discrimination against minorities, women and other protected groups can nonetheless constitute a claim under the FHA's disparate-impact standard, which characterizes policies as discriminatory if they adversely affect those groups, regardless of intent.

In the case before the court, the nonprofit Inclusive Communities Project filed suit against the Texas Department of Housing in 2008, alleging that the agency perpetuated segregation by steering tax credits to companies constructing affordable housing in low-income minority neighborhoods in the Dallas suburbs, bypassing development in more affluent white neighborhoods. The federal district court ruled that the allocation of tax credits had a disparate effect on minorities, violating the FHA, irrespective of intent. Texas is arguing that the FHA prohibits only intentional discrimination.

The United States has come a long way since the days of legally sanctioned segregation, but vestiges of that deeply entrenched system continue to exact a toll. Contemporary discrimination looks different from its historical counterpart. Today few people explicitly express racial animus, and intentional discrimination is difficult to prove. But establishing the discriminatory effects of certain policies instituted by landlords, realtors, lending institutions, insurance companies and governmental agencies is relatively easier. And prohibiting those systemic policies is necessary to dismantle long-standing barriers to equal housing

opportunity, which in turn affects social and economic opportunities more broadly. The court should not require plaintiffs to prove an intent to discriminate. Instead, it should uphold the disparate-impact standard and allow plaintiffs to argue that certain policies and practices that disproportionately disadvantage minorities violate the FHA.

High stakes

“The origins of the FHA are rooted in a system of segregated housing so severe that it left a legacy of lasting, intertwined economic and social ills based on race,” the NAACP Legal Defense Fund noted in an amicus brief filed last year. Congress passed the FHA in 1968 a week after Martin Luther King Jr. was assassinated, in part to quell rioting that followed the civil rights icon’s death and to honor his work. Two years earlier, King led a march in Chicago to protest housing segregation. The law, which prohibits discrimination in the sale, rental and financing of housing, has since served as a powerful tool to combat the unequal treatment of minorities and other groups. It was not just private actors that discriminated. Federal government [policies](#) such as redlining, restrictive covenants and exclusionary zoning supported segregated housing, all of which contributed to and perpetuated racial isolation.

Whether intentional or not, segregation takes an insidious toll on minority groups. Housing is correlated with social and economic mobility. Those in more diverse and inclusive neighborhoods have greater access to a robust education, medical care, healthy environmental conditions and employment opportunities. And the importance of integrated neighborhoods does not end there. [Recent events in Ferguson, Missouri, and elsewhere have demonstrated](#) that the kind of policing that people experience varies depending on where they live. Also, if the court invalidates the disparate-impact standard, the law’s protections for [survivors of domestic violence](#) would be undermined, since they are disproportionately affected by zero tolerance policies for violence in the home.

While some policies may not be designed to discriminate, they reflect their shameful historical context, and the effect is the same: segregation.

Besides, as [Sen. Elizabeth Warren](#), D-Mass., argued in an op-ed for The Washington Post last month, limiting the FHA's application would erode economic opportunities. The civil rights era law extends protections to unfair mortgage financing practices and predatory lending that fueled the 2008 financial crisis, prompting foreclosures that left minority communities devastated. In fact, the federal government has used the disparate-impact standard to hold some of [those responsible for the crisis](#) accountable.

Opponents are calling for the elimination of the disparate-impact standard, arguing that it is unfair and counterproductive. They contend that the standard could deter affordable housing developers for fear of liability and fails to recognize that construction in wealthier neighborhoods is more expensive, unfairly maligns those who hold no discriminatory intent and may require companies to make race-conscious business decisions. But the latter concern amounts to little more than [fearmongering](#). In fact, unless a plaintiff can prove that an alternative measure could serve the same purpose with a less discriminatory effect, defendants can avoid liability by demonstrating a nondiscriminatory justification for the policy or practice.

Legally and morally justified

The disparate-impact standard has been used for more than four decades, but the Texas case represents the third time the issue came before the Supreme Court in three years. The prior two cases, [Magner v. Gallagher](#) and [Mount Holly v. Mount Holly Gardens Citizens in Action](#), both settled less than a month before arguments were scheduled, owing in part to pressure from civil rights groups and government officials who feared an adverse ruling.

Advocates see the court's interest in the case as an ominous sign of its antipathy toward civil rights protections, given the absence of factors that usually warrant the court's review. Eleven federal appeals courts have held that disparate impact can establish a violation of the FHA. No lower court invalidated the law, thus requiring the Supreme Court's resolution. And the latest case comes on the heels of court's 2013 decision [invalidating core provisions of the Voting Rights Act](#).

The disparate-impact standard is on solid legal ground. First, the overarching motivation for the FHA's passage was to promote integration in housing. Several current and former members of Congress, including original co-sponsors of the bill, submitted an [amicus brief](#) arguing that the law was intended to encompass disparate-impact cases in the law's ambit. Later, when Congress amended the FHA [in 1988](#) to expand its scope, it declined to roll back the settled precedent of allowing disparate-impact claims. While civil rights advocates were concerned that the court would gut the law, the oral arguments in the FHA case provided a sliver of hope from a surprising ally, conservative Justice Antonin Scalia. During the hearing, he cited the congressional approval of the amendment and pointedly asked the lawyers for Texas, "[Why doesn't that kill your case?](#)"

The federal government also supports the plaintiff's position. In fact, in 2013, Barack Obama's administration issued new [Housing and Urban Development Department rules](#) that explicitly state that the FHA covers disparate-impact claims.

While some policies may not be designed to discriminate, they reflect their shameful historical context, and the effect is the same: segregation. Until we live in a postracial society, we must promote inclusive and diverse communities that foster equal opportunity.

Lauren Carasik is a clinical professor of law and the director of the international human rights clinic at the Western New England University School of Law.

The views expressed in this article are the author's own and do not necessarily reflect Al Jazeera America's editorial policy.