Editor's Note : This week the blog will publish a multi-part online symposium on United States v. Texas, a challenge by Texas and twenty-five states to the Obama administration's deferred-action policy for immigration. Contributions to this special feature, as well as an "explainer" by this blog's Lyle Denniston, are available here.

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Symposium: Supreme Court's victory for disparate impact includes a cautionary tale

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Introduction

In 2012 and 2013, when civil rights leaders persuaded St. Paul, Minnesota (*Magner v. Gallagher*) and then Mount Holly, New Jersey (*Mount Holly v. Mt. Holly Gardens Citizens in Action*) to abruptly dismiss legal challenges to Fair Housing Act (FHA) disparate-impact liability on the steps of the U.S. Supreme Court, the conventional wisdom was that at least five justices on the high court were prepared to rule that the FHA prohibits only intentional discrimination—not statistical disparities. With today's ruling in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, a majority of the Supreme Court proved that conventional wisdom wrong.

In a surprising decision authored by Justice Kennedy, the Court clarified that the FHA reaches otherwise lawful activities which, while free of discriminatory intent, are nonetheless found to have a "disparate impact" on minority groups. In so holding, the Court agreed with decades of unanimous federal appeals-court precedents that arrived at the same conclusion. At the same time, the high court cabined disparate impact liability to those policies that pose "artificial, arbitrary, and unnecessary barriers." That important qualifier may ultimately determine the outcome of this case on remand. And the Court further reminded the government and lower federal courts that important constitutional considerations limit the remedies available for disparate impact liability under the FHA.

Background

As previewed here and here, the case hinged on the meaning of Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act. The FHA makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The FHA further prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith," on account of those same protected characteristics. *Id.* § 3604(b). While the FHA clearly prohibits intentional discrimination, whether or not the statute encompasses disparate-impact liability had never been squarely considered by the Court.

The Low-Income Housing Tax Credit Program (LIHTC), 26 U.S.C. § 42(g)(1), offers tax credits to residential developers who build qualified low-income housing projects. Federal law requires that LIHTCs be distributed to developers through a designated state agency. Petitioners—the Texas Department of Housing and Community Affairs (TDHCA) and its Executive Director and board members—are charged with administering the federal LIHTC program in Texas. Under federal law, tax credits must be allocated according to a "qualified allocation plan" that "sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions." *Id.* § 42(m)(1)(B).

Respondent is a non-profit organization that assists low-income, predominantly African-American, Section 8 families to find affordable housing in "predominantly Caucasian, suburban neighborhoods" in the Dallas metropolitan area. In 2008, Respondent sued Petitioners, claiming that Petitioners disproportionately allocated tax credits in minority-concentrated neighborhoods, while disproportionately withholding tax credits from predominantly Caucasian neighborhoods. Alleging that Petitioners' allocation of tax credits created segregated housing patterns, Respondent brought a disparate-impact claim under the FHA.

The district court concluded that Respondent had established a "prima facie case" by showing that Petitioners approved tax credits for developments in minority neighborhoods at disproportionately higher rates than for housing in predominantly Caucasian neighborhoods. On appeal, the Fifth Circuit affirmed. Bound by its prior decisions in *Artisan/Am. Corp. v. City of Alvin*, 588 F.3d 291, 295 (5th Cir. 2009), and *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996), the court reaffirmed its view that disparate-impact claims are cognizable under the FHA. In doing so, the appeals court noted that every other federal appellate court to have considered the issue had reached the same conclusion.

Analysis

In divining Congress's intent behind the FHA, the Court seizes on the phrase "otherwise make unavailable," which it views as a results-oriented, "catch-all" phrase that refers to "the consequences of an action rather than the actor's intent." For the majority, this phrase is the functional equivalent

of the "otherwise adversely affect" language that appears in Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967. The majority points out that, like the FHA, those statutes also contain the phrase "because of race" but the Court had nonetheless held in earlier decisions that those statutes impose disparate-impact liability.

Undoubtedly the weakest part of the majority's rationale is its reliance on Congress's 1988 amendments to the FHA as a basis to conclude that Congress somehow "ratified" disparate impact liability. Because Congress knew at the time that nine courts of appeals had held the FHA encompasses disparate-impact liability, the Court reasons, three exemptions from liability included in the 1988 amendments would have been "superfluous" had Congress assumed that disparate impact liability was unavailable. But Justice Alito gets the better part of the argument in his dissent, pointing out that the official view of the United States in 1988, manifest by its formal position in the Supreme Court and many lower courts, was that the FHA prohibits only intentional discrimination. As Justice Alito concludes: "It is implausible that the 1988 Congress was aware of certain lower court decisions [allowing for disparate impact] but oblivious to the United States' considered and public view that those decisions were wrong." And the Court has consistently rejected identical arguments about "implicit ratification" in other cases. It is a testament to the force of Justice Alito's argument on this point that the majority offers nothing in response but silence.

Most importantly, the full majority cautions that disparate impact liability poses "special dangers" that must be limited to avoid serious constitutional questions that might arise under the FHA if, for example, such liability were imposed based *solely* on a showing of a statistical disparity. This requires giving housing authorities and private developers adequate leeway to explain the valid interests their policies serve, an analysis that is analogous to Title VII's business necessity defense. The Court emphasizes that policies are not contrary to the disparate impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." And the Court confirms that a disparate impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy causing that disparity. The Court views this crucial causality requirement as necessary to ensure that defendants (and courts) do not resort to the use of racial quotas.

It will be interesting to see how the "artificial, arbitrary, and unnecessary" framework plays on remand under the particular facts of this case. As the Court notes, the underlying dispute "involves a novel theory of liability that may, on remand, be seen simply as an attempt to second guess which of two reasonable approaches a housing authority should follow." It hardly seems "artificial, arbitrary, and unnecessary" to allocate limited tax credits for low-income housing for minorities *in* lower-income communities rather than allocate them to the much higher-income suburbs where, presumably, fewer low-income minorities will stand to benefit. If the fact finder below agrees, the plaintiffs in this lawsuit may ironically end up winning the war but losing the battle.

Conclusion

As today's decision presages, the next challenge to "disparate impact" theory the Court will undoubtedly be forced to consider may prove to be a far more difficult one. As Justice Scalia noted in his concurrence in *Ricci v. DeStefano*, whether any statute that affirmatively requires race-based actions to remedy "disparate impacts" can be harmonized with the Fourteenth Amendment's guarantee of equal protection is not an easy question to answer. While that thorny constitutional question has not yet presented itself, the Court will not be able to avoid it forever.

Posted in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, Texas Dept. of Housing v. The Inclusive Communities Project symposium

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