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Fair Housing and Discrimination After *Inclusive Communities*

By David L. Callies and Derek B. Simon

Some of the most effective means of combating housing discrimination are statutes prohibiting discrimination against certain protected minority classes. The federal Fair Housing Act (FHA) represents a model for such statutory prohibitions. The FHA prohibits discrimination by both public (e.g., state and local government agencies) and private (e.g., landlords and real estate brokers) actors on the basis of race, religion, national origin, sex, family status, or disability. Following a US Supreme Court decision in the 1970s, proof of intent to discriminate became a prerequisite to bringing an action under the US Constitution's 14th Amendment Due Process and Equal Protection Clauses. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). But a suit under the FHA does not need to demonstrate such intent. For decades, the federal circuit courts of appeals have sustained dozens of lawsuits claiming discrimination based simply on the disparate impact of government or private actions on one of the protected classes.

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In 2015, the Supreme Court affirmed the use of disparate impact claims under the FHA in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), notwithstanding that disparate impact or effect is not explicitly mentioned in the FHA. But the Court hedged the application of disparate impact claims with so many caveats and restrictions that many federal courts have ruled against parties bringing these claims, many of which would have prevailed before *Inclusive Communities*.

This article addresses the historical problem of discrimination in housing, and the use of the FHA as a remedy. It concludes with a summary of how federal courts have addressed disparate impact claims following *Inclusive Communities*. For a more extensive treatment of this topic, see David L. Callies & Derek B. Simon, *Fair Housing, Discrimination, and Inclusionary Zoning in the United States*, 49 Urb. Law. 687 (2017); and David L. Callies & Derek B. Simon, *Fair Housing, Discrimination and Inclusionary Zoning in the United States,* 4 J. of Int'l and Comp. L. 39 (2017).

Fair Housing and Discrimination in Housing

Discriminatory Intent

In 1977, the Supreme Court decided *Arlington Heights*, which held that the Constitution's Equal Protection Clause provides relief in cases that involve discrimination in housing, but only if the plaintiff alleging discrimination can demonstrate that the local or state government defendant intends to discriminate against the plaintiff. Relying primarily on its decision in *Washington v. Davis*, 426 U.S. 229 (1976), decided after the Seventh Circuit's decision but before oral argument in *Arlington Heights*, the Court reiterated that official action would not be held unconstitutional solely because it resulted in a racially disproportionate impact. In language as plain as can be imagined, the *Arlington Heights* Court held that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Id. at 265. Absent that showing, the Court said, the Seventh Circuit's finding of a "discriminatory 'ultimate effect' is without independent constitutional significance." Id. at 271. This decision laid the foundation for disparate impact claims under the FHA to become one of the most prevalent mechanisms for fighting modern-day housing discrimination.

The FHA and Disparate Impact

In 1968, Congress enacted the FHA "following the urban unrest of the mid-1960s and the chaotic aftermath of the assassination of the Rev. Dr. Martin Luther King, Jr." H.R. Rep. No. 711, 100th Cong., 2d Sess. 15 (1988). The FHA's goal, as stated within its statutory text, is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. In 1968, Senators Celler and Mondale articulated Congress's ambitious belief that the FHA's proscription of discriminatory housing practices would "remove the walls of discrimination which enclose minority groups" and "replace ghettos with truly integrated and balanced living patterns." 114 Cong. Rec. 9563 (1968) (statement of Sen. Celler); 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale).

The thrust of the FHA is found within its two primary substantive provisions. First, 42 U.S.C. § 3604(a) makes it unlawful "to refuse to sell or rent after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make available or deny, a dwelling to any person because of race, color, religion, sex, familial status, or natural origin." Second, 42 U.S.C. § 3606(b) makes it unlawful to "discriminate 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 because of race, color, religion, sex, familial status, or natural origin."

Today, the FHA protects the following classes and no others (in particular, there is no per se protection for economic status): race, color, religion, sex (but not sexual orientation), family status, national origin, and handicapped status.

Disparate Impact and Its Emergence Under the FHA

Before *Inclusive Communities*, the Supreme Court had recognized and upheld disparate impact claims under a number of statutes, including Title VII of the Civil Rights Act (Title VII), the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). The origins of disparate impact claims can be traced to the Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, an employer implemented new policies that required prospective employees, except for the company's labor department (or current employees seeking to transfer departments), to have a high school education and to pass two professionally prepared aptitude tests to be eligible for employment. Id. at 427-28. Although the new policies were facially neutral, the Court nevertheless found that they violated Title VII because of the long history of inferior education received by African Americans and because the employer failed to establish that either requirement had a demonstrable relationship to successful job performance. Id. at 431.

Griggs provided the analytical framework for the decision in *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), which signaled the emergence of disparate impact claims under the FHA. In *Black Jack*, the Eighth Circuit considered whether a zoning ordinance that prohibited the construction of new multi-family dwellings violated the FHA. See id. at 1182. The Eighth Circuit reversed the district court's determination that the ordinance did not have a discriminatory effect and held that the lower court failed to take into account "either the 'ultimate effect' or the 'historical context' of the City's actions." Id. at 1186. Having found that the plaintiffs established a prima facie case of

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disparate impact, the court shifted the burden to demonstrate that its conduct was necessary to promote a compelling governmental interest to the city. See id. at 1182, 1186. The court ultimately invalidated the ordinance and found there was no factual basis to support the city's assertion that its proffered interests were furthered by the ordinance. See id. at 1187-88.

The FHA protects the following classes and no others (in particular, there is no per se protection for economic status): race, color, religion, sex (but not sexual orientation), family status, national origin, and handicapped status.

Inclusive Communities Project

Background and Lower Court Decisions

In March 2008, Inclusive Communities Project, Inc. (ICP) filed suit against the Texas Department of Housing and Community Affairs (TDHCA) alleging discrimination under the FHA. *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 860 F. Supp. 2d 312, 313-314 (N.D. Tex. 2012) (*Inclusive Communities Project I*). ICP is a non-profit organization dedicated to achieving racial and socioeconomic integration in the Dallas metropolitan area. TDHCA, according to Texas's Government Code, is the agency vested with the responsibility of administering the federal government's Low-Income Housing Tax Credits (LIHTC) program in Texas. Tex. Gov't Code § 2306.053(b)(10). Under the LIHTC program, the federal government provides tax credits to developers of low-income housing that the developers can then sell to finance construction of the low-income projects.

ICP alleged that TDHCA improperly exercised its discretion in making decisions regarding the allocation of the tax credits by allocating the credits in a manner that had a discriminatory effect on African American residents. See *Inclusive Communities Project I*, 860 F. Supp. 2d at 317, 322. Specifically, ICP contended that TDHCA was disproportionately approving tax credit units for developments in predominantly minority neighborhoods and disproportionately disapproving tax credit units for developments in predominantly Caucasian neighborhoods. See *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 278 (5th Cir. 2014) (*Inclusive Communities Project II*). The consequence, according to ICP, was the continued concentration of affordable units in minority neighborhoods, a lack of such units in Caucasian neighborhoods, and the perpetuation of the housing segregation that the FHA seeks to end. Id.

In 2012, the district court found that ICP successfully proved a prima facie case of disparate impact under the FHA, although it failed on its claims of intentional discrimination. *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 860 F. Supp. 2d at 319-22 (N.D. Tex. 2012). On appeal, review was limited to a single issue: "[W]hether the district court correctly found, that ICP proved a claim of violation of the [FHA] . . . based on disparate impact." *Inclusive Communities Project II*, 747 F.3d at 280.

After the district court's decision, the Department of Housing and Urban Development (HUD) issued regulations codifying disparate impact under the FHA. Adopting HUD's burden-shifting approach, the Fifth Circuit reversed and remanded the case back to the district court for application of HUD's regulations, given its "demonstrated expertise with [the] facts." Id. at 283. On October 2, 2014, the Supreme Court granted THDCA's petition for writ of certiorari, which presented to the Court the question of whether disparate impact claims were cognizable under the FHA. *Inclusive Communities*, 135 S. Ct. at 2513.

Supreme Court Decision: Disparate Impact Saved? Maybe

When the Supreme Court handed down its decision in *Inclusive Communities* on June 25, 2015, it came as no surprise that the Court found disparate impact claims cognizable under the FHA. Eleven federal circuit courts of appeals opinions had previously done so, and the Supreme Court itself had similarly done so in cases brought under the ADEA, ADA, and Title VII. What is particularly significant, however, is the likely lasting effect the Court's decision will have on the ability of plaintiffs to prevail on such claims.

Under *Inclusive Communities*, the substantiation of an FHA violation through a disparate impact claim requires satisfaction of a three-prong analysis. First, the plaintiff must show that a policy or practice has a disparate impact on a class of persons protected under the FHA: race, religion, national origin, family status, or handicapped status. Second, the defendant must be given an opportunity to rebut the charge of discrimination by demonstrating that the practice or policy is not for discriminatory purposes but for a benign and neutral public goal, purpose, or policy, such as protection of the health, safety, and welfare of the community. Third, the plaintiff alleging discrimination may still succeed if the plaintiff can show there are other, less burdensome methods to accomplish the benign and neutral goals the defendant claims for the purposes of the challenged public policy.

Justice Kennedy's opinion in *Inclusive Communities* concentrated primarily on the first prong, under which a plaintiff must set forth a prima facie violation of the FHA. First, there is no liability if the allegation of disparate impact is based solely on a showing of statistical disparity. *Inclusive Communities*, 135 S. Ct. at 2523. Second, such statistical disparity must also fail if plaintiffs cannot point to a policy of the offending government,

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Even if ICP could establish that a specific, facially neutral policy caused the disparity it complained of, ICP failed to prove a statistically significant disparity sufficient to warrant the imposition of FHA liability.

rather than a single instance of an action, having such a statistically disparate impact. Id. As the Court explained, "[r]acial imbalance . . . does not, without more, establish a *prima facie* case of disparate impact," Id. at 2523 (alterations in original)(quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)), and a "statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." Id. The Court characterized this as a "robust causality requirement." Id.

In consideration of the second and third prongs, the Court ruled that it would be "paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable." Id. at 2523. According to Justice Kennedy, "disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity." Id. at 2522. Further, "[d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies." Id. Accordingly, "[t]he FHA is not an instrument to force housing authorities to reorder their priorities, [but rather] aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation." Id. The opinion further stated that "[i]t may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units." Id. at 2523-24. Therefore, while the Court upheld the use of disparate impact claims under the FHA, it also unquestionably elevated a plaintiff's burden for substantiating such claims.

Disparate Impact after *Inclusive Communities*

Inclusive Communities on Remand and Rehearing

The district court's treatment of *Inclusive Communities* on remand from the Supreme Court best illustrates how lower courts are construing *Inclusive Communities* as elevating the burden for plaintiffs, particularly at the prima facie stage. The court reconsidered whether ICP had established a prima facie case, noting that it had previously granted ICP partial summary judgment "without the benefit of the Supreme Court's opinion." *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty*. Affairs, No. 3:08-CV-0546-D, 2015 WL 5916220, at *3 (N.D. Tex. Oct. 8, 2015). Relying upon Justice Kennedy's "cautionary language," the court concluded that it had not previously "give[n] the prima facie requirement the same emphasis the Supreme Court ha[d] given it." Id. The court noted that, although ICP had not relied solely on evidence of statistical evidence alone, many of the other sources ICP cited also largely relied upon statistical evidence, and thus the court arguably had "not analyze[d] ICP's evidence through the prism of the 'robust causality requirement' envisioned by the Supreme Court." Id.

The court further emphasized that TDHCA also did not have the benefit of the Supreme Court's decision. Id. at *4. Noting that TDHCA "essentially d[id] not contest ICP's prima facie case," the court concluded that "TDHCA should be permitted to challenge ICP's prima facie showing based on a clearer understanding of the requirements and consequences of ICP's establishing a prima facie case." Id. Consequently, "the interests of justice and fundamental fairness require[d] not only that ICP's disparate impact claim be decided anew under the burden-shifting regimen adopted by HUD and the Fifth Circuit, but that the court start with whether ICP has established a prima facie case." Id.

Upon re-briefing and a fresh round of oral arguments, the district court held that ICP had failed to establish a prima facie violation of the FHA and dismissed the entirety of ICP's disparate impact claim. *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 WL 4494322, at *1 (N.D. Tex. Aug. 26, 2016). The court's decision was not based on a single deficiency in ICP's claims, but rather, ICP's wholesale failure to satisfy the newly informed disparate impact standard.

First, ICP "failed to point to a specific, facially neutral policy that purportedly caused a racially disparate impact." Id. at *6. Specifically, "[b]y relying simply on TDHCA's exercise of discretion in awarding tax credits, ICP has not isolated and identified the specific practice that caused the disparity in the location of low-income housing." Id. Instead, ICP relied upon the "cumulative effects" of TDHCA's decision making process over a multi-year period, an argument that has been rejected as insufficient to underlie disparate impact claims in other contexts. See id. (citing *Anderson v. Douglas & Lomason Co.*, 26 F. 3d 1277, 1283-85 (5th Cir. 1994) (holding that the plaintiff in an employment discrimination case unsuccessfully asserted that the cumulative effects of the defendant's employment practices caused a racial disparity in promotions). ICP's failure to identify a specific, facially neutral policy also became apparent when the court considered what potential remedy would be available

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if ICP were to prevail. According to the court, Justice Kennedy's opinion requires that "[r]emedial orders in disparate-impact cases . . . concentrate on the elimination of the offending practice, and courts should strive to design race-neutral remedies," and that "lower courts should be careful not to 'impose racial targets or quotas,' because doing so 'might raise difficult constitutional questions.' Id. (citing *Inclusive Communities*, 135 S. Ct. at 2512). In other words, "[t]o remedy disparate impact, the court must craft a race-neutral remedy that removes the offending practice." Id. at *7. Yet, "[a]lthough ICP complains of TDHCA's exercise of discretion in housing decisions, it does not ask the court to prohibit TDHCA from using its discretion; rather, it asks the court to require that TDHCA exercise its discretion in a specific way: to desegregate housing." Id. Such a remedy, therefore, would not be race-neutral.

Second, the court found that ICP's claim must be dismissed because, "regardless of the label ICP places on its claim, it [wa]s actually complaining about *disparate treatment*, not disparate impact." Id. (emphasis added). As the court explained, "[w]here the plaintiff establishes that a subjective policy, such as the use of discretion, has been used to achieve a racial disparity, the plaintiff has shown disparate treatment." Id. (citing *Johnson v. Metro. Gov't of Nashville & Davidson Cnty.*, 2008 WL 3163531, at *4-6 (M.D. Tenn. Aug. 4, 2008)). Therefore, because ICP was not complaining about the existence of TDHCA's discretion, but rather, how TDHCA was exercising such discretion, its claim was one of disparate treatment. Id.

Third, the court found that even if TDHCA's use of its discretion is a specific, facially neutral policy, ICP nevertheless failed to establish a causal relationship between the exercise of that discretion and the racial disparity claimed. Id. at *8. Noting that Justice Kennedy cautioned that "[i]t may be difficult [for ICP] to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units[,]" the court concluded that "ICP has not proved that TDHCA's exercise of discretion—and not other factors—caused the statistical disparity." Id. at *9 (alterations in original).

Finally, further buttressing its conclusion, the court found that, even if ICP could establish that a specific, facially neutral policy caused the disparity it complained of, ICP failed to prove a statistically significant disparity sufficient to warrant the imposition of FHA liability. See id. at *10. Simply put, the court concluded that the evidence ICP submitted failed to prove "how the statistical disparity would have been lessened if TDHCA had no discretion to [take the actions that ICP's claim targeted]." Id.

Other Cases Focusing on ICP's Cautionary Language

The decisions of a significant number of courts that have confronted FHA disparate impact claims after the Supreme Court's decision in *Inclusive Communities* similarly demonstrate that plaintiffs now must carry undeniably heightened burdens merely to proceed past the *prima facie* stage. After a review of approximately 50 federal court decisions in the past three years, plaintiffs' claims in these cases usually fail (particularly in the first two years), for one or more of the following reasons: (1) failure to satisfy the robust causality requirement; (2) inadequate evidence to demonstrate a statistical disparity; and (3) failure to identify a specific, facially neutral policy.

Decisions in the first two years following *Inclusive Communities* tended to favor defendant government agencies by a ratio of about 6 to 1. However, since the beginning of 2018, the ratio has changed to about 4 to 1, particularly if the alleged discriminatory defendant is a public (e.g., HUD or similar governmental landlord) landlord or a lending institution.

For example, in *Paige v. N.Y.C. Housing Authority*, 2018 WL 3863451 (S.D.N.Y. 2018), the plaintiffs alleged that the New York City Housing Authority's (NYCHA) failure to inspect and remediate lead paint caused or will cause a disparate impact on families with young children and discourage families with young children from renting or remaining in NYCHA housing. Noting the standards set forth in *Inclusive Communities*, the district court held that although the plaintiffs did not offer statistics, they did allege facts stating an FHA claim at the pleading stage because the plaintiffs may be able to establish that the NYCHA's acts caused significantly adverse or disproportionate impact on persons of a particular type—families with young children. Id. at *5.

Again, in *City of Oakland v. Wells Fargo Bank, N.A.*, No. 15-cv-04321-EMC, 2018 WL 3008538 (N.D. Cal. June 15, 2018), the city alleged that Wells Fargo offered mortgage loans to the city's residents on a race-discriminatory basis, constituting both intentional and disparate impact discrimination. The discrimination allegedly caused high rates of foreclosures, which heavily affected minority borrowers and harmed the city in various ways. Wells Fargo filed a motion to dismiss. In its discussion, the district court noted the requirements for a disparate impact claim relying on statistical evidence.

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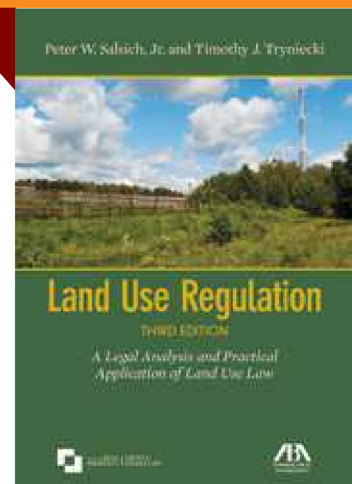

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The district court determined that the city's allegations drew a sufficient causal link between the specific policies and practices and the disparate impact on minority borrowers for pleading purposes. The city therefore successfully stated a claim for disparate impact discrimination.

Perhaps the most frequently identified deficiency is the failure to satisfy Justice Kennedy's "robust causality" requirement. For example, in *Azam v. City of Columbia Heights*, No. CV 14-1044 (JRT/BRT), 2016 WL 424966, *1 (D. Minn. Feb. 3, 2016), the plaintiff alleged that the city's enforcement of its health and safety codes with respect to his rental properties "ha[d] the effect of making affordable rental dwellings unavailable . . . [resulting in] a disparate impact [on] persons intended to be protected by the [FHA]." Id. at *10. In granting the defendant's motion for summary judgment, the district court found that the plaintiff failed to establish a prima facie case of disparate impact, particularly the "robust causality requirement" and, in any event, failed to submit an alternative practice with a lesser impact.

In *City of Joliet, Illinois v. New West, L.P.*, 825 F.3d 827 (7th Cir. 2016), the Seventh Circuit Court of Appeals upheld the district court's dismissal of the plaintiff's claim for failing to identify a specific, facially neutral policy. In that case, the city commenced condemnation proceedings against an allegedly dilapidated, crime-ridden apartment complex that was approximately 95 percent African American. Id. at 829–30. Noting *Inclusive Communities*' caution that "a one-time decision may not be a policy at all," the Seventh Circuit upheld the "district court's findings . . . that the condemnation of the complex was a specific decision, not part of a policy to close minority housing in Joliet." *Id.* at 830. The court further noted "governmental entities . . . must not be prevented from achieving legitimate objectives," and that the city's condemnation was in furtherance of the goals approved in *Inclusive Communities*. Id.

Conclusion

Federal remedies for housing discrimination have a long history in the United States. After the Supreme Court required a showing of intentional discrimination as a prerequisite for a constitutional challenge, the emphasis for challenging housing discrimination shifted to the FHA. In a series of federal appellate court decisions during the past 40 years, federal courts recognized recovery under the theory of disparate impact: no need to show intent to discriminate but only that the complained-of action has a discriminatory effect on a class (race, religion, gender, family status, disability) protected by the FHA. It is not particularly surprising, therefore, that the Supreme Court upheld the disparate impact theory in *Inclusive Communities*. But the Court hedged its application with so many conditions and expressed so many concerns that arguably it has become significantly more difficult for plaintiffs alleging discrimination to succeed than it was before the Court weighed in. Such difficulty is apparent in the wave of federal district court cases approving government actions and dismissing discrimination claims during the past four years. ■

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