NLIHC Expanded Summary of Disparate Impact Standard Oral Arguments Before The U.S. Supreme Court

On January 21, the U.S. Supreme Court heard oral arguments in the case of *Texas Department of Housing and Community Affairs vs. The Inclusive Communities Project*. At issue is whether the Fair Housing Act of 1968 bars not only intentional discrimination, but also policies and practices that have a disparate impact – that do not have a stated intent to discriminate but that have the effect of discriminating against the Fair Housing Act's protected classes – race, color, national origin, religion, sex, familial status, or disability.

Background

Section 804(a) of the Fair Housing Act makes it unlawful "[t]o refuse to sell or rent…, **or otherwise make unavailable** or deny, any dwelling to any person because of race, color, national origin, religion, sex, familial status, or handicap." (emphasis added)

For more than 45 years, courts have recognized two categories of discrimination prohibited under the Fair Housing Act of 1968: acts that are clearly intentional, and acts such as policies and practices that might seem neutral but that have a discriminatory effect.

Shortly after passage of Title VIII of the Civil Rights Act of 1968 (more commonly referred to as the Fair Housing Act), federal circuit courts unanimously upheld that violations of the Fair Housing Act can be established through a disparate impact standard of proof. By 1988 when the Fair Housing Act was amended to expand its scope, nine circuit courts of appeal had found the disparate impact standard necessary to enforce the law. Today, eleven circuits, every circuit to consider the question, have agreed. There are only 13 circuit courts. Under the disparate impact standard, courts assess discriminatory effect and whether an action perpetuates segregation, whether the discrimination is justified, and whether less discriminatory alternatives exist for the challenged practice.

The 1988 amendments to the Fair Housing Act passed in the Senate by a vote of 94 to 3. Congress rejected an effort then to add a discriminatory intent requirement. The House of Representative's Committee Report stated, "The Committee understands that housing discrimination…is not limited to blatant, intentional acts of discrimination. Acts that have the effect of causing discrimination can be just as devastating as intentional discrimination."

In the original lawsuit, *Inclusive Communities Project vs. Texas Department of Housing and Community Affairs*, ICP challenged how the Texas Department of Housing and Community Affairs (TDHCA) allocated Low Income Housing Tax Credits (LIHTCs) in the Dallas metropolitan area, asserting that TDHCA's allocation decisions had a disparate racial impact. Ninety-two percent of the LIHTC units were in census tracts with more than 50% minority households. In March 2012, Federal District Judge Sidney A.

Fitzwater ruled that the way TDHCA awarded LIHTCs in the Dallas area had a disparate racial impact, violating the Fair Housing Act. However, the State of Texas decided to appeal Judge Fitzwater's decision in an effort to have the Supreme Court rule against disparate impact.

Highlights of the Oral Arguments:
Solicitor General of the State of Texas, Scott Keller

The Solicitor General of the State of Texas, Scott Keller, opened by arguing that the Fair Housing Act does not recognize disparate impact claims for two reasons:

1. The plain text of the Fair Housing Act does not use effects- or results-based language, and therefore is limited to intentional discrimination, and when a statute prohibits actions taken because of race and it lacks effects-based language, the statute is limited to intentional discrimination.
2. The canon of constitutional avoidance compels this interpretation. Mr. Keller is referring to the 14th Amendment to the U.S. Constitution, which calls for, among other features, equal protection of the laws.

Most of the Justices' questioning of Mr. Keller seemed to focus on his first point. Justice Sonya Sotomayor quickly noted that in other statutes, such as Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, also did not use the words 'disparate impact' early on, yet the Supreme Court recognized that it applies the disparate impact standard. [Amendments to Title VII in 1991 explicitly used the words "disparate impact."]

Justice Ruth Bader Ginsberg asserted that in enacting both the Fair Housing Act and Title VII Congress had the "grand goal" of "undoing generations of rank discrimination." Justice Ginsburg continued, by referring to an earlier Supreme Court decision, *Trafficante*, in which the Court described the objective of the Fair Housing Act as one of replacing ghettos through integrated living patterns.

Justice Ginsberg added that, "…in 1964, when the Civil Rights Act passed, and in 1968, when the Fair Housing Act passed, nobody knew anything about disparate impact. That didn't come up 'till the Griggs decision, and it was this Court that gave the interpretation to Title VII in light of the purpose of the statute."

Mr. Keller responded by stating that the Court needed to focus on the plain text of the Fair Housing Act, arguing that "make unavailable" in the Fair Housing Act was not an active verb, compared to the verb "adversely affect" used in Title VII, which has an established disparate impact standard. Justice Elena Kegan spared with Mr. Keller, concluding that "make unavailable" focuses "on an effect in the same way that the 'adversely affect' language does, and it just does it a little bit more economically, but the effects-based nature of the provision is still the same."

Justice Antonin Scalia then began a series of comments declaring, "What hangs me up…is the fact that Congress seemingly acknowledged the effects test later in

legislation when it said that certain effects will not qualify…Why doesn't that kill your case? When we look at a provision of law, we look at the entire provision of law, including later amendments. We try to make sense of the law as a whole."

Justice Scalia was referring to the 1988 amendments to the Fair Housing Act that provided three exemptions from liability under the disparate impact standard:
1) persons convicted of illegal manufacture or distribution of a controlled substance;
2) local, state, or federal restrictions on the number of occupants permitted to occupy a dwelling; and
3) allowing a person engaged in the business of providing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, disability, or familial status.

Picking up the thread of the 1988 amendments, Justice Kagan reminded Mr. Keller that when Congress considered those amendments they were aware that ten circuit courts of appeals had said that disparate impact was a valid action under the Fair Housing Act. In addition, Congress explicitly articulated three circumstances in which disparate impact would not apply. Nor did Congress negate the decisions of the circuit courts.

Justice Sotomayor reiterated that argument, and referred to the fact that in 1988 Congress did not act on a proposal by a Member of Congress to eliminate the disparate impact standard. If Congress did not like the disparate impact analysis of the ten circuit courts, they would have acted on the proposal to eliminate it.

Whereupon Justice Scalia commented, "That's a very strange thing for Congress to do, to believe that those court of appeals' opinions are wrong and yet enact these exemptions. So even though those opinions are wrong, they will not apply to these things. That's very strange."

Mr. Keller returned to arguing, "The Court has to construe the plain text of the statute that Congress enacted." Justice Scalia replied:

> "It [the Court] has to construe the plain text of the law, and the law consists not just of what Congress did in 1968, but also what it did in '88. And you look at the whole law and you say, what make sense? And if you read those two provisions together, it seems to be an acknowledgement that there is such a thing as disparate impact. However, it will not apply in these [three] areas that the 1988 amendment says. We don't just look at each little piece when it was serially enacted and say what did Congress think in '68? What did it think in '72? We look at the law. And the law includes the '68 act and the '88 amendments. And I find it hard to read those two together in any other way than there is such at thing as disparate impact."

When Mr. Keller stated, "The 1988 amendments don't refer to disparate impact," Justice Scalia asserted, "But they make no sense unless there is such a thing as disparate impact. They are prohibiting something that doesn't exist, right?"

Justice Stephen Breyer weighed in saying:

> "The law has been against you. There's been disparate impact for 40 years. Maybe it's only 35. And it's universally against you. And as far as I can tell, the world hasn't come to an end….this has been the law of the United States uniformly throughout the United States for 35 years, it is important, and all the horribles that are painted don't seem to have happened or at least we have survived them. So, why should this Court suddenly come in and reverse an important law which seems to have worked out in a way that is helpful to many people, has not produced disaster, on the basis of going back and making a finely spun argument on the basis of a text that was passed many years ago and is ambiguous at best?"

Mr. Keller only episodically touched upon a second fundamental claim of why the Fair Housing Act does not recognize disparate impact claims – the cannon of constitutional avoidance. He asserted that "equal protection claims here are stark," referring to the 14th Amendment to the U.S. Constitution, which calls for, among other features, equal protection of the laws. Mr. Keller said, "First, the government has not explained if it's going to enforce the HUD regulation to protect only minorities. If it does, that's likely unconstitutional…" However, the Justices did not seem to thoroughly engage in this claim during Mr. Keller's time.

Highlights of the Oral Arguments:
Donald B. Verrilli, Jr., Solicitor General, U.S. Department of Justice

Mr. Verrilli's role was as a friend of the court in support of ICP, but also to defend HUD's disparate impact rule (see *Memo*, 2/8/13). He began by referring to the three exemptions in the Fair Housing Act amendments of 1988, which he argued:

> "…most clearly show that HUD's disparate impact regulations are permissible interpretations of the Fair Housing Act. [Those three exemptions] presuppose the existence of disparate impact liability and so serve no real purpose without them – without disparate impact liability."
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> "And the provenance of those exemptions lends particularly strong support for the reasonableness of HUD's reading. They were added by amendment in1988 at a time when nine courts of appeals had ruled that the Fair Housing Act authorized disparate impact."

Chief Justice John Roberts commenced repeated questioning about what he perceived to be the difficulty of deciding what impact is good and bad. He posited two proposals both with good impacts: one to build new housing in a low income area that would primarily benefit minorities, another to build new housing in a more affluent area, thus promoting integration. "But, I still don't understand which is the disparate impact," the

Chief Justice wondered. “Which is the bad thing to do, not promote better housing in the low income area or not promote housing integration?”

Mr. Verrilli responded that HUD or the courts must look at which is having a disparate impact and apply the test that the courts and HUD have used for many years – that is analyze the justification for a policy or practice and determine whether there is a race-neutral alternative that has less harmful effects.

Mr. Verrilli later took the initiative to address constitutional avoidance. He stated that earlier in the oral arguments, in the context of Title VII, some of the Justices and Mr. Keller had posited that the only way to avoid disparate impact liability is to engage in race-based remedies. Mr. Verrilli asserted that in other Fair Housing cases adjudicated by the 11 circuit courts, the remedy was substituting one race-neutral rule for another race-neutral rule. For example if a landlord cannot justify an occupancy restriction that is particularly tight, the remedy would be a less stringent occupancy restriction or none at all. “In such a situation, no one gets classified by race, no one gets a burden imposed upon them because of race, and no one gets a benefit because of race.”

Highlights of the Oral Arguments:
Michael M. Daniel for the Inclusive Communities Project

The issue of constitutional avoidance was given greater discussion in Justice Scalia’s questioning of Mr. Daniel. When Mr. Daniel began by saying, “It’s clear from the Congressional Record Congress was worried and concerned about making units only available in low income, minority areas that it called ‘ghettos.”

Justice Scalia quickly interjected that the word “unavailable” was not the problem; the problem was unavailable on the basis of race. Twice Justice Scalia declared that racial disparity is not racial discrimination. “Let’s not equate racial disparity with discrimination…what you are arguing here is that racial disparity is enough to make whatever policy adopted unlawful.”

Chief Justice Roberts asked, “Is there a way to avoid disparate-impact consequence without taking race into account in carrying out the governmental activity? It seems to me that if the objection is that there aren’t a sufficient number of minorities in a particular project, you have to look at race until you get whatever you regard as the right target.” Mr. Daniel replied, “You don’t have to look at race at all. You look at the practice causing it.”

Much of the discussion with Mr. Daniel reiterated how the disparate impact tests has been applied for many years: the justification for a policy or practice is analyzed, and the party challenged must show that there are no alternative policies or practices that do not have a disparate effect.

The transcript of the oral arguments is at
http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1371_g4ek.pdf

The audio of the oral arguments is at
http://www.supremecourt.gov/oral_arguments/audio/2014/13-1371