

# Client Alert

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## Disparate Impact Doctrine Survives Supreme Court Review

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After years of debate and false starts, the Supreme Court has held that the Fair Housing Act (“FHA”) permits disparate impact claims. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, No. 13-1371, 576 U.S. \_\_\_ (2015), a divided Court held that specific language in the statute permits plaintiffs to challenge housing practices that have an unintentional but “disproportionate adverse effect on minorities.” The Court cautioned that such practices must be “artificial, arbitrary, and unnecessary,” as well as “unjustified by a legitimate rationale,” in order to violate the FHA, and that policy considerations require caution in fashioning a disparate impact test. But, the Court provided only faint guidance on the mechanics of that test, ensuring that the lower courts and litigants around the country will continue to struggle with applying the disparate impact standard. One thing is for certain, though: The decision has far-reaching implications, opening up avenues of argument not only in housing development cases, but in litigation and enforcement actions under the Fair Housing Act, the Equal Credit Opportunity Act, and beyond.

### THE LONG LEAD UP

**The Foundational Cases:** The arguments in *Inclusive Communities* are built on a line of foundational decisions. These decisions will, in turn, continue to shape how courts and litigants argue and decide the many open issues remaining today.

**Griggs:** Disparate impact analysis has its genesis in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, the Supreme Court analyzed Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment, and concluded that Title VII plaintiffs can make employment discrimination claims without proving intent to discriminate. The Court held that “[t]he Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation.” 401 U.S. at 431. And thus, disparate impact claims were born.<sup>1</sup>

In formulating the elements of other federal discrimination claims, courts have relied heavily on the Title VII *Griggs* framework. That said, there are important differences between Title VII and other discrimination statutes, and those differences have resulted in differences in the courts’ articulation of the metes and bounds of non-Title VII discrimination claims.

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<sup>1</sup> It bears mentioning that despite dispensing with the need to demonstrate purposeful discrimination, disparate impact analysis is rooted in the effort to remedy the vestiges of overt discrimination. Although *Griggs* addressed the facially neutral requirements of a high school education and the ability to pass a general intelligence test, it was decided in the context of the defendant’s long history of discrimination. 401 U.S. at 426. This factual situation is typical in disparate impact jurisprudence and carries through into the *Inclusive Communities* decision.

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**Smith:** Consider, for example, the Age Discrimination in Employment Act (“ADEA”). In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court relied on *Griggs* (in addition to the ADEA’s text) to conclude that disparate impact claims were available under the ADEA. 544 U.S. at 240. But the specific text was critical and remains so in analyzing disparate impact today. ADEA section 2000e-2(a)(1) prohibits an employer from failing or refusing to hire an employee, among other things, “because of” the individual’s age. Section 2000e-2(a)(2), though, prohibits employers from taking certain actions to “deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual’s age” (emphasis added). The Court held in *Smith* that it is this “otherwise adversely affects” language in both the ADEA and Title VII that creates disparate impact liability. *Id.* at 235-36.

**The First Try Under the FHA:** The Supreme Court was first poised to decide how to apply these issues to the FHA in *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010). In that case, landlords—who received multiple code enforcement orders for conditions at properties they leased to low-income households in St. Paul, Minnesota—sued the city and its housing officials and public housing agency. As Justice Alito’s dissent in the *Inclusive Communities* decision explains, in *Magner* “the Eighth Circuit held that the [FHA] . . . could be used to attack St. Paul, Minnesota’s efforts to combat ‘rodent infestation’ and other violations of the city’s housing code.” 576 U.S. \_\_\_, \_\_\_ (2015) (Alito, J., dissenting) (slip op., at 1). That is because such enforcement “increased the price of rent,” and that had a “disparate impact” on minorities in the city. *Id.* The City of St. Paul appealed, and the Court granted *certiorari* in 2011. 132 S.Ct. 548 (2011). The Court never rendered a decision, though, because the City dismissed the appeal in a much-criticized settlement that the Justice Department had allegedly engineered<sup>2</sup> to avoid Supreme Court review of the disparate impact question. 132 S.Ct. 1306 (2012).

**The Second FHA Try:** Meanwhile, a second disparate case was also unfolding. Back in 2002, the Township of Mount Holly, New Jersey, proposed a redevelopment project in a low-income neighborhood. The Township declared the neighborhood blighted and proceeded with a plan of eminent domain. Residents filed suit. They alleged, among other things, disparate impact and intentional discrimination under the FHA. The Third Circuit ultimately agreed that the FHA permits these disparate impact claims. *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 381-82 (3d Cir. 2011). The Supreme Court took up the case in June 2013, again granting, in part, *certiorari* to decide whether disparate impact is cognizable under the FHA. 133 S.Ct. 2824 (2013). Once again, though, after the parties fully briefed the matter, they settled, and *certiorari* was dismissed. 134 S.Ct. 636 (Nov. 15, 2013).

**Inclusive Communities:** And so we come to *Inclusive Communities*. At a bench trial, Inclusive Communities argued that the Texas Department of Housing and Community Affairs disproportionately approved low-income housing tax credits for developments in predominantly minority neighborhoods and denied the credits in predominately white neighborhoods. This, Inclusive Communities claimed, “creat[ed] a concentration of the [low income] units in minority areas, a lack of units in other areas, and maintain[ed] and perpetuat[ed] segregated housing patterns” in violation of the FHA. The district court held for Inclusive Communities, and the Fifth Circuit affirmed. On October 2, 2014, the Supreme Court granted *certiorari* to decide whether disparate impact claims

<sup>2</sup> See our client alert [here](#), and, for example, the Congressional Reports on the related investigation at <http://oversight.house.gov/wp-content/uploads/2013/04/DOJ-St-Paul.pdf> (Republicans) and <http://democrats.oversight.house.gov/news/press-releases/house-democrats-issue-memo-on-perez-role-in-magner-v-gallagher> (Democrats).

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are cognizable under the FHA. It declined to grant *cert.* on the question of the appropriate standard for evaluating disparate impact claims.

## INCLUSIVE COMMUNITIES' HOLDINGS

The majority opinion in *Inclusive Communities* held that disparate impact is cognizable under the FHA because: (1) the statute's text refers to the consequences of an action; (2) by 1988 Congress was aware of the law regarding disparate impact and implicitly ratified it by enacting FHA amendments that reference disparate impact (which would have been superfluous if disparate impact was not cognizable); and (3) disparate impact is consistent with the FHA's statutory purpose. 576 U.S. \_\_\_, \_\_\_ (2015) (slip op., at 5-7).

**The FHA's Text:** Section 804(a) of the FHA provides that it shall be unlawful "[t]o 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) (emphasis added).

The majority latched onto the phrase "otherwise make unavailable" to reach the conclusion that the phrase refers to "the consequences" of an action rather than the actor's intent. *Inclusive Cmty.*, 576 U.S. \_\_\_, \_\_\_ (2015) (slip. op., at 11-12). It analogized the FHA's use of the "otherwise make unavailable" phrase to Title VII and the ADEA's use of the phrase "otherwise adversely affect" as discussed in *Griggs* and *Smith*. *Id.* at 12.

The Court also found persuasive that, similar to Title VII and the ADEA, the FHA's phrase is located at the "end of lengthy sentences that begin with prohibitions on disparate treatment" and served as a catchall that looks to consequences rather than intent. *Id.* The Court made short work of the argument that the phrase "because of race" foreclosed disparate impact since an action cannot be "because of race" unless race is a reason for the action. Noting that both Title VII and the ADEA contain similar "because of" language, and that the Court has held both statutes to encompass disparate impact liability, the majority does not lend any credence to this claim. *Id.* at 12-13. This particular analysis is a major focus of the dissents in the case.

**The 1988 FHA Amendments:** The Court then turned to the FHA Amendments that Congress enacted in 1988 and noted that, by that time, all of the nine Courts of Appeals that had addressed the question concluded that the FHA encompasses disparate impact claims. *Id.* at 13. Citing to legislative history, the Court concluded that Congress was aware of this precedent when it enacted those amendments and further noted that, as pointed out by Justice Scalia during the oral argument, certain of those amendments embodied exceptions to disparate impact liability. *Id.* at 14-15. Citing its long-standing rule against "a reading [of a statute] which renders some words altogether redundant," the Court stated that these amendments would not only be superfluous, but that they simply would not make sense if disparate impact did not apply to the FHA. *See Id.* at 15 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995)).

**The FHA's Purpose:** In what is probably the least controversial part of the opinion, the majority found that Congress enacted the FHA, like Title VII and the ADEA, in order to address discriminatory practices. *Id.* at 17 (citing 42 U.S.C. § 3601). The Court cited a number of cases that use disparate impact to invalidate laws and ordinances that implicitly function to exclude minorities. *Id.* at 17 (citing, e.g., *Greater New Orleans Fair Housing Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 569, 577-578 (E.D. La. 2009) (invalidating post-Hurricane

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Katrina ordinance restricting rental housing units to only “blood relative[s]” in an area of the city that was 88.3% Non-Hispanic white and 7.6% African American)). The majority further suggested that disparate impact has also proved beneficial for industry, as it has allowed private developers to protect their property rights by stopping municipalities from enforcing ordinances that, in practice, result in discriminatory outcomes. *Id.* (citing *Huntington v. Huntington Branch NAACP*, 488 U.S. 15, 16-18 (1988)).

## LIMITING PRINCIPLES

Many observers have suggested that disparate impact theory could lead to a variety of undesirable outcomes including, as noted in Justice Alito’s dissent, preventing a municipality from making “a slumlord kill rats without fear of a lawsuit.” 576 U.S. \_\_\_, \_\_\_ (2015) (Alito, J., dissenting) (slip op., at 1). The majority does appear to recognize certain risks, including that disparate impact liability could, in fact, “perpetuate race-based considerations rather than move beyond them” since market participants might simply adopt racial quotas in an attempt to reduce potential liability. *Id.* at 20-21. To avoid this, the majority cautions that courts should “avoid interpreting disparate impact liability to be so expansive as to inject racial considerations into every housing decision.” *Id.* at 21. In addition, the majority recites various considerations that it believes will limit the possibility of unintended consequences or runaway liability.

The majority makes clear that in stating a *prima facie* case, plaintiffs must articulate a specific policy that causes a perceived disparity, including demonstrating a robust causal link between the policy and the allegedly associated outcome. 576 U.S. \_\_\_, \_\_\_ (2015) (slip op., at 20-21). In other words, a racial imbalance, standing alone, is not sufficient, and multiple factors underlying decisions may attenuate any causal link.

In addition, the majority appears to provide some insight on a defendant’s justification for policies that produce an impact. Citing *Griggs*, it indicates that impact claims should apply to “artificial, arbitrary and unnecessary” policies and should avoid the displacement of “valid” ones. *Id.* at 21. Defendants should be permitted to “state and explain the valid interest served by their policies” and adopt ones that are “necessary to achieve a valid interest.” *Id.* at 18-19. Finally, the majority suggests that remedial orders should concentrate on the elimination of offending practices and ensure that additional measures are designed to “eliminate racial disparities through race-neutral means.” *Id.* at 22.

## THE DISSENTS

Justice Alito, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, issued a thorough, 35-page dissent. Aimed at the *Magner* case, it begins with the statement, “No one wants to live in a rat’s nest.” 576 U.S. \_\_\_, \_\_\_ (2015) (Alito, J., dissenting) (slip op., at 1). The dissent uses *Magner* as a foil throughout, pointing out potentially absurd and harmful possible applications of the majority’s holding, such as the city of St. Paul’s inability to order landlords to get rid of a rat infestation.

The dissent first takes on the opinion’s statutory construction argument, emphasizing that it artificially divorces the FHA’s “make unavailable” language from the “because of” language that modifies it. Accordingly, the dissent argues that the statute provides that a defendant shall not “otherwise make unavailable” housing “because of” a prohibited factor. *Id.* at 2-9 (emphasis added). In the dissent’s view, this statutory language precludes a disparate impact analysis as “because of” clearly means that a “factor was a reason for what was done.” *Id.* at 4.

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For the same reason, the dissent also rejects the various legislative history arguments in the majority's decision, arguing that legislative history is irrelevant where the statutory language is clear. *Id.* at 9-11.

After taking a swipe at HUD for issuing its disparate rule only in response to the *Magner* appeal, the dissent also argues that the rule is not entitled to deference in any event because, again, the statutory text is itself clear. *Id.* at 20. In support, the dissent points out that during the applicable time period, the United States itself had always argued that the FHA prohibits only intentional discrimination. *Id.* at 12-13.

Finally, the dissent argues that the *Smith* decision is irreconcilable with the present opinion, as it suggests that *Smith* requires the "effects" language be present in a statute in order to permit disparate impact. As discussed, *Smith* analyzed two sections of the ADEA, one that included such language and one that didn't. Only the section that included the "effects" language could be enforced using a disparate impact theory. *See id.* at 23-27.

The opinions conclude with a separate and strongly worded additional dissent from Justice Thomas. In a nutshell, Justice Thomas argues that "[w]e should drop the pretense" that the earlier holdings permitting disparate impact in *Griggs* and *Smith* were "legitimate." 576 U.S. \_\_\_, \_\_\_ (2015) (Thomas, C., dissenting) (slip op., at 1). He further argues that even the "effects" language in those statutes does not reflect an intent to permit disparate impact claims and instead should all be interpreted to require "discriminatory intent." *Id.* at 2-4. This, Justice Thomas concludes, is an "obvious" "error" that will "take its toll." *Id.* at 3, 11.

### TAKEAWAYS

The Court's decision leaves much undecided, including the applicable standard and the potential application of the disparate impact standard to other statutes like the Equal Credit Opportunity Act (both topics that we will be covering soon). It is all but certain, though, that not only will these issues be battled out in the courts, but that entities subject to fair lending laws will be subject to increasingly aggressive litigation and enforcement in the wake of the holding. This, in turn, highlights that now more than ever, robust and proactive compliance measures are key to any fair lending program.

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