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MEMORANDUM

Via E-Mail

TO: Amici in Inclusive Communities Case **FROM:** Harry J. Kelly 
CC: John Hayes
 Brian Whittaker
RE: Inclusive Communities Case -- **DATE:** June 26, 2015
 Analysis of Supreme Court Decision

Yesterday, I circulated a brief alert to notify you that the Supreme Court had rendered its decision in *Texas Department of Housing and Community Development v. The Inclusive Communities Project, Inc.*, in which we filed a brief on your behalf. I wanted to provide a more detailed update to you as quickly as possible. Below, I'll outline the chief points of Justice Kennedy's majority opinion and the dissents authored by Justices Alito and Thomas. Obviously, the decision is disappointing in that it affirmed that disparate impact is recognized by the Fair Housing Act ("FHAct"). Nevertheless, Kennedy's opinion frankly acknowledges that disparate impact is a mixed bag that can frustrate legitimate goals of government agencies and private housing providers and he offers a number of "safeguards" that, if implemented by lower courts in the future, may make it more difficult for plaintiffs to bring disparate impact cases.

Justice Kennedy's Majority Opinion

Answering a question that courts have been wrestling with for years, Justice Kennedy's majority opinion (on behalf of himself and Justices Breyer, Ginsburg, Kagan and Sotomayor) affirmed that housing practices and policies that have a disparate impact on classes of persons protected by the FHAct may violate the FHAct, even in the absence of intent to discriminate. Justice Kennedy based his decision on several principles based on past precedents and statutory texts:

1. He looked at past decisions of the Supreme Court, especially the *Griggs v. Duke Power Co.* and *Smith v. City of Jackson* opinions, to find support for the disparate impact theory. Specifically, Justice Kennedy concluded that *Griggs* and *Smith* stand for the principle an antidiscrimination law will support disparate impact if the statute text "refers to consequences of actions and not just the mindset of actors, and where that interpretation is consistent with statutory purpose." Slip op., at 10. Like Justice Alito in his dissent, we had relied on *Smith* to reach the opposite conclusion – that in order to allow a disparate impact claim, the text of the statute must expressly outlaw conduct that has a

discriminatory effect – but clearly Kennedy drew a different conclusion from that decision.

2. Turning to the FHAct itself, Kennedy concluded that, pursuant to *Griggs* and *Smith*, the original text was broad enough to encompass disparate impact liability. Specifically, he pointed to the “otherwise make unavailable” provisions of §§ 3604(a) and 3605(b) as referring “to the consequences of an action rather than the actor’s intent.” *Id.*, at 11. “This results-oriented language counsels in favor of recognizing disparate-impact liability,” he wrote. *Id.*
3. Kennedy examined the 1988 amendments to the FHAct to further support his position. In amending the act, Congress adopted a series of provisions making clear that specific conduct, such as adopting reasonable occupancy limitations, do not violate the FHAct. According to Kennedy, all of these exceptions would only make sense if Congress accepted that the FHAct incorporated disparate impact liability, as a number of the Federal appeals courts had determined by that point. “[N]one of these amendments would make sense if the [FHAct] encompassed only disparate-treatment claims,” Kennedy wrote. *Id.*, at 15.

While accepting that disparate impact exists under the FHAct, Justice Kennedy was keenly aware of the sort of practical concerns we raised in our brief about the potential pitfalls that disparate impact liability can present. Thus, Kennedy warned that “[d]isparate-impact liability mandates the ‘removal of artificial, arbitrary and unnecessary barriers,’ not the displacement of valid governmental policies.” *Id.*, at 18. Earlier, Kennedy warned that disparate impact “must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system” (*id.*, at 10) – hardly an expansive endorsement of disparate impact liability.

Having found that disparate impact liability exists under the FHAct, Kennedy thus spent much of his decision narrowing the scope of that liability and offering a series of “safeguards” intended to prevent abuse of disparate impact theory:

1. **“Robust causality requirement.”** Kennedy stressed that statistical evidence alone is not sufficient to support disparate impact claims: “[A] statistical disparity must fail if the plaintiff cannot point to defendant’s policy or policies causing that disparity.” *Id.*, at 20. He called for a “robust causality requirement” to prevent housing providers from adopting constitutionally suspect racial quotas to defend against disparate impact claims. *Id.* He pointed out that causation is not easy to prove: where a builder makes a stand-alone decision to develop a specific property, it “will not be easy to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all.” *Id.* Likewise, “[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 20-21. Specifically, he warned that if the plaintiff in *Inclusive Communities* “cannot show a causal connection between the [Texas agency’s tax credit allocation]

policy and a disparate impact – for instance, because the federal law substantially limits the [Texas agency’s] discretion – that should result in dismissal of the case.” *Id.*, at 21. While causation is implied in most courts’ disparate impact jurisprudence, Kennedy places a heavy burden on plaintiffs to show causation as a predicate to proving a prima facie case.

2. **Housing providers must be allowed to adopt policies that address valid goals.** Most courts and HUD in its regulations acknowledge that government agencies and housing providers can defeat a disparate impact claim by demonstrating a legitimate, nondiscriminatory purpose. Kennedy reaffirmed that, recognizing the “housing authorities and private developers [must] be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.” *Id.* at 19. He warned that the FHAct “does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities.” *Id.* The strong implication is that were such a “double bind” arises, disparate impact claims are almost by definition impossible to establish.
3. **Housing providers should expressly acknowledge potential disparate impacts and explain their justifications.** Recognizing the disparate impact liability should not be an impediment to effective policy-making by agencies or business, Kennedy suggested that those entities may want to expressly set out their reasons for adopting particular policies and to evaluate possible disparate impacts. “An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interests served by their policies.” *Id.*, at 18. While this is central to a defense against disparate impact claims, it may also be appropriate for agencies to expressly consider potential impacts at the time they adopt a policy, to determine if there are likely impacts and if so, whether less discriminatory outcomes are available.
4. **A policy is not contrary to disparate impact requirements unless it raises arbitrary, artificial and unnecessary barriers.** Repeatedly, Justice Kennedy referred to language from the *Griggs* decision, that “[g]overnmental or private policies are not contrary to the disparate-impact requirement unless they are ‘artificial, arbitrary, and unnecessary barriers.’” *Id.*, at 12, *citing Griggs*, 401 U.S. at 431. Obviously, this is a concept that has been part of disparate impact analysis for many years, but Kennedy’s repeated invocation of these concepts suggest that in order to demonstrate disparate impact, a plaintiff should be required to affirmatively show not only that the challenged practice has a discriminatory effect, but that it raises such “artificial, arbitrary and unnecessary barriers.”

The Dissents

Two dissents were filed. The principal dissent was filed by Justice Alito, in which Chief Justice Roberts and Justices Scalia and Thomas joined. Kennedy wrote a 25 page majority decision, but

Alito’s dissent was 35 pages long, and it meticulously refuted most of the points raised by Kennedy. For example, consistent with the argument presented by the Texas agency and our amici brief, Justice Alito pointed out that *Griggs* and *Smith* actually stand for the proposition that to support a disparate impact claim, an anti-discrimination statute must expressly outlaw discriminatory effects, and the FHAct does not do that. Also consistent with our argument, he pointed out that as enacted, the FHAct outlawed conduct “because of” race and the other protected classes, and argued that necessarily, a “because of” standard outlaws intentional action, rather than discriminatory effects. And he strongly rejected any inferences that there was a consensus about disparate impact at the time Congress amended the FHAct in 1988, pointing out that at the time, in a separate case pending before the Supreme Court, the United States had argued that the FHAct “prohibits only intentional discrimination.” Slip op., at 12. He also chided the majority for adopting a rule that the majority itself acknowledges may frustrate the ability of local governments and private providers from carrying out their essential housing duties. “Local governments make countless decisions that may have some disparate impacts related to housing,” Alito warned, and Congress should not be deemed to involve the Federal courts in endless rounds of second-guessing local decisions. *Id.*, at 32. As an example of the harmful consequences of disparate impact, Alito pointed to the previously-dismissed *Magner v. Gallagher* case, where strict local health code enforcement was alleged to raise disparate impact claims due to resulting dislocations of minority tenants. “Something has gone badly awry,” he chided, “when a city can’t even make slumlords kill rats without fear of a lawsuit.” *Id.* at 2.

In a separate dissent, Justice Thomas argued that the *Griggs* case, which initially found disparate impact in employment discrimination cases, was in error, and that the majority’s decision in *Inclusive Communities* only extended that error. More controversially, he argued that in a diverse society, disparities based on race or other protected classes are not always the product of concerted decisions. Slip op., at 8. Indeed, he claimed that “[r]acial imbalances do not always disfavor minorities.” *Id.*, at 9. Thomas warned that broad application of disparate impact may lead housing providers to adopt racial quotas as a means to protect against disparate impact claims, and he warned that “‘racial balancing’ by state actors is ‘patently unconstitutional.’” *Id.*, at 10 (citation omitted).

Analysis

Fair housing advocates have lauded the *Inclusive Communities* decision as endorsing the fundamental outlines of disparate impact liability as enunciated by Federal courts over several decades. While there is no doubt that Justice Kennedy did recognize the importance of the FHAct in fighting long-entrenched patterns of discrimination and the utility of disparate impact in fighting those practices, if that is all he did, his opinion would have been much shorter. One cannot read Justice Kennedy’s opinion without concluding that he views disparate impact like a powerful medicine – important and useful to fight a disease, but also potentially dangerous and counterproductive if applied at the wrong time and in the wrong dosage. Much of his decision focuses on the potential harm that disparate impact can cause. In reality, there is not much

distance between his views and Justice Alito’s about the potential harmful impact that disparate impact can present.

Essentially, Kennedy embraces the view that disparate impact can be used effectively if the lower courts embrace the specific safeguards that he identifies. In particular, he focuses on the “robust causality requirement” he finds essential to make out a prima facie case. And his opinion strongly suggests that, in light of the many individual decisions that go into any policy that an agency or housing provider adopts, it will be very difficult to prove that a specific decision was the “cause” of a specific disparate impact. While it is true that causation has been part of disparate impact jurisprudence, it is apparent that Justice Kennedy wants courts to scrutinize these elements closely to avoid putting agencies and housing providers into the sort of “double bind” that he warns against. Kennedy certainly threatens that the plaintiff in the *Inclusive Communities* case may have won only a Pyrrhic victory if it cannot demonstrate that the actual statistical disparities it identified resulted from the challenged tax credit allocation practices.

Unfortunately, while the “safeguards” Kennedy adopts may assist judges and litigants in resolving disparate impact claims in court, they do not provide a lot of guidance to housing providers who are trying to develop policies and practices in order to avoid litigation in the first place. Everyone agrees that it is desirable to avoid putting agencies and providers into a “double bind,” but Kennedy’s opinion offers little guidance on how to develop policies to avoid disparate impact claims. The most concrete suggestion he makes – preparing a disparate impact analysis that explains the purpose for adopting a new policy, identifies the policy options available, and evaluates other less discriminatory alternatives – is probably a good exercise for any agency or provider to pursue. But such an exercise does not assure that a policy will not be challenged later.

Conclusion

The majority decision in *Inclusive Communities* is not a complete victory for either side. It reflects a compromise, accepting the concept of disparate impact liability under the FHAct but attempting to impose restrictions on its application that will prevent it from becoming an obstacle to reasonable policy decisions by government agencies and private housing providers. The ultimate impact of the decision will rest with the lower Federal courts – if they treat the decision as nothing more than an endorsement of past practices, it will result in a significant and burdensome expansion of disparate impact cases. Clearly, that is not what Justice Kennedy wants to happen. Instead, he wants to constrain and channel disparate impact in a way that helps meet the overall goals of the FHAct without unnecessarily frustrating legitimate decision making by government and private entities. We will have to wait to see whether the lower courts embrace the “safeguards” Justice Kennedy has outlined and, if they do, whether they will prevent the negative outcomes against which Justice Kennedy has warned.

