

SCOTUS Affirms but Narrows Disparate Impact Liability under the Fair Housing Act

By Harry J. Kelly, Esq. and Brian J. Whittaker, Esq. (Washington, D.C. Office)

Answering a question that courts have been wrestling with for years, the U.S. Supreme Court today affirmed that housing practices and policies that have a harsher effect, or “disparate impact,” on classes of persons protected by the Fair Housing Act (the “Act”) may violate the Act, even in the absence of intent to discriminate. Speaking for the Court majority in *Texas Department of Housing and Community Development v. The Inclusive Communities Project, Inc.*, Justice Kennedy confirmed that the Act permits disparate impact liability based on the statutory text, the Act’s purpose, and decades of acceptance of disparate impact liability by Congress and lower courts. Joined by three other Justices, Justice Alito dissented, arguing that neither the text of the Act nor precedent permits disparate impact liability.

Despite its ruling, the Court majority attempted to reign in expansive application of disparate impact liability, which should make it more difficult for plaintiffs to prove discrimination and easier for defendants to justify their actions based on nondiscriminatory reasons. Justice Kennedy laid the groundwork for “safeguards” to prevent reasonable housing policies and practices from being attacked as discriminatory by recognizing the need to permit defendants to prove that a policy or practice is needed to achieved a legitimate interest (or business necessity) and identifying a “robust causality requirement” that must be adequately alleged and proven by plaintiffs. In other words, a mere statistical disparity associated with a particular housing policy or practice is not enough to establish liability, absent proof that a defendant’s policy or practice causes the disparity. And disparate impact liability should not be used to second-guess a reasonable choice between two options. For example, the Court majority suggested that defendants cannot be held liable if their discretion to implement a challenged policy or practice is substantially limited by federal law or is intended to ensure compliance with health and safety codes.

As a result of this decision and separate district court litigation, HUD will likely need to revise its regulations—“Implementation of the Fair Housing Act’s Discriminatory Effects Standard”—to ensure that they comply with the “safeguards” outlined in Justice Kennedy’s opinion. Nevertheless, as Justice Alito pointed out in dissent, the Court majority provided little clarity or specificity about the contours of the causality requirement imposed on plaintiffs or the legitimate interest defense available to defendants. As a practical matter,

Justice Kennedy's decision may make it easier for judges and parties to litigate disparate impact claims in court, but it may not provide a lot of practical guidance for housing providers to draft policies to avoid disparate impact claims in the first place. Accordingly, the threat of disparate impact litigation, and significant costs associated with such litigation, will remain present with respect to many housing policies and practices that have a disproportionate effect on classes of persons protected by the Act as HUD and lower courts struggle to apply the Court's opinion to specific facts in the future.