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## The Supreme Court recognizes but limits disparate impact in its Fair Housing Act decision<sup>1</sup>

### Consumer Financial Services Alert

By Paul F. Hancock, Andrew C. Glass, Melanie Brody, Roger L. Smerage, and Olivia Kelman

On June 25, 2015, the Supreme Court, by a 5-4 margin, upheld the application of disparate impact under the Fair Housing Act (“FHA”) in *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project, Inc.* (No. 13–1371) (“Texas DHCA”). While upholding the theory, the Court imposed significant limitations on its application in practice.

In a disparate-impact claim, a plaintiff may establish liability, without proof of intentional discrimination, if an identified business practice has a disproportionate effect on certain groups of individuals and if the practice is not grounded in sound business considerations. The Court, however, imposed important limitations on the application of the theory “to protect potential defendants against abusive disparate-impact claims.” Slip. op. at 21. In particular, the Court held that a racial imbalance, without more, cannot sustain a claim and directed lower courts to “examine with care” the claims at the pleadings stage. *Id.* at 20. The Court emphasized the plaintiff’s burden to establish a “robust” causal connection between the challenged practice and the alleged disparities. Further, a defendant’s justification is “not contrary to the disparate-impact requirement, unless ... artificial, arbitrary, and unnecessary.” *Id.* at 21. Finally, “remedial orders” must “concentrate on the elimination of the offending practice” through “race-neutral means.” *Id.* at 22.

### The Court Recognizes Disparate Impact under the Fair Housing Act

Justice Anthony Kennedy wrote for the majority, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Justice Samuel Alito dissented, joined by Chief Justice John Roberts and Justices Antonin Scalia and Clarence Thomas. Justice Thomas separately dissented.

Justice Kennedy identified a number of bases to uphold disparate impact.

#### Statutory Language

The Court held that the language of the FHA recognizes disparate impact, concluding that two other anti-discrimination statutes “provide essential background and instruction.” *Id.* at 7-10 (discussing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII employment law), and *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005) (Age Discrimination in Employment Act (“ADEA”))). Noting that “Congress’ use of the phrase ‘otherwise make unavailable’” in Section 804(a) of the FHA “refers to the consequences of an action rather than the actor’s intent,” the Court analogized to the phrase “otherwise adversely affect” found in certain sections of Title VII and the ADEA. *Griggs* and *Smith* considered that language indicative of congressional intent to prohibit acts that result in disparate impact. See *id.* at

<sup>1</sup> A nearly-identical version of this article was posted on SCOTUS Blog [here](#):

## The Supreme Court recognizes but limits disparate impact in its Fair Housing Act decision

11-13. And, while the phrase “otherwise make unavailable” is not in Section 805 of the Act, the Court concluded that the word “discriminate” in that section sufficed under *Board of Education of City School District of New York v. Harris*, 444 U.S. 130 (1979). See *id.* at 11.

In dissent, Justice Alito rejected the Court’s view that the critical statutory language was the phrase “otherwise make unavailable,” instead concluding that “the key phrase is ‘because of.’” Slip op. at 3 (Alito, J., dissenting). He noted that on numerous occasions, the Court had interpreted the phrase “because of” to mean “the ‘reason’ that the [person] decided to act.” *Id.* (citing *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ---, 133 S. Ct. 2517, 2527 (2013)). Because the phrase is in both Sections 804 and 805, Justice Alito concluded that “intent makes all the difference” and would have ruled that disparate impact alone cannot give rise to liability under the Act. *Id.* at 5-6.

Writing separately, Justice Thomas took to task the Court’s reliance upon *Griggs* and its interpretation of Title VII. Proffering that “[w]e should drop the pretense that *Griggs*’ interpretation ... was legitimate,” he suggested that Title VII nowhere contained an express or implicit prohibition on conduct that may produce a disparate impact. Slip op. at 1 (Thomas, J., dissenting).

### *Appellate Jurisprudence and Congressional Amendments*

To support its opinion, the majority relied upon the post-enactment history of the FHA. The Court noted that between the time of the statute’s enactment and 1988, when Congress amended the Act, “all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims.” Slip op. at 13. Because “Congress was aware of this unanimous precedent,” but nevertheless “made a considered judgment to retain the relevant statute,” the Court concluded that Congress “accepted and ratified” the holdings of the Courts of Appeals. See *id.* at 13-14. Justice Alito calls this reasoning into question, noting that while the Courts of Appeals are entitled to “respectful consideration,” the Court must not “ignore clear statutory language on the ground that other courts have [consistently] done so.” Slip op. at 12 (Alito, J., dissenting).

The Court found further support in Congress’ 1988 amendments, namely “three exemptions from liability that assume the existence of disparate-impact claims.” Slip op. at 14. Reasoning that these exemptions, which addressed the role of property appraisals, drug convictions, and occupancy restrictions under the Act, “were deemed necessary because Congress presupposed disparate impact under the FHA as ... enacted” and would otherwise be “superfluous,” the Court found no other conclusion “logical.” *Id.* at 14-15. That one of these exemptions—the one related to property appraisals—is located in Section 805 lent further support to the Court’s conclusion that both Section 804 and Section 805 recognized disparate impact. See *id.* at 15-16.

### *Legislative Purpose*

The Court also articulated a basis in public policy to support its decision. The Court stated that “[r]ecognition of disparate-impact claims is consistent with the FHA’s central purpose.” *Id.* at 17. That purpose, like the policy behind Title VII and the ADEA, “was ... to eradicate discriminatory practices within a sector of our Nation’s economy.” *Id.* The Court pointed to “zoning laws and other housing restrictions” that it viewed as “unfairly ... exclud[ing] minorities from certain neighborhoods without any sufficient justification.” *Id.* It concluded

## The Supreme Court recognizes but limits disparate impact in its Fair Housing Act decision

that “[m]uch progress remains to be made in our Nation’s continuing struggle against racial isolation.” *Id.* at 24.

### The Court Imposed Limitations on Disparate-Impact Claims

Although recognizing disparate impact under the FHA, the Court focused much of its analysis on the “important and appropriate means of ensuring that disparate-impact liability is properly limited.” *Id.* at 18. While the fuller implications of the Court’s decision will take time to develop through application in the lower courts, aspects of the potential impact of the ruling are discussed below.

#### *Overbroad Application of Disparate Impact May Give Rise to Serious Constitutional Questions*

The Court warned that if the limitations described in *Texas DHCA* are not observed, “the specter of disparate-impact litigation” under the FHA would “undermine[] its own purpose as well as the free-market system.” *Id.* at 21. Adopting the position articulated in Justice Scalia’s concurrence in *Ricci v. DeStefano*, 557 U.S. 557 (2009) (“disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies”), the Court cautioned that disparate-impact claims may cause “serious constitutional questions.” Slip op. at 18. Such consideration can arise where disparate impact is used “[w]ithout adequate safeguards at the prima facie stage” of a suit. *Id.* at 20. In particular, the Court recognized that the “pervasive” use of disparate impact “would almost inexorably lead governmental or private entities to use ‘numerical quotas,’” that is the consideration of such factors as race, in housing-related decisions. *Id.* The Court pointed to the *Texas DHCA* litigation as an example, questioning whether the “decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa.” *Id.* Thus, the Court warned that to avoid a possible double bind, “potential defendants may adopt racial quotas” in attempting to immunize the outcomes of decisions from disparate impact challenge. *Id.* According to the Court, that type of decision-making may itself run afoul of the equal protection clause.

Noting that disparate impact plays a role in “uncovering discriminatory intent,” and the Court referenced challenges to zoning and land-use laws as “heartland,” or core, disparate-impact cases. *Id.* at 17.

#### *Courts Must Apply Safeguards at the Pleadings Stage to Protect Defendants*

Given the constitutional questions to which an overbroad application of disparate impact may give rise, the Court described the safeguards necessary “to protect potential defendants against abusive disparate-impact claims.” *Id.* at 21. The Court emphasized that lower courts must “examine with care” disparate-impact claims “at the pleading stage.” *Id.* The decision empowers lower courts to dismiss claims at an early stage and without subjecting defendants to expensive, and often intrusive, fact discovery. As the Court stated, “prompt resolution of these cases is important.” *Id.*

In describing the requisite pleadings-stage safeguards, the Court relied upon *Wards Cove v. Atonio*, 490 U. S. 642 (1989), in which it held that to sustain a disparate-impact case, a plaintiff must identify a specific policy of the defendant and adequately plead that such policy is the *cause of* the disparity. To distinguish meritless from meritorious claims, the Court

## The Supreme Court recognizes but limits disparate impact in its Fair Housing Act decision

directed lower courts to “avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations” into every FHA decision. Slip op. at 21. Thus, the Court held that a “racial imbalance does not, without more, establish a prima facie case of disparate impact,” and that a plaintiff can no longer maintain a disparate-impact claim by pleading a mere “statistical disparity.” *Id.* at 19-20. Disallowing claims where a plaintiff cannot establish a “robust” causal link to a defendant’s actual policies serves to eliminate suits seeking to hold a defendant liable for alleged racial disparities it “did not create.” *Id.* at 20. The Court held 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 20-21.

Additionally, the Court outlined the contours of an important defense to a plaintiff’s prima facie case, namely that “policies are not contrary to the disparate-impact requirement unless they are artificial, arbitrary, and unnecessary barriers.” *Id.* at 21. Businesses must be given “leeway to state and explain the valid interest served by their policies,” *id.* at 18, and should be able “to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system,” *id.* at 10.

Further, the Court cautioned, as it did in *Wards Cove* and *Ricci*, that when a defendant offers a legitimate business justification, a plaintiff cannot sustain a disparate-impact claim if it cannot prove “there is ‘an available alternative ... practice that has less disparate impact and serves the [entity’s] legitimate needs.’” *Id.* at 10. The Court’s decision appears to create a more lenient standard for defendants than the standard the federal government has proposed, in line with the Court’s holding in *Wards Cove*.

Finally, the Court held that “even when courts do find liability under a disparate-impact theory,” remedial orders must “concentrate on the elimination of the offending practice” through “race-neutral means.” *Id.* at 22. The Court appears to suggest that cases of this type should not be subject to punitive sanctions and penalties.

### Conclusion

While supporters of the disparate-impact theory may perceive the Court’s decision as a “win,” the decision imposes significant limitations on the application of the theory, which provide an important benefit to defendants in FHA cases. And the Court was clear in directing lower courts to root out frivolous claims early in FHA litigation. The Court’s limitations appear in tension with the U.S. Department of Housing and Urban Development’s description of the theory contained in its 2013 disparate-impact rule. We expect these issues to be played out in future litigation.

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