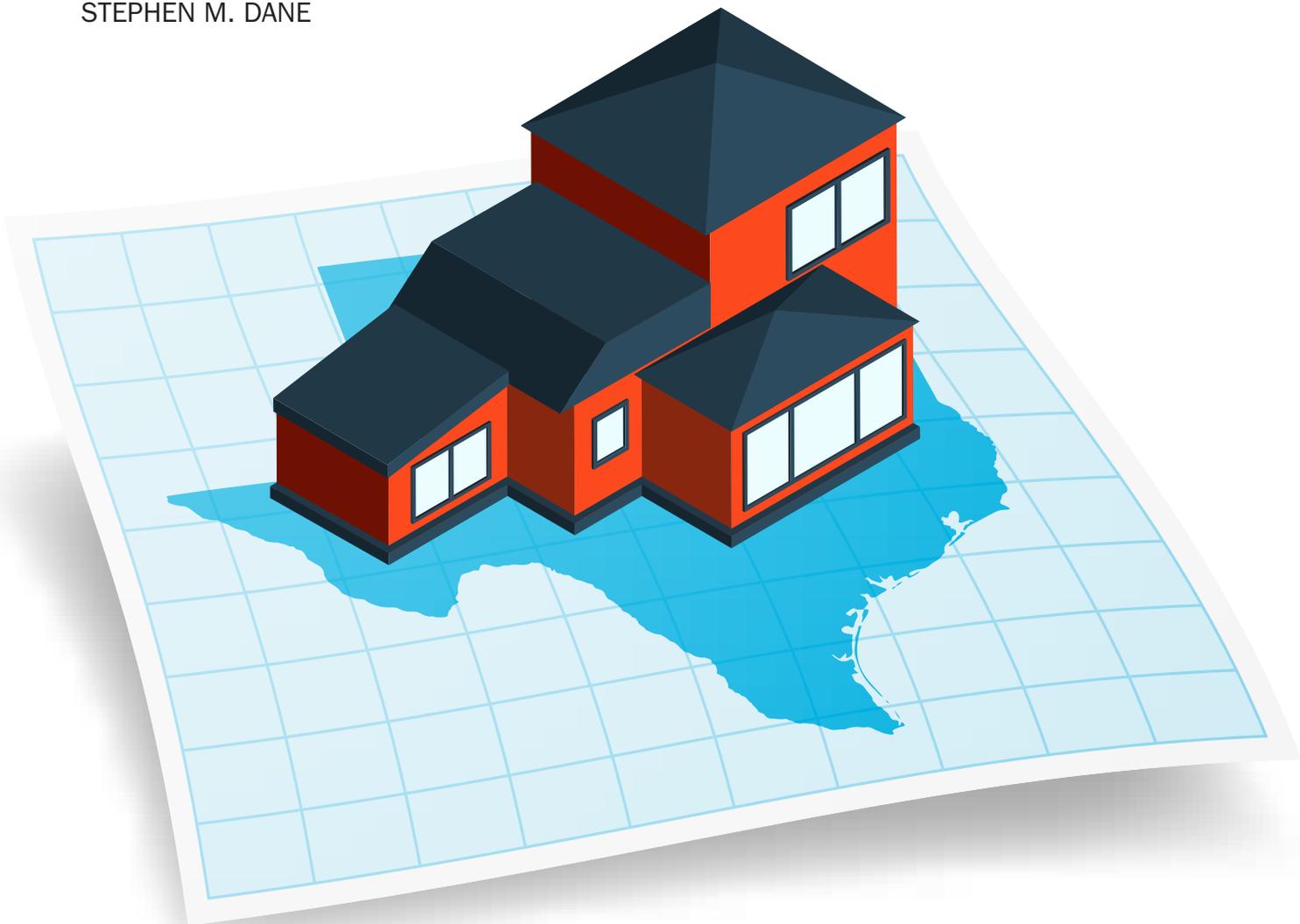


# The Potential **'Impact'** of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* On Future Civil Rights Enforcement and Compliance

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In one of its last decisions of the 2014–15 term, the U.S. Supreme Court issued a significant civil rights decision interpreting the federal Fair Housing Act. At issue in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*<sup>1</sup> was whether claims of “disparate impact” can be maintained under the Act. The Court concluded that Congress did indeed intend for the Act to be enforced with disparate impact claims, and that such claims are consistent with the Act’s central purpose, which includes the eradication of discriminatory practices “that function unfairly to exclude minorities ... without any sufficient justification.”<sup>2</sup>

Although disparate-impact claims have been successfully litigated under the Fair Housing Act for over 40 years in the lower courts, the Supreme Court’s strong endorsement of disparate-impact liability presages increased vigor by enforcement agencies, as well as the application of this theory of liability to emerging housing and lending practices.

### The Disparate Impact Paradigm

In contrast to a traditional claim of intentional discrimination, where a plaintiff must establish that the defendant had a discriminatory intent or motive, a plaintiff bringing a disparate-impact claim can challenge practices that have a disproportionately adverse effect on minorities or other protected classes and that are otherwise unjustified by a legitimate business or government rationale. Disparate impact is a method of proving discrimination without having to show that the discrimination was intentional.

As is common in other civil rights contexts, there is a “burden-shifting” process that is applied to assess the viability of such claims. First, the plaintiff must show that the challenged conduct, policy or practice disproportionately harms members of a group that is protected by the Fair Housing Act.<sup>3</sup> Second, the defendant may seek to prove that the challenged practice is justified by a legitimate, nondiscriminatory purpose. At the final stage of the analysis, the plaintiff may prove that despite any legitimate, nondiscriminatory purposes, the defendant could achieve its goal in a way that has a less discriminatory impact on the protected group.

### The Fair Housing Act

The Fair Housing Act was originally passed in 1968 and amended in 1988. It prohibits discrimination based on race, color, religion, national origin, sex, disability, and familial status in housing-related transactions. Its reach extends to the sale or rental of housing, lending and insurance practices, zoning, multifamily construction, and virtually any other residential real-estate-related activity.

As the Supreme Court noted in *Inclusive Communities*, the Act was enacted to eradicate discriminatory practices within the housing sector of our nation’s economy. There is a “clear national policy against discrimination in housing” and the Act “must play in important part in avoiding ... two societies, one black, one white—separate and unequal.”<sup>4</sup> The Court acknowledged the Fair Housing Act’s continuing role in moving the nation toward a more integrated society. Although the *Inclusive Communities* case itself involved claims of disparate impact based on race, there is no doubt that the disparate-impact methodology will apply to all protected classes.

### Potential Applications of Disparate-Impact Liability

The *Inclusive Communities* decision confirms that going forward, disparate impact will remain an important tool for combatting housing practices, while not motivated by bias, may nonetheless disproportionately harm protected groups. Here are some examples of where disparate-impact liability is being applied to enforce the Fair Housing Act:

- Zoning—Courts have historically applied disparate impact liability under the Fair Housing Act in cases targeting zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification.<sup>5</sup> The Supreme Court called this the “heartland” of disparate-impact liability.<sup>6</sup>
- Community redevelopment—As cities throughout the country experience a massive resettlement of their urban cores, they are rapidly seeking to redevelop formerly blighted areas. Because longtime residents of these areas are disproportionately black and Latino, redevelopment can have a disparate impact if it causes displacement.<sup>7</sup> Such cases may be brought against private developers as well as governmental entities.<sup>8</sup>
- Criminal background screening—There is an undeniable racial dimension to incarceration. African-Americans and Latinos are incarcerated at rates that are disproportionately higher than their numbers in the general population. Housing providers are increasingly insisting on criminal background checks as part of the rental screening process. These practices will see increasing scrutiny under the disparate impact paradigm.<sup>9</sup>
- Redlining and predatory lending—Long a staple of fair housing enforcement, mortgage lending policies and practices that adversely impact minorities, women and people with disabilities

will continue to be filed, both by private plaintiffs and government enforcement agencies.<sup>10</sup>

- Subsidized housing—In many communities, minorities and the disabled are disproportionately represented in the pool of eligible subsidized housing participants as compared to the community’s population as a whole. This can give way to a variety of disparate-impact claims. For example, subsidized housing waitlist preferences have been challenged on disparate-impact grounds.<sup>11</sup> Likewise, insurance company restrictions on coverage or pricing for landlords who rent to subsidized housing tenants have been successfully challenged.<sup>12</sup> Landlords who seek to withdraw from participation in subsidized housing programs may be subject to disparate-impact claims.<sup>13</sup>
- State and local immigration laws—To the extent local and state jurisdictions seek to manage immigrant populations with housing-related restrictions, the Fair Housing Act will be triggered. Any housing requirements having a disparate impact based on ethnicity, national origin, or race are subject to challenge.<sup>14</sup>

“Disorderly conduct” or “chronic nuisance” ordinances—Hundreds of jurisdictions across the country have nuisance laws that, because they are drafted broadly, have been applied to include police responses to domestic violence incidents. Such ordinances will often force landlords to take steps to evict affected tenants following a triggering number of police responses at the property, under threat of hefty fines or other penalties. These laws can have a clear disparate impact on women, who make up the very large majority of domestic violence victims.<sup>15</sup>

## Conclusion

The *Inclusive Communities* decision reaffirmed 40 years of lower court precedent applying the disparate-impact model to claims brought under the Fair Housing Act. But the broader impact of the decision will be to focus enforcement efforts more on policies and practices, both old and new, which create “artificial, arbitrary and unnecessary barriers” to equal housing opportunities. Local government lawyers, landlords, lenders, insurers and others subject to the Fair Housing Act are well advised to review their policies before being forced to do so by an enforcement action. ☉



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## Endnotes

<sup>1</sup>*Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015).

<sup>2</sup>*Id.* at 2521-2522.

<sup>3</sup>The U.S. Department of Housing and Urban Development has issued regulations defining the contours of disparate impact claims. 24 C.F.R. § 100.500(a) (2016).

<sup>4</sup>135 S. Ct. at 2525 (quoting Report of the Nat’l Advisory Comm’n on Civil Disorders (1968)).

<sup>5</sup>*Inclusive Cmty.*, *supra* note 1, 135 S. Ct. at 2522 (citing *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988) (holding that the town’s zoning restrictions against multifamily housing had an unlawful adverse racial impact and perpetuated segregation)); *Greater New Orleans Fair Hous. Action Ctr. v. Saint Bernard Parish*, 641 F. Supp. 2d 563 (E.D. La. 2009).  
<sup>6</sup>135 S. Ct. at 2522.

<sup>7</sup>*See, e.g., Mount Holly Gardens Citizens in Action Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013); *cert. dismissed*, No. 11-1507, 2013 WL 6050174 (U.S. Nov. 15, 2013).

<sup>8</sup>*See, e.g., Crossroads Residents Organized for Stable & Secure Residencies et al. v. MSP Crossroads Apartments LLC et al.*, No. 0:16-cv-00233 (D. Minn.) (plaintiffs, mostly low-income tenants, challenge a private housing provider’s plan to “reposition the complex in the market in order to appeal to and house a different [young professional] tenant demographic population.” *See* Compl. (Doc. 1), ¶ 1; *id.* ¶¶ 49-59, 68-71 (disparate impact allegations)).

<sup>9</sup>*See, e.g., Fortune Soc’y Inc. v. Sandcastle Towers Hous. Dev. Fund Corp.*, Case No. 1:14-cv-06410 (E.D.N.Y., filed Oct. 30, 2014).

<sup>10</sup> *See, e.g.,* Compl. for Declaratory & Inj. Relief & Damages, *City of Baltimore v. Wells Fargo*, No. 08-062 (D. Md. Jan. 8, 2008); *Ramirez v. GreenPoint Mortgage Funding Inc.*, 633 F. Supp. 2d 922 (N.D. Cal. 2008).

<sup>11</sup>*See, e.g., Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000).

<sup>12</sup>*Viens v. American Empire Surplus Lines Ins. Co.*, 113 F. Supp. 3d 555 (D. Conn. 2015).

<sup>13</sup>*Graoch Assocs. #33 LP v. Louisville/Jefferson County Metro Human Relations Comm’n*, 508 F.3d 366 (6th Cir. 2007).

<sup>14</sup>*See Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165 (M.D. Ala. 2011), *vacated as moot*, No. 11-16114, 2013 WL 2372302 (11th Cir. May 17, 2013).

<sup>15</sup>*Briggs v. Borough of Norristown*, No. 2:13-cv-2191 (E.D. Pa. 2013); *see* [www.aclu.org/cases/briggs-v-borough-norristown-et-al](http://www.aclu.org/cases/briggs-v-borough-norristown-et-al) (last updated Sept. 18, 2014).