

# U.S. Supreme Court Upholds Disparate-Impact Claims in Fair Housing Act Cases

Article By:

Real Estate Practice Group at Wilson Elser

---

On June 25, 2015, in ***Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project***, the **U.S. Supreme Court** held that a plaintiff may establish a *prima facie* case under the **Fair Housing Act** (FHA) on the basis of statistical evidence that a governmental policy causes a disparate impact, without proof that the discrimination was intentional. The case, involving the allocation of low-income housing tax credits. But Justice Kennedy's opinion for the 5-4 majority (Chief Justice Roberts and Justices Scalia, Thomas and Alito dissented), made it clear that the Court's analysis extended to any claim under FHA, including claims based on local land use regulation. In fact, Justice Kennedy pointed directly at “zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification,” commenting that suits “targeting such practices reside at the heartland of disparate-impact liability.”

## The Court's Analysis

The effect of this is that bringing an FHA claim reverses the usual burden of proof in challenging the substance of a land use regulation. The FHA makes it unlawful to “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). Basically, applying the employment discrimination analogy, if the plaintiff adequately pleads statistical evidence that a local government policy has caused a disparity in housing patterns along lines protected by the statute, the burden shifts to the defendant to justify the regulation.

In the context of land use regulation, this analysis reverses the burden of proof in challenging the substance of a land use regulation. In a traditional substantive due process challenge, there is a heavy burden on the plaintiff to overcome the presumption of constitutionality and establish that the regulation is irrational. Now, in an FHA case, where the plaintiff can establish that there is disparate impact, the local government has to prove that the regulation is rational.

## The Causation Requirement

The causation requirement, however, may be a significant factor in limiting claims here, or at least defeating them at an early stage. Establishing that a local land use regulation has caused a particular racial or ethnic housing pattern is far more complicated than demonstrating the linkage in an

---

employment discrimination case between an allegedly discriminatory policy and the statistical disparity in employment.

In addition, Justice Kennedy emphasized the importance of the causation requirement: “a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity.” Further, the plaintiff must satisfy the causation requirement at the pleading stage. “A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a *prima facie* case of disparate impact.” While the liberality of federal pleading standards suggests that it will not be difficult for a plaintiff to overcome this burden, Justice Kennedy’s opinion certainly provides a basis for a vigorous defense on causation at the earliest stages of the litigation.

## The Business Necessity Defense

Even where there is sufficient proof of the statistical disparity *and* causation, the local government can still defend on the basis of the land use analogue of the “business necessity” defense against disparate-impact liability available under Title VII. “Governmental or private policies are not contrary to the disparate-impact requirement unless they are ‘artificial, arbitrary, and unnecessary barriers.’” Justice Kennedy recognized in his opinion that the factors that traditionally sustain land use regulations will not be ignored in the context of an FHA claim. “Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community’s quality of life and are legitimate concerns for housing authorities.” As Justice Kennedy stated further: “Disparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies.”

Critically, the burden on the local government under an FHA case will not be as substantial as it is in a First Amendment case. The Supreme Court affirmed the order of the United States Court of Appeals for the Fifth Circuit, including its holding that it was error for the District Court to require the defendant to prove “that there are no other less discriminatory alternatives to advancing their proffered interests.”

## Summary

How these issues will play out as FHA disparate-impact litigation spreads across the country is unclear. Certainly, where the statistics are favorable, this decision makes it much easier for a plaintiff to survive a motion to dismiss and perhaps even a motion for summary judgment. Costly trials will be inevitable until the courts work out more precisely how the burden-shifting works in this context. What standards the courts adopt for pleading causation will be critical. As *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928), teaches, causation is hard enough to analyze even in the context of a discrete incident. But how does one prove – or disprove – that a particular governmental policy caused hundreds or thousands of residents to reside or not reside in a particular locality? Also unclear, although we know that the traditional justifications for zoning laws – traffic and environmental issues and even community character – will support a defense, is what level of justification the courts will require.

Source URL: <https://natlawreview.com/article/us-supreme-court-upholds-disparate-impact-claims-fair-housing-act-cases>