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The Power of the Supreme Court's Decision in the Fair Housing Act Case, *TDHCA v. ICP*

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Courts and commentators will have much more to say about the significance of the U.S. Supreme Court's June 25, 2015 decision in Texas Department of Housing and Community Affairs v. Inclusive Communities Project (*TDHCA v. ICP*). I believe it makes three enormously important contributions to the law and policy governing housing discrimination and segregation.

The three contributions regard residential racial segregation, disparate impact, and the Low Income Housing Tax Credit program. Although the case went to the Supreme Court as a challenge to disparate impact as a basis for liability and usually is discussed in that context, I think the ruling's implications for residential racial segregation are even more important, so I discuss those first.

1. Residential Racial Segregation

The opinion does three important things with respect to residential racial segregation: it identifies integration as a purpose of the Fair Housing Act (FHA); it indicts federal, state, and local governments for causing and exacerbating residential racial segregation; and it affirms the obligation to advance integration.

The Fair Housing Act does not use the words "integration" or "segregation." The legislative history, early Supreme Court decisions, and many opinions from the courts of appeals identify residential racial integration as a purpose of the statute, but there has not been a recent Supreme Court acknowledgment of this. This decision provides that acknowledgment and reaffirmation.

The Court underscores the contemporary significance of the Kerner Commission report, which "identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of . . . social unrest" and "found that both open and covert racial discrimination prevented black families from . . . moving to integrated communities." (Slip opinion 6.) The Commission recommended enactment of a fair housing act "[t]o reverse '[t]his deepening racial division' . . . ." (Sl. op. 6.) Congress enacted the FHA "to resolve the social unrest in the inner cities." (Sl. op. 7.) The Court concluded its opinion by writing of our "striving to achieve our 'historic commitment to creating an integrated society," admonishing (Sl. op. 24, emphasis added):

> The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." . . . . *The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society*.

The Court also acknowledges the role of federal, state, and local governments in creating this racial division. On this point, even the dissent agrees, citing "the country's shameful history of segregation and *de jure* housing discrimination . . . ." (Dissent of Justice Alito, Sl. op. 10.) The majority's review cites work by Michael Klarman, Kenneth Clark, and a group of Housing Scholars who filed a brief *amici curiae* in the case.

The Court says that the FHA makes unlawful "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification." (Sl. op. 17.) Indeed, the Court states that "[s]uits targeting such practices reside *at the heartland* of disparate-impact liability" and cites three archetypal cases in which Huntington, NY, Black Jack, MO, and St. Bernard Parish, LA were held liable for such practices. (Sl. op. 17, emphasis added.) The Court says that the FHA enables litigants "to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment," to "stop . . . municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units," to "prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping." (Sl. op. 17-18.)

The Court notes that while *de jure* residential racial segregation has been declared unconstitutional, "its vestiges remain today, intertwined with the country's economic and social life."

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We may hope that the Supreme Court's opinion in* TDHCA v. ICP *will lead these agencies affirmatively to obey the command of the Fair Housing Act before that statute marks its 50th anniversary.

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(Sl. op. 5.) The Court's eloquent conclusion warns that "Much progress remains to be made in our Nation's continuing struggle against racial isolation." (Sl. op. 24.) Recent events in Ferguson, Baltimore, Charleston, and many other places have illuminated this tragic truth. Recent studies from Harvard, Stanford, Minnesota, and elsewhere have demonstrated the devastating impact of segregated neighborhoods and the life-enhancing advantages of inclusionary land use in high opportunity areas. The Court puts itself on the "right side of history" by re-invigorating "our 'historic commitment to creating an integrated society'" and insisting that the "FHA must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white – separate and unequal.'" The last substantive line of the Court's opinion is a call to action for advocates: "The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society." (Sl. op. 24.)

2. Disparate Impact

The petition that asked the Supreme Court to grant *certiorari* in this case presented two questions: are disparate impact claims cognizable under the FHA and, if they are, "what are the standards and burdens of proof that should apply?" The Court granted *cert.* on the first question only.

All the federal Article III courts of appeals that had considered this question—eleven of the twelve —had held disparate impact cognizable under the FHA. The U.S. Department of Housing and Urban Development had recently issued a regulation recognizing disparate impact as cognizable under the FHA. Nonetheless, the Supreme Court granted *cert.* in this case, as it had in two earlier disparate impact cases where petitions had been dismissed by the parties.

Given this background, the Supreme Court's holding that the FHA encompasses disparate impact claims is a welcome confirmation for civil rights advocates. It is especially significant that the Court's decision rested on an interpretation of the statute, not on deference to the HUD regulation. The Court's holding relied on the FHA's "results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA [Age Discrimination in Employment Act], Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose." (Sl. op. 23.)

An important aspect of the opinion is the recognition that the disparate impact standard helps to identify intentional discrimination that is not overt. As the Court says, disparate impact liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." (Sl. op. 17.) The decision's recognition of "unconscious" or implicit bias will enable advocates to "prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping." (Sl. op. 18.)

The Court had not agreed to decide the question about what standards or burdens of proof should apply in disparate impact cases. The Fifth Circuit Court of Appeals had held that the district court should apply the burden-shifting standards in the HUD regulation. The Supreme Court, quoting the employment discrimination standard, said that "Disparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers' . . . " so that governmental priorities "can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation." (Sl. op. 18.) Plaintiffs must "allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection" between the defendants' policy or policies and the disparity. (Sl. op. 20, 21.) Defendants have to "state and explain the valid interest served by their policies" (Sl. op. 18) and must "prove [each policy] is necessary to achieve a valid interest." (Sl. op. 19.) This seems to me a restatement of existing law —the consensus of the courts of appeals in FHA cases and the HUD regulation. On remand in this case and in other cases, the courts will sort out whether this is the case.

3. The Low Income Housing Tax Credit Program

The third aspect of the decision that seems to me very important is its implications for the Low Income Housing Tax Credit (LIHTC) program, the largest subsidized housing production and rehabilitation program in the United States. The Court said that "this case involves a novel theory of liability." (Sl. op. 18, citing Seicshnaydre, Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act, 63 Am. U. L. Rev. 357, 360-363 (2013).) Studies of the LIHTC program elsewhere have shown the same pattern as that of which ICP complains in this lawsuit: a disproportionate allocation of tax credits for family units to minority-concentrated, high-poverty, under-resourced neighborhoods with substandard schools, environmental hazards, inadequate employment opportunities, unsafe and unhealthy conditions. (See, Affordable Housing, Racial Isolation, Editorial, *The New York Times*, June 29, 2015.) State housing finance agencies administer the LIHTC program under the jurisdiction of the Department of the Treasury. Treasury, HUD, and the state housing agencies are obligated to eschew actions that discriminate against minorities and actions that perpetuate segregation; they also are obligated by the FHA affirmatively to further the policies and purposes of the FHA, which include "moving toward a more integrated society." (Sl. op. 24.)

Advocates for inclusionary housing policies should make strong use of this Supreme Court opinion to induce local, state, and federal agencies to take

effective action "to achieve our 'historic commitment to creating an integrated society' . . . ." (Sl. op. 24.) In this process, "race may be considered in certain circumstances and in a proper fashion." (Sl. op. 22.) The Supreme Court has encouraged "private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units." (Sl. op. 17.) When state and local governments block developers' proposals for family LIHTC developments in high opportunity areas, those agencies will have "to state and explain the valid interest served by their policies." (Sl. op. 18.) They must "prove [the policy] is necessary to achieve a valid interest." (Sl. op. 19.) Merely uttering the word "revitalization" will not satisfy the LIHTC statute's reference to housing that contributes to "a concerted community revitalization plan." As the district court in this case indicated in its remedial order, the FHA counsels endorsement of family units in "neighborhoods with good schools and disqualifi[cation of] sites that are located adjacent to or near hazardous conditions, such as high crime areas or landfills." (Sl. op. 3.) As advocates press these points with government agencies, we may hope that the Supreme Court's opinion in *TDHCA v. ICP* will lead these agencies affirmatively to obey the command of the Fair Housing Act before that statute marks its 50th anniversary. ❑

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change the demographics of the classroom or school. This concern could also be diminished if No Child Left Behind requirements continue to be weakened or if the reauthorization of ESEA focused more attention on diversity goals.

- Rather than the current punitive labels, accountability systems could reward districts and schools for taking steps to becoming more diverse and improving regional equity. This may mean providing some reprieve for districts and schools that receive students in terms of labeling and sanctions or it could mean providing schools that have intentionally targeted attracting diverse populations with a special designation as a "Diversity School." Providing this designation on students' high school transcripts may provide an advantage in an increasingly competitive college admissions environment and could potentially attract both urban and suburban families.

Concluding Thoughts

The programs that we studied have worked hard, often against strong political and educational pressures, to reduce inequities related to educational access and opportunity in their metropolitan areas, though none have been able to stem the tide of growing racial and socio-economic inequality. As a result, at this point in time, state or federal policy action is critical to not only support these policies across the country but also to foster the creation of similar efforts in other metropolitan areas. Importantly, it is only with the intentional focus on policies that foster regional educational equity both through schooling as well as through broader policies to reduce racial and socioeconomic isolation of families (i.e., through affordable housing, equitable transit and workforce development) that the urban school "crisis" can be addressed, and that opportunity can be improved for all youth. ❑

Resources

Most Resources are available directly from the issuing organization, either on their website (if given) or via other contact information listed. Materials published by PRRAC are available through our website: www.prrac.org

Race/Racism

- "**Black Girls Matter: Pushed Out, Overpoliced, and Underprotected"** (2015, 29 pp.), by Kimberlé Williams Crenshaw, with Priscilla Ocen and Jyoti Nanda, for the African American Policy Forum & Center for Intersectionality and Social Policy Studies. Available at www.aapf.org

- "**Spotlighting the Work of Women in the Civil Rights Movement's Freedom Rides**" By Anna Holmes appeared in the June 2, 2011 *Washington Post*. Holmes provides a detailed narrative of SNCC's journey. The article can be found at portside.org

- "**A Social and Racial Justice Press by People of Color**" has been launched by Justice Matters Press. More information can be found at justicematters.press

- "**Black Lives Matter**" by Resist examines the Black Lives Matter movement, social impact, and vision for the future. More information can be found at resist.org

- **"Photographing Freedom: A Photographic Memoir of the Civil Rights Movement":** Inf. from