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If the Supreme Court Bans the Disparate Impact Standard it Could Annihilate One of the Few Tools Available to Pursue Housing Integration

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The U.S. Supreme Court could be on the verge of issuing a major setback to racial integration efforts. It will soon hear oral arguments regarding whether the federal government and states can pursue policies that perpetuate or exacerbate racial segregation in housing but that cannot be proven to have been designed with a racially discriminatory purpose. Federal appeals courts have consistently held that such policies should be prohibited if they have a “disparate impact” on minorities—if the consequence is segregation, even if no conscious intent to segregate can be proven. The Supreme Court may rule otherwise.

The segregation of low-income minority families into economic and racial ghettos is one cause of the ongoing achievement gap in American education. Students from low-income neighborhoods, where parents themselves typically have less education, are exposed to less literacy at home and so come to school less prepared to take advantage of good instruction. If they live in more distressed neighborhoods with more crime and violence, they come to school under stress that interferes with learning. When such students are concentrated in classrooms, even the best of teachers must spend more time on remediation and less on grade-level instruction.¹

The case before the court, *Inclusive Communities Project v. Texas Department of Housing and Community Affairs*, is important because the U.S. Supreme Court has increasingly made it more difficult to fight segregation in many areas of American life, requiring civil rights plaintiffs in most instances to prove that defendants consciously intended to discriminate. For example, the court has effectively ended its enforcement of elementary and secondary school desegregation by ruling that racially homogenous and isolated schools don’t violate the constitutional principles of *Brown v. Board of Education*, unless school districts purposely assign African American students to separate and inferior schools — if not by explicit ordinance, then by provable intent. When it comes to the Fair Housing Act, however, civil rights groups and the Department of Housing and Urban Development (HUD) have continued to insist that even when the intent to discriminate is not present or provable, housing policies are prohibited by law if they have a disparate impact on minorities by perpetuating minorities’ isolation. Whether a conservative majority of the Supreme Court prevents such enforcement of housing legislation by applying the narrow “intent” requirement of its radical constitutional theory will be decided in this case.

The lawsuit concerns the Low-Income Housing Tax Credit program (LIHTC) with which the federal government subsidizes construction of low-income housing nationwide by issuing tax credits to developers who build affordable rental apartments. The LIHTC has become the most important federal program to develop housing for lower-income families. But it has reinforced racial segregation in many metropolitan areas as developers propose, and state governments then approve, placement of a disproportionate share of LIHTC-financed family housing in low-income and minority neighborhoods.²

Defenders of the practice of placing LIHTC projects in disadvantaged neighborhoods contend (with some support in the LIHTC legislation itself) that it is easier to attract tenants by placing new units close to where they already live, and that such projects help revitalize slum neighborhoods.

But there is no evidence that placing more low-income housing in low-income minority neighborhoods has contributed to revitalization.³ Revitalizing low-income neighborhoods requires, at the least, bringing in mixed-income housing so that the resulting neighborhood is truly integrated and minority children can then go to integrated schools where their achievement can rise. But when developers have claimed to use LIHTC subsidies to “revitalize” neighborhoods,

what they have most frequently meant is bringing more low-income (though newly constructed) housing to an already impoverished community, reinforcing its segregation.

The convenience of locating LIHTC projects in segregated neighborhoods is no reason to ignore the provisions of the Fair Housing Act of 1968. The act not only prohibits racial discrimination in housing but also requires recipients of federal funds to “affirmatively further” fair (i.e., integrated) housing in their communities. The Fair Housing Act does not permit neighborhood revitalization strategies that encourage more low-income and minority families to live in low-income and minority neighborhoods.

In 2008, the Inclusive Communities Project (ICP), a Dallas civil rights group, sued the state of Texas, claiming that the operation of the LIHTC program in Dallas violated the Fair Housing Act. ICP had been attempting to promote racial integration in the Dallas area by helping African American families who were eligible for rent subsidies (commonly known as “Section 8” vouchers) find affordable apartments in predominantly white neighborhoods. This was difficult because so many of the tax-subsidized family housing developments approved by the Texas Department of Housing were located in heavily minority and low-income communities.

The ICP complaint showed that in the city of Dallas, 92 percent of all LIHTC units for families are in census tracts where more than half of the residents are minority and 85 percent are in neighborhoods where at least 70 percent of residents are minority. Predominantly white neighborhoods contain 19 percent of all rental units in the city of Dallas, but only 3 percent of LIHTC units.⁴

Dallas is an extreme example of a nationwide pattern whereby the LIHTC apparently operates to perpetuate and sometimes to exacerbate segregation. A survey in the mid-1990s found that over half of LIHTC units were placed in inner-city neighborhoods, with only one-quarter placed in suburbs. Of the inner-city units, three-fourths were in census tracts where half of the households were low-income (i.e., below 80 percent of the area’s median income); half were placed in tracts where more than half of the residents were minority. Even when LIHTC projects were placed in suburbs, half were placed in low-income neighborhoods and 20 percent were in neighborhoods where more than half of the residents were minority.⁵

More recent analyses conclude that things have not improved much, if at all, since the earlier survey. A review of the program’s metropolitan area placements through 1999 found that 43 percent of LIHTC family housing units were located in high-minority neighborhoods (compared with 22 percent of all housing units that were located in such neighborhoods). This pattern didn’t increase segregation—it might even have diminished it a bit—because tenants in these projects would have been even more likely to live in high-minority neighborhoods were it not for the LIHTC program. But not increasing segregation is a low standard by which to judge the LIHTC program. It should affirmatively further integration, not leave segregation in place.⁶

Another analysis, covering LIHTC units completed through 2005, found that about three-fourths were placed in neighborhoods where poverty rates were at least 20 percent. These are very disadvantaged neighborhoods. Census tracts with poverty rates of 20 percent or more are likely also to have large numbers of households with very low incomes, even if not below the official poverty line. The study looked at the 46 states that have large metropolitan areas, and where in those metro areas the states placed their LIHTC units. Thirty-one of the 46 states placed a higher proportion of their LIHTC family units in relatively poor neighborhoods (where the poverty rate was at least 10 percent) than the

proportion of all family rental units in such poor neighborhoods. Thirty-nine of the 46 states placed a majority of their LIHTC family units in census tracts where the minority population was greater than that of the metropolitan area as a whole.⁷

It is possible that these analyses understate the extent to which the LIHTC program perpetuates segregation. Many inner-ring suburbs today are in transition from predominantly white and middle class to predominantly minority and low income, as urban redevelopment projects and the demolition of public housing have forced low-income and minority families to search for new accommodations in the suburbs. If LIHTC units are being placed in such temporarily integrated communities, point-in-time analyses will not capture whether, over time, they are contributing to segregation. Recent events in Ferguson, Missouri, have called attention to this demographic shift.⁸

If families eligible for LIHTC housing were allowed to be more widely dispersed throughout metropolitan areas, including in predominantly white and middle-class neighborhoods, their children could more frequently attend integrated schools where resources (such as teacher time) exist to compensate for the disadvantages these children face and make their ultimate success more likely. When disadvantaged children live in neighborhoods where they can attend integrated schools, their achievement rises,⁹ without any harmful effects for middle-class children in those schools.

In response to the ICP complaint that Texas perpetuates segregation in its LIHTC program, a federal district court in Dallas found that the Texas Department of Housing had not intentionally discriminated; it was simply the case that the eligible projects that developers proposed were in minority communities and the Texas Department approved the projects as presented if they met financial and design guidelines. But the lower court also found that the Fair Housing Act had been violated because the placement of LIHTC units had a disparate impact on minorities, i.e., it perpetuated racial segregation, even if there was no proof that segregation was the explicit intent of developers and government officials. The federal appeals court upheld these conclusions.

Housing developers and other supporters of the racial status quo in metropolitan housing patterns have long sought a case like this that might give the Supreme Court a chance to end the use of disparate impact as a standard. Continued (or greater) enforcement of a disparate impact standard could prevent developers from building subsidized apartments where they choose—because land might be cheaper or community opposition might be less in ghetto neighborhoods, for example.

The procedures of the Texas Department of Housing illustrate why the disparate impact standard is necessary to prevent seemingly nonracial policies from perpetuating segregation. The department can consider various factors in awarding its annual allotment of federal tax credits. Although it can give favorable consideration to proposals to build in “high opportunity” (e.g., low-poverty) neighborhoods, it can also give favorable consideration to proposals in low-income census tracts where many potential tenants already live. This factor is permitted by a provision in the federal LIHTC legislation, undermining the Fair Housing Act’s requirement that such programs affirmatively further integration. The Texas Department of Housing also gives extra consideration to proposals for housing in tracts where there is community support for low-income housing, illustrated by advocacy of neighborhood organizations and of the local state senator or representative. Permitting these considerations virtually invites middle-class opponents of integration to scuttle possible location of low- or moderate-income housing in their neighborhoods.

Opponents of the disparate impact standard have brought two previous cases to the Supreme Court, but they were withdrawn or settled by the parties before the Supreme Court had a chance to rule. Civil rights advocates fear that with the court now having another chance to decide such a case, it will use the opportunity to ban the disparate impact standard and annihilate one of the few tools available to pursue housing integration.

A case that went to the Supreme Court in 2013, but was settled before a ruling, originated in New Jersey and involved an urban renewal project that razed a low-income mostly black neighborhood. The project had the effect of forcing displaced residents to relocate to other segregated neighborhoods because it provided inadequate assistance for those families to find new housing in integrated communities. In that case, *Township of Mount Holly, et al. v. Mt. Holly Gardens Citizens in Action, Inc., et al.*, the Economic Policy Institute, in collaboration with the Haas Institute for a Fair and Inclusive Society, and the Chief Justice Earl Warren Institute on Law and Social Policy, both at the University of California, Berkeley, organized a group of historians and other social scientists to file a supporting brief to the Supreme Court.¹⁰

With the Dallas ICP lawsuit now also going to the Supreme Court, EPI and the Haas Institute have prepared another amicus brief of historians and other social scientists in support of the ICP claim.¹¹

Oral argument in the case is scheduled at the Supreme Court for January 21.

Our brief makes the following argument: Historically, the federal, state, and local governments have, in concert with one another and with private interests, acted to purposely segregate metropolitan areas by race. Once these patterns of segregation were established by deliberate racial policy, placement of federally subsidized housing (to be occupied predominantly by minority tenants) in already segregated neighborhoods unlawfully reinforces this segregation, even if Jim Crow policies are no longer in effect and no purposeful intent to segregate can be proven to motivate contemporary federally subsidized housing placement decisions. In other words, placement of LIHTC housing in racially isolated neighborhoods has a disparate impact on minority tenants' right to desegregation, in violation of the Fair Housing Act. We also argue that it is unlawful for government agencies simply to respond to developer proposals without considering their racial impact, because the Fair Housing Act requires these agencies to affirmatively pursue integrated housing. As our brief recounts, a much earlier (1972) Supreme Court decision stated that the FHA's main purpose is to "replace ghettos 'by truly integrated and balanced living patterns.'" This purpose would be improperly repudiated if the Supreme Court were now to prohibit the disparate impact standard.

Our brief includes unique time-series maps, prepared by the Haas Institute, showing how the segregation of the Dallas metropolitan area persists into the present.

In addition to Lawrence Mishel, president of EPI; Christopher Edley, faculty director of the Warren Institute; and Stephen Menendian, assistant director of the Haas Institute; signatories to our amicus brief in the ICP case include notable historians and social scientists such as Elizabeth Anderson, Kendra Bischoff, John Brittain, Nancy Denton, Erica Frankenberg, Colin Gordon, Ian Haney-Lopez, Ira Katznelson, James Loewen, Myron Orfield, Beryl Satter, Patrick Sharkey, Gregory Squires, and others.

A history of the ICP case, including the initial ICP complaint and the lower-court decisions, are available at the website of the Poverty and Race Research Action Council.¹² Our amicus brief of historians and social scientists is posted on the EPI website.¹³

That the Supreme Court agreed to hear this case is an ominous development. The court's role is usually, and properly, to resolve disputes between federal appeals courts. In this case all 11 of the federal appeals courts that have heard cases like this have upheld the disparate impact standard. Thus, there is no benign explanation for the Supreme Court's agreement to decide the ICP case.¹⁴

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