

EDITORIAL

The Supreme Court Keeps the Fair Housing Law Effective

By The Editorial Board

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Housing discrimination doesn't have to be intentional to be illegal. That is the point of the Supreme Court's ruling on Thursday interpreting the Fair Housing Act of 1968 in accord with clear congressional intent, and preserving a well-established and critical tool in the long-running battle to ensure a more integrated society.

By a vote of 5-4, Justice Anthony Kennedy, joined by the four more liberal justices, ruled that the law allows plaintiffs to challenge government or private policies that have a discriminatory effect, without having to show evidence of intentional discrimination.

Explicit, legally sanctioned racial segregation in housing may be over, Justice Kennedy wrote, but "its vestiges remain today, intertwined with the country's economic and social life." From discriminatory lending practices to zoning laws that favor higher-income home buyers, persistent patterns work to hurt minorities and other vulnerable groups the law was written to protect.

And over the long term, the effects of housing segregation can alter future incomes and opportunities. A Harvard study released in May found that young children whose families had been given housing vouchers that allowed them to move to better neighborhoods were more likely to attend college — and to attend better colleges — than those whose families had not received the vouchers. The voucher group also had significantly higher incomes as adults.

The current case, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, involved a dispute over whether housing for lower-income, mostly black residents in Dallas should be built in the inner city or in the suburbs. The federal government provides tax credits to encourage developers to build such housing,

and a Texas group that favors racially integrated housing complained that Texas was giving out too many of those credits to developers to build in poor neighborhoods. The group sued under the fair-housing law, which makes it illegal to refuse to sell, rent “or otherwise make unavailable” housing to anyone because of race, sex or other protected categories.

This wording, Justice Kennedy wrote, tracks other civil rights laws that the court has found to prohibit racially disparate impacts, even if a challenged policy appears race-neutral.

As he explained, “Congress’s use of the phrase ‘otherwise make unavailable’ refers to the consequences of an action rather than the actor’s intent” and this “results-oriented” language supports disparate-impact liability. Recognition of such liability, he added, also plays a crucial role in uncovering discriminatory intent by allowing plaintiffs to challenge unconscious or disguised prejudices and prevent segregated housing patterns that result from those biases.

This has been the accepted meaning of the fair-housing law for decades. Since the act was passed in 1968 as the last major piece of the country’s civil-rights legislation, every federal appeals court in the country has read it to permit claims of discriminatory effect. When Congress amended the law in 1988, it did not question that unanimous interpretation.

In dissent, Justice Samuel Alito Jr., joined by Chief Justice John Roberts Jr. and Justices Clarence Thomas and Antonin Scalia, warned that the majority’s ruling would discourage programs intended to help lower-income people get better housing.

But as Justice Kennedy explained, a claim of discriminatory impact is only the first step in getting redress. People who bring fair-housing lawsuits still must show a “causal connection” between the challenged policy and the discriminatory effect. And government officials or private businesses can overcome a challenge by showing that there is a legitimate business reason for the policy or practice, and that there is not a less discriminatory alternative.

The broad interpretation of the fair-housing law endorsed by the court on Thursday has been a big part of the law’s success. “Against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse,” Justice Kennedy wrote, but he also acknowledged that “much progress remains to be made in our Nation’s continuing struggle against racial isolation.” Keeping the Fair Housing Act responsive to discrimination in all its forms is critical to that progress.

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