

Causality, Causation, Chaos

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Disparate Impact Framework



(1) Does the housing practice have a discriminatory effect?

* Actually or predictably results in a disparate impact/perpetuates segregation

(2) Is there a legally sufficient justification?

* *Practice is necessary to achieve a substantial, legitimate, non-discriminatory interest; not hypothetical or speculative*

(3) Could the interest be served in a less discriminatory way?

24 C.F.R. § 100.500(a), (b)

Disparate Impact Framework cont'd

*Complainant/plaintiff “has the burden of proving that the challenged practice **caused or predictably will cause a discriminatory effect.**”*

24 C.F.R. § 100.500(c)(1)



Causation Before *ICP*

“Typically . . . demonstrated by statistics.” *Hallmark Developers, Inc. v. Fulton Cty.*, 466 F.3d 1276 (11th Cir. 2006).

Emblematic cases demonstrating causation analysis:

- **Challenged zoning ordinance that limited availability of affordable housing; African-Americans were overrepresented in the population eligible for affordable housing.** *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988).

Causation Before *ICP*, cont'd

- **Challenged ordinance that banned multifamily housing; African-Americans were twice as likely as whites to live in multi-family housing.** *Greater New Orleans Fair Hous. Action Ctr. v. Saint Bernard Parish*, 641 F. Supp. 2d 563 (E.D. La 2009).
- **Municipality provided slower rates of law-enforcement personnel response to unannexed urban islands; these neighborhoods were disproportionately Latinx.** *The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2011).

***Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive
Cmtys. Project, 135 S. Ct. 2507 (2015)***

“Robust causality requirement” – *ICP*

- “A **robust causality requirement** is important in ensuring that defendants do not resort to the use of racial quotas. Courts must therefore examine with care whether a plaintiff has made out a prima facie showing of disparate impact, and prompt resolution of these cases is important. Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are “artificial, arbitrary, and unnecessary barriers.” *Griggs*, 401 U.S., at 431, 91 S.Ct. 849. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision. These limitations are also necessary to protect defendants against abusive disparate-impact claims.”

Making Sense of Robust Causality

Making sense of “robust causality”

- Term appears zero times in pre-*ICP* case law.
- Many courts have continued to assess causation by asking (1) who is adversely affected by the challenged practice, and (2) is a protected classification overrepresented in that group?
 - *NFHA v. Travelers Indemnity Co.*, 261 F. Supp. 3d 20 (D.D.C. 2017)
 - *de Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415 (4th Cir. 2018)
 - *City of Los Angeles v. Wells Fargo & Co.*, 691 F. App'x 453 (9th Cir. 2017)

Oviedo Town Ctr. II, L.L.P. v. City of Oviedo

- District court errors:
 - Plaintiffs had to show the practice “affected racial minorities differently than non-minorities.”
 - “Robust causality requirement” heightened a disparate impact plaintiff’s burden.
 - Plaintiffs had to show the city was **responsible for** the racial disparities in the population of apartment residents who would be affected by the challenged practice.
 - Plaintiffs could not prevail because “racial imbalance is endemic to affordable housing.”

Oviedo Town Ctr. II, L.L.P. v. City of Oviedo

- More district court errors:
 - No disparate-impact liability if affordable housing was available elsewhere in the City
 - Proximate causation
 - Zone of interests



Proximate Causation – a New FHA Requirement?

Proximate Causation

- *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017)
 - Injury at issue = city's lost property-tax revenue and increased municipal expenses
 - Required inquiry: Do these losses have a close enough connection to the conduct the FHA prohibits?
 - Proximate causation is about more than foreseeability → “some direct relation” between the injury asserted and the injurious conduct alleged.

