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### **Winfield v. City of New York: Testing the Limits of Disparate-Impact Liability after Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.**

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# Winfield v. City of New York: Testing the Limits of Disparate-Impact Liability after *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*

Andrea McArdle

I. Introduction .....	287
II. The Tension in <i>ICP</i> : Reducing the Salience of Race versus Concern for Perpetuating Racial Isolation .....	289
A. <i>ICP</i> 's Case Theory: Highlighting the Harms of Perpetuating Racially Segregated Housing.....	289
B. The Court's Response: Acceptance of the Pro-Integration Argument—with Reservations.....	292
III. <i>Winfield v. City of New York</i> : Using the Fair Housing Act to Challenge Residential Segregation at the Community District Level.....	295

## I. Introduction

At the close of its 2014 Term, a five-to-four majority of the Supreme Court held in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* (*ICP*)<sup>1</sup> that disparate-impact claims are cognizable under the Fair Housing Act (FHA).<sup>2</sup> The specific legal challenge involved the claim that the State of Texas awarded tax credits under the Low Income Housing Tax Credit (LIHTC) program<sup>3</sup> disproportionately to affordable housing projects to be built in racially segregated, economically distressed areas, and allocated far fewer tax credits to housing being developed in higher-resourced areas that afford access to improved education and employment opportunities.<sup>4</sup> This article addresses

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1. 135 S. Ct. 2507 (2015).

2. 42 U.S.C. § 3601 et seq.

3. 26 U.S.C. § 42 et seq.

4. Brief for Plaintiff-Appellee Inclusive Communities Project, Inc., at 15–18, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

tensions and questions that remain in the wake of the Court's highly consequential opinion. Recognizing that the opinion focused on the broader question whether Congress intended disparate-impact liability to be actionable under the Fair Housing Act, the article will consider the implications of the opinion for achieving racial justice as lower courts, housing advocates, local governments, and private developers seek to apply the Court's precepts to specific contexts.

A key consideration in Part II will be the Court's treatment of the legal theory developed by the plaintiff, The Inclusive Communities Project, Inc., in *ICP* that promoting residential mobility to areas of greater opportunity is integral to achieving the aims of the Fair Housing Act.<sup>5</sup> This discussion addresses the Court's seeming struggle throughout the opinion between, on the one hand, concerns to reduce the "salience of race" in social and economic functioning,<sup>6</sup> and, on the other, the importance of reducing the degree of racial isolation<sup>7</sup> that, in segregated neighborhoods, impairs access to resources present in more racially and economically integrated areas. It will show that although the Court ruled that disparate-impact liability was actionable under the Fair Housing Act, it articulated a number of limits on its ruling but offered limited guidance to those seeking to implement the decision.

In Part III, the article will address related claims advanced in a recent lawsuit, *Winfield v. City of New York*,<sup>8</sup> a post-*ICP* challenge to a lottery, referred to in the complaint as an "outsider-restriction" policy, that New York City uses to screen applications for access to affordable housing.<sup>9</sup> As developed in the complaint, the policy accords a preference for 50 percent of units in an affordable housing project to the residents of the community district in which the project is to be built. The complaint turns on the theory that the outsider-restriction policy limits the ability of New York City residents otherwise equally eligible for affordable housing to have equal opportunity to be considered when applying for units located outside their community district.<sup>10</sup> It alleges that this restriction, in turn, impairs the

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5. Brief for Plaintiff-Appellee at 44–46.

6. *Inclusive Cmty.*, 135 S. Ct. at 2524.

7. *Id.* at 2525.

8. *Winfield v. City of New York*, Case 1:15-cv-05236 (S.D.N.Y. filed July 7, 2015).

9. *Id.*

10. *Id.* New York City is divided into fifty-nine community districts across five boroughs. These districts vary in area from less than 900 acres to almost 15,000 acres and in population from fewer than 35,000 residents to more than 200,000. Each community district is represented by a local community board, constituted by local law in 1975, which serves as a site of local governance and community input. N.Y.C. Dep't of City Planning, *Community Portal*, [http://www.nyc.gov/html/dcp/html/neighborhood\\_info/nhmap.shtml](http://www.nyc.gov/html/dcp/html/neighborhood_info/nhmap.shtml). Each board comprises up to fifty members, who serve without salary. Half of the board members are nominated

mobility that affords access to housing sited in higher opportunity districts and constitutes disparate-impact as well as intentional discrimination under both the Fair Housing Act and the city's Human Rights Law.<sup>11</sup>

The article will examine the legal theory and background of the *Winfield* complaint in relation to the Court's signals in *ICP* concerning the scope of disparate-impact liability under the FHA. It argues that the facts pleaded in the *Winfield* case implicate core concerns animating the drafters of the Fair Housing Act, which the Court in *ICP* recognized. Related to these mobility-to-opportunity concerns in the complaint, this part will note recent research that centers on the significance of place, and in particular opportunities for residential mobility, in improving the life circumstances of persons living in racially and economically segregated neighborhoods.

The article concludes with some preliminary observations whether the Court's analysis in *ICP* affords support for this litigation-based effort to pursue a vision of racial justice and inclusion in the provision of affordable housing. In *ICP*, the analysis of disparate-impact liability was complicated by the relevance of the community-revitalization provisions of the Low Income Housing Tax Credit program, which are not at issue in *Winfield*. Further, unlike *ICP*, the *Winfield* case does not challenge the locations where affordable housing is being built but rather the lack of equal access to affordable housing opportunities on the basis of where applicants reside in New York City. To the extent that the Court suggested that the particular facts in the *ICP* case might not warrant a finding of disparate-impact liability, these facts seem distinguishable from the policy challenged in *Winfield*.

## **II. The Tension in *ICP*: Reducing the Salience of Race versus Concern for Perpetuating Racial Isolation**

### *A. ICP's Case Theory: Highlighting the Harms of Perpetuating Racially Segregated Housing*

This part offers a close reading of the Court's interpretation of the Fair Housing Act in *ICP*, arguing that the Court's rationale reveals a tension at the heart of the opinion between agreement with the pro-integration goal of the Act and concern that implementing that goal would reinforce race-based decision making. This tension complicates efforts at predicting how the opinion will be applied in future cases. Understanding the source of the tension, in turn, benefits from a consideration of the parties and the underlying theory of the complaint.

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by their district's city council members and all board members are selected and appointed by the borough president. New York City community boards have a significant advisory role in land use and zoning matters. NYC Mayor's Community Affairs Unit, *About Community Boards*, <http://www.nyc.gov/html/cau/html/cb/about.shtml>.

11. New York City Human Rights Law, N.Y.C. ADMIN. CODE § 8-107.

A non-profit organization serving low-income African American families in the Dallas metropolitan area, ICP's mission is to assist these families who qualify for the Section 8 Housing Choice Voucher program to obtain rental housing in predominantly Caucasian suburban neighborhoods.<sup>12</sup> In this action, ICP challenged the practices of the Texas Department of Housing and Community Affairs (TDHCA), the state agency charged with allocating federal Low Income Housing Tax Credits (LIHTC) to finance the building of affordable housing projects.<sup>13</sup> The LIHTC statutory scheme sets eligibility requirements for assigning credits and also confers on the states authority to develop additional criteria for awarding credits. The statute contemplates that developers that receive credits will be able to finance the building of housing projects by selling the credits to investors.<sup>14</sup>

In its complaint, ICP alleged that the TDHCA allocated credits disproportionately to projects located in predominately minority districts in the Dallas metropolitan area rather than majority-Caucasian districts that offered superior education and employment opportunities. The complaint further alleged that this practice perpetuates residential segregation that historically has deprived African Americans in this area from attaining equal access to higher-opportunity areas and has relegated them to housing located in high-crime, environmentally degraded neighborhoods, in violation of the disparate-impact provisions of the Fair Housing Act.<sup>15</sup> After trial, the District Court for the Western District of Texas found that ICP had demonstrated disparate impact under a burden-shifting arrangement that placed the burden on defendant (TDHCA) to show both that it had a substantial interest justifying its practice and that there were no less intrusive alternatives to it. On appeal, the Fifth Circuit reversed and remanded, determining that the recently promulgated Department of Housing and Urban Development (HUD) standard shifting the burden of demonstrating less intrusive alternatives to the plaintiff should be applied.<sup>16</sup> The TDHCA petitioned for certiorari, challenging an issue that it preserved but had not argued below: whether the Fair Housing Act made actionable a disparate-impact claim of discrimination.<sup>17</sup>

In the Supreme Court, the briefs of ICP<sup>18</sup> and the Solicitor General<sup>19</sup> supported a construction of the Fair Housing Act that reflected its broad

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12. Brief for Plaintiff-Respondent at 18, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

13. *Id.* at 20, 23.

14. *Id.* at 20.

15. *Id.*

16. *Inclusive Cmty. Project v. Tex. Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 281–82 (5th Cir. 2014).

17. Brief for Plaintiff-Respondent at 29–30, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

18. *Id.* at 32–33, 42–47, 59–61.

19. Brief for U.S. Solicitor General as Amicus Curiae at 17–30.

purpose and forty years of federal appellate court interpretation. The plaintiff's brief also developed a theme that Texas's allocation of low income housing tax credits impeded residents of racially segregated, economically distressed areas from realizing the benefits of housing located in higher-opportunity areas and thus of achieving the purpose of the FHA.

Citing legislative history accompanying the FHA, the *ICP* brief highlighted the detrimental impact and opportunity losses caused by residential segregation:

Segregated housing is deeply corrosive both for the individual and for his community. It isolates racial minorities from the public life of the community. It means inferior public education, recreation, health, sanitation, and transportation services and facilities. It means denial of access to training and employment and business opportunities. It prevents the inhabitants of the ghettos from liberating themselves, and it prevents the Federal, State, and local governments and private groups and institutions from fulfilling their responsibilities and desire to help in this liberation. App. 48a (U.S. Attorney General Katzenbach).<sup>20</sup>

After detailing the extent to which housing in Dallas had long been racially segregated, the brief challenged the allocation of LIHTC units by the TDHCA as effectively reproducing the level of *de jure* racial segregation that had existed in Dallas public housing. The brief pointed out that between 1994 and 2008 the number of affordable housing units in predominantly minority census tracts had increased substantially while, at the same time, majority-Caucasian Dallas suburbs developed with limited affordable housing.<sup>21</sup>

The brief went on to explain that between 1995 to 2009, TDHCA did not assign tax credits for any family units in predominantly white tracts in Dallas but allocated LIHTCs to units to be developed in locations reflecting "ghetto conditions."<sup>22</sup> Further, it noted that the housing in Dallas offered under Section 8 vouchers is principally sited in minority areas because many property owners in largely Caucasian areas have declined to participate in the voucher program. The net result has been to restrict housing opportunities available in non-minority, higher-opportunity areas.<sup>23</sup>

The brief also contrasted *ICP*'s pro-integration argument with the consequences of assigning tax credits to the project championed by Intervenor Frazier Revitalization, Inc. (FRI). The location of the FRI project was described as high-crime and high-poverty (over 40 percent) with rising unemployment and the absence of retail and other services.<sup>24</sup> Apparently

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20. Brief for Plaintiff-Respondent at 10.

21. *Id.* at 15.

22. *Id.* at 16.

23. *Id.* at 20.

24. *Id.* at 17. In its brief to the Court, Intervenor Frazier Revitalization, Inc. described itself as a § 501(c)(3) nonprofit corporation constituted to help carry out a neighborhood plan on a former public housing site, Frazier Courts, in South Dallas.

drawing on these arguments, the Court's opinion acknowledged the societal effects of racial segregation while offering a somewhat moderated scope of effects-based liability.

*B. The Court's Response: Acceptance of the Pro-Integration Argument—with Reservations*

This section analyzes the Court's complicated response to the arguments developed by ICP and the federal government as *amicus curiae*, arguing that the Court both accepted their reading of the purpose and context of the Fair Housing Act while adopting a cautionary approach to its application. Initially, Justice Kennedy's majority opinion in *ICP* closely followed the theory of the case developed on appeal in the briefs of ICP and the Solicitor General. The Court addressed the impact of segregation in its reference to the historical context in relation to which the Fair Housing Act was enacted.

In Part IB of the opinion, for example, the Court reviewed historic markers of residential segregation in the United States and the discriminatory practices that were at segregation's core. The Court particularly linked societal unrest in the 1960s to racially segregated housing patterns and lack of equal access to housing,<sup>25</sup> citing the 1968 *Report on the National Advisory Commission on Civil Disorders* (the Kerner Commission Report) for its observations on the extent to which nonwhite families lived in racially segregated, blighted urban areas and on a resulting "deepening racial division."<sup>26</sup> The Court further noted that, in the immediate aftermath of the assassination of Dr. Martin Luther King, Jr., in April 1968, and in response to the Kerner Commission proposals to adopt legislation banning discrimination and promoting racial integration in the sale and rental of housing, Congress enacted the Fair Housing Act.<sup>27</sup>

The Court returned to the issue of racial segregation in Part II of the opinion, in identifying as part of the "heartland" cases, i.e., cases that directly implicate the concerns that the Fair Housing Act was enacted to remedy, those practices, such as exclusionary zoning laws and bans on the construction of multifamily housing, that restrict racial minorities' access to housing in particular neighborhoods.<sup>28</sup> In addition to this discussion, the Court's pointed mention of the problem of "racial isolation" in

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With substantial representation on its board by Frazier Courts residents as well as members of the Dallas business community, FRI is tasked with acquiring blighted properties and transferring them to developers to rehabilitate. These revitalization projects are funded by low income housing tax credits. Brief of Respondent Frazier Revitalization, Inc., in Support of Petitioners, at 1–2, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015).

25. *Inclusive Cmty.*, 135 S. Ct. at 2516.

26. *Id.*

27. *Id.*

28. *Id.* at 2522.

Part III of the opinion, echoing a reference at the conclusion of Part II,<sup>29</sup> indicates a concern that a theory of disparate-impact liability be capacious enough to protect against policies and practices that, in effect, continue to codify the reality of segregated housing.

Specifically, the Court quoted Justice Kennedy's concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>30</sup> which differed in nuanced ways from the plurality's concern in that case to limit substantially the use of race-based remedies.<sup>31</sup> In *ICP*, the Court quoted Justice Kennedy's reference in *Parents Involved* to the "historic commitment to creating an integrated society" as justification for using appropriate tools to combat actions that perpetuate racial segregation in housing.<sup>32</sup>

Nonetheless, the Court in *ICP* tempered statements that would otherwise seem to embrace residential mobility as the key means to achieving the goals of the Fair Housing Act. The Court went on to address the need to recognize some limits on disparate-impact liability after canvassing multiple factors supporting the interpretation that disparate-impact claims are cognizable under the FHA: the statute's results-oriented language;<sup>33</sup> the similar structure and language of two similarly aimed anti-discrimination statutes, Title VII of the Civil Rights Act<sup>34</sup> and the Age Discrimination in Employment Act;<sup>35</sup> the 1988 amendments to the FHA;<sup>36</sup> and the purpose of the FHA.<sup>37</sup>

First, the Court noted "serious constitutional questions" if liability were found only on the basis of a "statistical disparity" in the racial composition of affordable housing developments.<sup>38</sup> The Court also noted that, unlike the "heartland" disparate-impact cases combatting artificial and arbitrary impediments to racially inclusive housing, the case at issue entailed a "novel theory of liability,"<sup>39</sup> that is, that assigning housing tax credits to develop housing in a blighted area was inconsistent with the aims of the FHA to achieve more widespread integration in housing.<sup>40</sup> Instead, it is important, the Court opined, to give "leeway" to housing authorities and private

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29. *Id.* at 2525.

30. 551 U.S. 701,789 (2007) (Kennedy, J., concurring in part and concurring in judgment).

31. *Id.* at 733, 748.

32. *Inclusive Cmty.*, 135 S. Ct. at 2525 (quoting *Parents Involved*, 551 U.S. at 797).

33. *Id.* at 2518–20.

34. *Id.* at 2516–18, discussing the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a)(2).

35. *Id.* at 2516–18, discussing Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(2).

36. *Id.* at 2519–21.

37. *Id.* at 2521–22.

38. *Id.* at 2523.

39. *Id.* at 2522.

40. *Id.* at 2523.



developers to demonstrate valid interests behind challenged policies, similar to the business necessity defense allowed under Title VII.<sup>41</sup> It would be “paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation’s cities merely because some other priority might seem preferable.”<sup>42</sup>

Referring to the risk that race-based considerations would be introduced into every determination about housing, the Court stated that it was necessary to insist on a “robust causality requirement” beyond a showing of statistical disparity.<sup>43</sup> The Court tied its argument for limiting the scope of disparate-impact liability to the “artificial, arbitrary, and unnecessary barriers” standard stated in *Griggs v. Duke Power Co.*<sup>44</sup> The Court observed that limiting the reach of disparate-impact liability would also mitigate against the commencement of “abusive” claims that would have a chilling effect on the construction of affordable housing and impair government efforts to enforce building and housing codes designed to protect residents’ health and welfare.<sup>45</sup> The Court further expressed concern that remedial orders adopt race-neutral means, avoiding racial targets or quotas that could implicate “difficult constitutional questions.”<sup>46</sup>

Yet even after invoking the need for limits, the Court acknowledged that a reference to race in crafting remedies was not entirely foreclosed: “local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.”<sup>47</sup> And in concluding, the Court again cited the Kerner Commission’s caution against societal segregation.

In sum, the opinion in *ICP* draws on the historic context of the Fair Housing Act in interpreting it to encompass disparate-impact discrimination. Yet the Court’s policy-based concerns coupled with mention of constitutional questions, presumably involving reference to race in designing remedies, place limits on the ruling. Moreover, despite the Court’s reference to these limits as “cautionary standards” and “safeguards” for interpreting the FHA, it seems fair to question how much guidance the Court has in fact given for those seeking to invoke or implement its ruling. The following section addresses this question in the context of a newly filed lawsuit that asserts that the City of New York has engaged in both

41. *Id.* at 2522.

42. *Id.* at 2523.

43. *Id.*

44. 401 U.S. 424 (1971).

45. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2524 (2015).

46. *Id.*

47. *Id.* at 2525.

intentional and disparate-impact discrimination in the lottery system in effect for canvassing city residents' applications for affordable housing.

### III. *Winfield v. City of New York*: Using the Fair Housing Act to Challenge Residential Segregation at the Community District Level

Whether the *ICP* opinion affords adequate criteria for determining when local governments and private developers merit leeway under the FHA in deciding where to site affordable housing opportunities, or whether the value of residential mobility is primary, must await the contours of future claims. A lawsuit recently filed by the Anti-Discrimination Center against the City of New York may afford such an opportunity. In *Winfield v. City of New York*, the plaintiffs challenge an "outsider-restriction" policy, a lottery system under which city residents eligible to apply for affordable housing in the city are given preference with respect to 50 percent of the units if they reside in the community district in which the proposed housing will be located.<sup>48</sup> As a consequence, residents living outside the community district who are otherwise eligible to apply for affordable housing are prevented from competing for these units on an equal basis.<sup>49</sup> This section analyzes the theory of the lawsuit, arguing that the claim falls squarely within the core concerns of the Fair Housing Act and is also sufficiently distinguishable from the *ICP* facts to suggest that the complaint will likely succeed in sidestepping the Court's limits and cautionary statements.

The three plaintiffs are African Americans residing in Manhattan, Brooklyn, and Queens, who unsuccessfully applied via lottery for affordable units in various developments located in majority-white community districts in Manhattan.<sup>50</sup> The complaint alleges that the outsider-restriction policy perpetuates residential racial segregation that exists across the city, among the city's fifty-nine community districts and among households eligible to apply for affordable housing. The policy, it is alleged, impairs mobility of city residents, particularly African Americans and Latinos, who seek housing in higher-opportunity neighborhoods, many of which are majority white, that afford superior schools, health care, employment opportunities, parks, and lower crime rates.<sup>51</sup> The complaint also charges the city with intentional discrimination, alleging, among other grounds, that the outsider-restriction policy was adopted with awareness of a history of residential segregation in the city, that the city rejected more integration-enhancing

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48. *Winfield v. City of New York*, Case 1:15-cv-05236, Complaint ¶¶ 83–99 (S.D.N.Y. July 7, 2015).

49. *Id.* ¶¶ 100–26.

50. *Id.* ¶¶ 13–16.

51. *Id.* ¶ 7.

approaches, and that it responded to “racially—and ethnically influenced” political opposition.<sup>52</sup>

The complaint relies on a variety of statistical measures of racial disparity that merit discussion here. They include a “dissimilarity index,” which quantifies the intensity of housing segregation.<sup>53</sup> This index captures the unevenness in distribution of two groups across “areal” units in a larger area and is one of five recognized dimensions of segregation.<sup>54</sup> Discussed in various analyses of measuring residential segregation, this index was noted in a widely cited 1955 sociological study of segregation indices by Otis Dudley Duncan and Beverly Duncan and essentially validated in an influential 1988 study by sociologists Douglas Benton and Nancy Massey.<sup>55</sup>

The complaint alleges that in 1980, among the largest U.S. cities, New York was the second most segregated using the dissimilarity index measured between African Americans and whites, and that in 2010, New York remained the second most segregated city with respect to this same dissimilarity index.<sup>56</sup> The complaint also alleges that in 1980, among the largest cities, New York City was the fourth most segregated in a dissimilarity index measured between Latinos and whites, and that in 2010, among the largest cities, New York was the second most segregated according to the Latino-white dissimilarity index.<sup>57</sup>

The lawsuit further charges that New York City is residentially segregated at the community district level. Stating that the city’s African American population is approximately 22.8 percent according to the 2010 Census,<sup>58</sup> the complaint alleges that there is substantial disparity in the distribution of African Americans among community districts; in seventeen of the districts, African Americans comprise less than 5 percent of the population whereas in eleven other districts, African Americans comprise more

52. *Id.* ¶ 8.

53. *Id.* ¶ 34.

54. The others are exposure, clustering, concentration, and centralization. John Iceland, Daniel H. Weinberg, and Erika Steinmetz, U.S. Census Bureau, Series CENSR-3, *Racial and Ethnic Residential Segregation in the United States: 1980-2000*, <https://www.census.gov/prod/2002pubs/censr-3.pdf>.

55. *Id.* The index computes the population of one of the two measured groups in an areal unit, for example, a census tract, divides this figure by the size of the group’s population in the larger area, obtains a similar calculation for the second group in the study, calculates the difference between the measures for the two groups, and then sums up the differences among all the areal units within the larger area. University of Michigan Population Studies Center, *Racial Residential Segregation Measurement Project, Calculation Formula for Segregation Measures*, <http://enceladus.isr.umich.edu/race/calculate.html>.

56. *Winfield v. City of New York*, Case 1:15-cv-05236, Complaint ¶¶ 35–40 (S.D.N.Y. July 7, 2015).

57. *Id.* ¶¶ 41–46.

58. *Id.* ¶ 49.

than 50 percent, and in six districts exceed 65 percent of the population.<sup>59</sup> To gauge the significance of the disparity between community district and citywide percentage of the group, the complaint also refers to “relative difference,” consisting of the difference between the citywide percentage and the community district percentage, divided by the citywide percentage.<sup>60</sup> The complaint explains that relative difference puts the scope of the difference in a context.<sup>61</sup> Applying this measure, the complaint alleges that in forty-two community districts, the relative difference between citywide and community district African American populations was 50 percent or more.<sup>62</sup> The complaint alleges a citywide Latino population based on the 2010 Census of approximately 28.6 percent,<sup>63</sup> with ten districts having Latino populations of less than 10 percent, twelve districts with more than 50 percent, of which nine had greater than 60 percent.<sup>64</sup> In thirty-three districts, the relative difference between citywide and community district percentages of the Latino population is 50 percent or more.<sup>65</sup>

In another comparative measure of residential segregation at the community district level, the complaint focuses on differences among households earning various percentages of Area Median Income, an important Department of Housing and Urban Development-developed gauge of eligibility for various categories of affordable housing.<sup>66</sup> According to the

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59. *Id.* ¶¶ 50–51.

60. *Id.* ¶ 52.

61. *Id.* at n.3. This calculation, as the complaint explains, gauges the percentage relationship between the citywide-district difference and the smaller of the two numbers in the calculation of difference. *Id.* The complaint offers the following explanation and example, stating that if one

[o]nly looked at a percentage-point difference, one would not be able to determine the *significance* of a particular percentage-point difference. Take, for example, variances between two pairs of numbers. In each pair, the percentage-point difference is nine points. In the first pair, the difference is between 1 percent and 10 percent. In the second pair, the difference is between 50 percent and 59 percent. In the first example, the nine percentage-point difference is nine times (or 900 percent) greater than the smaller of the two numbers; in the second example, the same nine percentage-point difference is only 18 percent greater than the smaller of the two numbers. It is relative difference that puts the scope of a variation in context.

*Id.* (emphasis in original).

62. *Id.* ¶ 53.

63. *Id.* ¶ 54.

64. *Id.* ¶¶ 55–56.

65. *Id.* ¶ 57.

66. At the federal level, the Department of Housing and Urban Development (HUD) refers to the median income for families in metropolitan and non-metropolitan areas to determine eligibility for a number of housing programs. HUD first sets an area median family income in a given year and takes family size into account, presenting family incomes as a percentage of the area median income. Florida

complaint, significant differences exist in most community districts between the percentage of households within a given income eligibility range who are African American or Latino and the citywide percentages of households in that income range who are African American or Latino.<sup>67</sup>

In a fourth effort to gauge the extent of residential segregation, the complaint examines where 50 percent of the citywide population of major racial groups reside. Drawing on 2010 Census data, the complaint notes that approximately 50 percent of Latinos in New York City live in about 25 percent of the city's community districts, approximately 50 percent of whites live in fewer than 25 percent of the city's community districts, approximately 50 percent of Asians live in 17 percent of the city's community districts, and approximately 50 percent of African Americans live in 15 percent of the city's community districts.<sup>68</sup> In effect, the smaller the percentages of community districts, the greater the degree of residential concentration. The complaint further alleges that all community districts "at least in part" have been affected by past intentional and disparate-impact segregation-perpetuating policies.<sup>69</sup>

Turning to the specific basis for its challenge, the complaint describes the origins and development of the outsider-restriction policy. First adopted in 1988 as a preference accorded for 30 percent of the affordable housing units for residents of the community district in which the units were being built,<sup>70</sup> the percentage was increased to 50 percent in 2002 and remains at that level.<sup>71</sup> The complaint also points out that the preference accorded residents of community districts does not depend on their length of residence within the district and thus cannot be justified on the basis of long-time involvement in a particular neighborhood.<sup>72</sup> The complaint connects these data to its overarching legal theory: that given the existing residential segregation among community districts, the outsider-restriction policy perpetuates segregation in New York City neighborhoods, including those located in majority-white community districts of opportunity such as those in which the plaintiffs had applied for housing.<sup>73</sup>

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Housing Data Clearinghouse, *Improving Housing Decisions*, <http://flhousingdata.shimberg.ufl.edu/apps/azindex.pl?t=18>.

67. *Winfield v. City of New York*, Case 1:15-cv-05236, Complaint ¶¶ 61–76 (S.D.N.Y. July 7, 2015).

68. *Id.* ¶ 76.

69. *Id.* ¶ 77.

70. *Id.* ¶ 81.

71. ¶¶ 83–87. The policy provides that applicants for 38 percent of affordable units have equal access to units via the lottery, *id.* ¶ 88, that city employees be given preference to 5 percent of the units, mobility-impaired applicants receive a preference for 5 percent of the units, and applicants with hearing or visual deficits, preference for 2 percent of the units, *id.* ¶ 89.

72. *Id.* ¶¶ 92–95.

73. *Id.* ¶¶ 100–01.

In alleging the city's awareness of the impact of residential segregation on access to opportunity,<sup>74</sup> the complaint refers to the city's actual or constructive knowledge of studies demonstrating the effects on children who mature in high-poverty, low-opportunity neighborhoods,<sup>75</sup> areas marked by inferior schools and health care, higher concentrations of environmental risk, and higher crime rates.<sup>76</sup> Similarly, the complaint refers to the city's actual or constructive knowledge of studies that demonstrate the advantages to children born to low-income families who are able to move to higher-opportunity neighborhoods.<sup>77</sup> Although the studies are unnamed in the complaint, recent social science research provides compelling support for the complaint's linking of children's opportunities with the degree to which they live in high- or low-poverty areas. In particular, a noteworthy 2104 study by Raj Chetty and his research associates explores the spatial dimensions of intergenerational mobility, identifying variations in mobility based on geographic areas.<sup>78</sup>

Analyzing the probability that a child born to a family in the bottom fifth of the national income distribution will ascend to the top fifth of that same distribution, the study found notable differences, ranging from a probability of 12.9 percent in San Jose, California, to 4.4 percent in Charlotte, North Carolina.<sup>79</sup> The study analyzes five "factors" that are "strongly" correlated with geographic variations in upward mobility: residential segregation, income inequality, strength of local schools, social capital such as participation in community networks, and family structure (one versus two parents).<sup>80</sup> Building on research that analyzed ways in which segregation impairs life opportunities, including lack of access to successful role models, well-funded schools, or employment, the Chetty study found an inverse correlation between racially segregated areas and upward mobility.<sup>81</sup>

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74. *Id.* ¶¶ 112–17.

75. *Id.* ¶ 118.

76. *Id.* ¶ 117.

77. *Id.* ¶ 120.

78. Raj Chetty, Nathaniel Hendren, Patrick Kline & Emmanuel Saez, *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129(4) Q.J. ECON. 1553–1623 (2014), available at [http://www.equality-of-opportunity.org/images/mobility\\_geo.pdf](http://www.equality-of-opportunity.org/images/mobility_geo.pdf).

79. *Id.* at 26–27 ([http://www.equality-of-opportunity.org/images/mobility\\_geo.pdf](http://www.equality-of-opportunity.org/images/mobility_geo.pdf)).

80. *Id.* at 3, 34–42.

81. *Id.* at 34–35. This study is also usefully discussed in Malcolm Gladwell, *Starting Over*, NEW YORKER, Aug. 24, 2015, at 32–37 (examining how decisions whether to relocate away from New Orleans after Hurricane Katrina affected the life circumstances of persons dispossessed by the storm). Another recent Chetty study relevant to the theory of both ICP and *Winfield* analyzed experimental data involving randomly chosen families who were given housing vouchers that

Other research based on analyses of U.S. Census data indicates that the concentration of people in the United States living in high-poverty areas—located in census tracts in which 40 percent or more of the residents have incomes lower than the federal poverty level—increased from 7.2 million in 2000 to 13.8 million in 2013.<sup>82</sup> In cities with the highest incidence of poverty, large percentages of minority populations lived in these poverty-concentrated areas.<sup>83</sup> This development reversed the improvements noted in the decade between 1990 and 2000<sup>84</sup> and is evidence both of the persistence and spatial concentration of poverty, the problem that the FHA was enacted in part to combat.

The *Winfield* case, unlike *ICP*, does not involve a challenge to the locations where affordable housing is being built or financed, that is, it does not implicate a city's locational choice between siting housing in a high-opportunity neighborhood or a project of "revitalization" in a higher-poverty area. Nor does it challenge the use of low-income housing tax credits to favor projects in locations having a high concentration of low-income, minority residents.<sup>85</sup> In this respect, the theory of the *Winfield* complaint is distinguishable from the plaintiffs' disparate-impact theory in *ICP*, which alleged that Texas's allocation of tax credits was segregation-reinforcing, perpetuating racially concentrated housing patterns and impairing opportunities that could lead to increased racial and economic integration.

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allowed them to move from a high-poverty area to a better-resourced neighborhood. The data demonstrated that moving to a higher opportunity neighborhood improved educational and employment outcomes for children of these families who were under thirteen when the families moved. Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence for the Moving to Opportunity Experiment*, available at [http://www.equality-of-opportunity.org/images/mto\\_paper.pdf](http://www.equality-of-opportunity.org/images/mto_paper.pdf) (May 2015). (Thanks are due to Stephen Miller's discussion, *The neighborhood matters, it turns out, but for tomorrow more than today*, LAND USE PROF BLOG (Aug. 21, 2015), [http://lawprofessors.typepad.com/land\\_use/2015/08/the-neighborhood-matters-one-generation-later.html](http://lawprofessors.typepad.com/land_use/2015/08/the-neighborhood-matters-one-generation-later.html), for bringing Gladwell's article and Chetty's research to my attention.)

82. Alana Semuels, *The Resurrection of America's Slums*, ATLANTIC (Aug. 9, 2015), available at [http://www.theatlantic.com/business/archive/2015/08/more-americans-are-living-in-slums/400832/?utm\\_source=Furman+Center+Mailing+List&utm\\_campaign=9418a09b88-Housing\\_Starts\\_Aug\\_29&utm\\_medium=email&utm\\_term=0\\_ea37468da6-9418a09b88-173366509](http://www.theatlantic.com/business/archive/2015/08/more-americans-are-living-in-slums/400832/?utm_source=Furman+Center+Mailing+List&utm_campaign=9418a09b88-Housing_Starts_Aug_29&utm_medium=email&utm_term=0_ea37468da6-9418a09b88-173366509) (discussing Century Foundation Fellow Paul Jargowsky's review of federal census data in *The Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy*, Aug. 9, 2015, <http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-jargowsky.pdf> ).

83. *Id.*

84. *Id.*

85. *Winfield v. City of New York*, Case 1:15-cv-05236, Complaint ¶¶ 107–09 (S.D.N.Y. July 7, 2015).

Rather, the *Winfield* complaint focuses attention on a policy restricting the ability of some city residents to be considered for available affordable housing developments based on the community district in which they live, arguing that this restricted access reinforces the impact of residential segregation on low-income persons of color. It links the elimination of the outsider-restriction policy with enhancing the values of residential choice and mobility-to-opportunity. To the extent that it emphasizes these values, the complaint invokes the broad remedial purpose of the Fair Housing Act and the *ICP* Court's connection of that purpose with its acknowledgment that the Act reaches disparate-impact discrimination.<sup>86</sup>

In its motion to dismiss, the city as expected reaffirmed its long-held outsider restriction policy (although it argued that a state real property tax law actually required community preference for the projects at issue). In a previously released press statement, New York City Mayor de Blasio had described the lottery as a "very balanced plan" allowing "people who are part of a neighborhood [to] have an opportunity to access affordable housing in that neighborhood."<sup>87</sup> Thus, the caveats and caution expressed in the *ICP* opinion that potentially limit its usefulness as a precedent will likely be tested in the *Winfield* litigation. For example, in commenting on the *ICP* complaint's "novel theory of liability," the Court observed that on remand the case "may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing."<sup>88</sup> If the Court is suggesting that developing blighted, racially segregated neighborhoods is an approach equally reasonable to one promoting residential mobility and integration, it is not

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86. Gesturing toward the broader, thematic connections between the *ICP* and *Winfield* suits, The Anti-Discrimination Center's website highlights a supportive quotation from Elizabeth Julian, president of The Inclusive Communities Project:

The fundamental theme of ADC's lawsuit is that there is no acceptable type or scope of housing segregation. That stance upsets lots of people who, for various reasons, support the segregated status quo. But it's the only stance compatible with a vision of a just society, and it is why ADC's lawsuit against New York City's outsider-restriction policy needs to be supported by civil rights advocates and their allies all across the country.

Anti-Discrimination Center, *Support for the Challenge to NYC's Outsider-Restriction Policy*, <http://www.antibiaslaw.com/article/support-challenge-nycs-outsider-restriction-policy> (last visited Oct. 3, 2015).

87. Telephone communication with plaintiffs' attorney Craig Gurian, Anti-Discrimination Center (Sept. 1, 2015). See also Sally Goldenberg, *DeBlasio Defends Housing-Lottery Policy Amid Legal Challenge*, POLITICO (July 13, 2015, 3:31 PM), <http://www.capitalnewyork.com/article/city-hall/2015/07/8571958/de-blasio-defends-housing-lottery-policy-amid-legal-challenge>.

88. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2522 (2015).



evident that the *ICP* opinion is a strong or clear precedent favoring use of the *FHA* to encourage racial and economic integration.

To be sure, both cases are animated by a concern for mobility, affording access, in the words of Chetty and his associates, to the “land of opportunity.” However, it is not even clear from the Court’s opinion that the complaint’s allegations in *ICP* relating to limits on residential mobility would qualify as disparate-impact discrimination. The Court hinted that, on remand, the complaint might not meet a “robust causality requirement,” which, to avoid “serious Constitutional questions,” the Court averred, must be based on more than statistical disparity in the racial composition of housing developments.<sup>89</sup>

In *Winfield*, the *ICP* Court’s concern that causality be demonstrated independently of a statistical disparity would have to be addressed. As noted, the *Winfield* complaint offers various statistical showings of over- and under-representation of minority racial and ethnic groups in particular community districts. However, the challenge made to the lottery system is rooted not in population statistics per se but rather in the concern to eliminate an explicitly preferential policy among applicants, which may prove to be a helpful point of differentiation. Moreover, the relief plaintiffs seek does not entail the imposition of racial targets or quotas, another concern of the *ICP* Court, but as noted requests the *elimination* of preferences (based on residency in a community district). Further, the absence of a rationale for according preferences merely by virtue of residing in a community district and the availability of an in-district preference without any consideration of longevity of residence<sup>90</sup> weigh in the plaintiffs’ favor. The plaintiffs can argue that removing the lottery preferences would count as dismantling “artificial, arbitrary, and unnecessary barriers” to desirable housing, a touchstone in *Griggs* that the *ICP* Court also embraced.<sup>91</sup>

As the disparate-impact case theory of *Winfield* is developed,<sup>92</sup> a key consideration will be the ability to sidestep *ICP*’s rationales for limiting

89. *Id.* at 2522–23.

90. *Winfield v. City of New York*, Complaint ¶¶ 92–95.

91. *Inclusive Cmty.*, 135 S. Ct. at 2524.

92. In addition to the complaint’s disparate-impact cause of action under the *FHA*, it alleges the city’s violation of the disparate-impact provisions of the city’s Human Rights Law, which may be shown where

(1) . . . a policy or practice of a covered entity or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any group protected by the provisions of this chapter; and (2) the covered entity fails to plead and prove as an affirmative defense that each such policy or practice bears a significant relationship to a significant business objective of the covered entity or does not contribute to the disparate impact.

N.Y.C. ADMIN. CODE § 8-107(17)(a)(1)(2).

The statute also provides that

disparate-impact liability. As noted above, the context of the *Winfield* suit is sufficiently distinguishable from *ICP* that it seems fair to assume that it can avoid conflict with *ICP*'s cautionary reservations. If the lawsuit can instead be situated in the "heartland" of FHA's historical context and purpose, considerations that the *ICP* majority recognized as crucial, the case is more likely to survive the motion stage and afford an opportunity to test whether FHA disparate-impact liability post-*ICP* will realize the racial justice concerns at the statute's core.

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[t]he mere existence of a statistical imbalance between a covered entity's challenged demographic composition and the general population is not alone sufficient to establish a prima facie case of disparate impact violation unless the general population is shown to be the relevant pool for comparison, the imbalance is shown to be statistically significant and there is an identifiable policy or practice or group of policies or practices that allegedly causes the imbalance.

N.Y.C. ADMIN. CODE § 8-107(17)(b).

A recent amendment to the city's Human Rights Law, the Local Civil Rights Restoration Act, adopted by the New York City Council in 2005, was intended to ensure that the Human Rights Law would be interpreted broadly and "independently from similar or identical provisions of New York state or federal statutes." Craig Gurian, *A Return to the Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 FORDHAM URB. L. J. 255, 256 (2006), quoting N.Y.C. Local Law No. 85 of 2005, § 1 (Oct. 3, 2005). Although analysis of the plaintiffs' cause of action under the City's Human Rights Law is beyond the scope of this article, the statute is potentially a promising vehicle for relief, in light of the stated intent not to replicate federal law but to provide a potentially greater source of rights.

