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Housing Market Discrimination: Analysis of impact case and its effect on builders/developers, NY Real Estate Journal, by Megan Yllanes, Esq, & Andrew Richards, Esq., 4-21-2016

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Shortly after Martin Luther King, Jr. was assassinated in 1968, former President Lyndon Johnson signed the Fair Housing Act (FHA) into law. In general, the FHA makes it unlawful to "[r]efuse to sell or rent …or otherwise make unavailable or deny, a dwelling to a person because of race" or "to discriminate against any person in" making certain real estate transactions "because of race" or other protected characteristics. As a result, the federal government offers low-income housing tax credits to developers through designated state agencies which are directed to develop plans identifying selection criteria for distributing these credits. Consequently, the distribution of tax credits has favored the development of housing units in low-income areas as opposed to higher-income areas.

In June 2015, the supreme court of the United States was confronted with a major civil rights case out of Texas which posed the question: Are disparate-impact claims cognizable under the FHA? "Disparate impact" is a legal theory applicable to antidiscrimination statutes such as the FHA. To establish disparate impact, a moving party need only prove that their opponent's practices have a disproportionally adverse "effect" on a protected class as opposed to an "intended" bias or discrimination. In a 5-4 decision, the supreme court ruled that the FHA prevents more than just intentional discrimination in the housing market. It also prohibits seemingly race-neutral policies that disproportionately harm minorities and other protected groups whether or not there is evidence of discriminatory intent. In doing so, however, the court limited when disparate impact claims will be successful, especially with respect to builders and developers.