

ECONOMIC FAIR HOUSING ACT

[Revised partial draft, with EHI edits to 6/22/22]

11_TH CONGRESS

___ SESSION

H. R. ___

To prohibit exclusionary housing practices comprehensively, throughout the United States, due to their discriminatory effects on minority group members and low- and moderate-income persons, their adverse effects on housing availability and affordability, on environmental protection, on commerce among the several States, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Rep. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To prohibit exclusionary housing practices comprehensively, throughout the United States, due to their discriminatory effects on minority group members and low- and moderate-income persons, their adverse effects on housing availability and affordability, on environmental protection, on commerce among the several States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Economic Fair Housing Act of 202_”.

SEC. 2. EXCLUSIONARY HOUSING PRACTICES.

(a) IN GENERAL.—The Fair Housing Act (42 U.S.C. 3601 *et seq.*) is amended by inserting after section 806 the following:

“SEC. 806A. EXCLUSIONARY HOUSING PRACTICES.

“(a) IN GENERAL.—It shall be unlawful for a government official or agency, or other person acting under color of law, to create or apply any law, regulation, policy, practice, action or failure to act, that would have the effect or intent of:

(i) restricting or substantially delaying, without sufficient justification, the production, preservation or availability of a suitable housing opportunity for a low- or moderate-income American; or

(ii) causing or contributing to the jurisdiction’s failure to provide its fair share of the regional housing needs.

“(b) The opportunity for suitable housing in a jurisdiction shall be made available as close as feasible, consistent with sound planning, to where a person protected by this section:

(i) works, resides, has a close family member residing, or has the person’s primary support system in the jurisdiction; or,

(ii) in the case of someone without any of those contacts with the jurisdiction, housing as close as feasible, consistent with sound planning, to the major places of employment in the jurisdiction.

“(c) No housing provider shall discriminate among prospective owners or renters based on their source of funds, payment or income, from any lawful source.

“(d) DEFINITIONS.—For the purposes of this section:

“(1) The term ‘close family member’ means, with respect to a person, by birth or adoption, a—parent; grandparent; child; grandchild; sibling; closest cousin with whom the person has a mutually agreeable housing opportunity; and any other direct living ancestor or living descendant.

“(2) The term ‘exclusionary housing practice’ means a zoning, housing, or land use restriction, or other action or failure to act, that has

the effect or intent of actually or predictably causing the exclusion of a low- or moderate-income person from dwelling in a house or neighborhood, without sufficient justification. All such practices are unlawful, to the extent that there is an available alternative practice that has less discriminatory effects and serves the legitimate needs of the land use entity involved. Exclusionary housing practices include, without limitation, the following practices and actions, where they have exclusionary effects without sufficient justification:

- (A) Zoning regulations;
- (B) Growth moratoriums, growth caps, and growth phasing schedules;
- (C) Building and housing code requirements;
- (D) Subdivision controls;
- (E) Permit requirements and delays;
- (F) Development-related fees including, without limitation, fees for plan review, permits and inspections, capital facilities, and development impacts;
- (H) Exactions from developments including, without limitation, required dedication of land to the public, construction or maintenance of public infrastructure, or provision of public services;
- (I) Housing-related restrictions by non-governmental officials authorized by law to restrict residents' housing rights (Home Owners Associations and their officials, for example); and
- (J) Undue administrative burdens on affordable housing management.

“(3) The term ‘exclusionary zoning’ means a land use control regulation that excludes, or is likely to exclude, a low- or moderate-income person from dwelling in the zoned area, without sufficient justification. A few examples of the myriad, possible exclusionary zoning provisions prohibited by this statute are:

- (A) Regulations requiring unnecessarily large lot and/or building sizes, building setbacks, lot widths, and/or parking setbacks; and
- (B) Regulations prohibiting, or placing unnecessary restrictions on, accessory apartments and/or multifamily housing, including rental apartments and condominiums.

“(4) The term ‘government official’ includes an official of any governmental agency at any level of government, including Federal, State, and local governments.

“(5) The term ‘primary support system’ means, with respect to a person, the primary source of needed, material assistance to the person.

“(6) The term ‘region’ means—for purposes of determining the fair share of regional housing needs applicable to a jurisdiction—

“(A) the metropolitan statistical area, if any, within which the jurisdiction is located, based on official, United States Census Bureau standards;

“(B) the smaller, multi-jurisdictional micropolitan area or areas, if any, based on official, United States Census Bureau standards; and

“(C) commute-sheds for each portion of the jurisdiction. A ‘commute-shed’ is the boundary of the area from which a worker can normally commute in 30 minutes or less to a specific location within the jurisdiction; and that area may include places beyond that location’s metropolitan and micropolitan areas (if any).

“(7) The term ‘regional housing needs’ means the amounts and types of housing that would be necessary in the region, in order to house suitably all the people who work, live, have a close family member living, or have their primary support system in, the region, or who would do so, in the absence of exclusionary housing practices.

“(8) The term ‘suitable housing’ means housing of the type, price, size, condition, and location that are reasonably suited to the person’s circumstances, including economic circumstances, and that meet applicable standards of health and safety.

“(9) The term ‘without sufficient justification,’ with respect to a zoning, housing, or land use restriction, means an action or failure to act that:

[ALTERNATIVE 1] actually or predictably results in a disparate impact on a group of persons protected by this Act, or creates,

increases, reinforces, or perpetuates economically segregated housing patterns that are not necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.¹

[ALTERNATIVE 2] results in a disparate impact on a group of persons protected by this Act, and that arbitrarily operates invidiously to discriminate on a prohibited basis; but that term does not include an action that is necessary to achieve a valid governmental or private interest, unless the evidence shows that there is an available alternative practice that has less discriminatory effects and serves the legitimate needs of the entity involved.²

¹ ALTERNATIVE 1 largely tracks the language of United States Dep't of Housing and Urban Development (HUD), *Fair Housing—Discriminatory effect prohibited*, 24 CFR 100.500(b) (2013). That rule was relied on in certain respects, and was discussed uncritically, by the Supreme Court in *Texas Dep't of Hous. and Comm'ity Affairs v. Inclusive Communities Project, Inc.* ("*Inclusive Communities*"), 576 U.S. 519 (2015). *See, e.g., id.* at 527, 541-542 (HUD Rule properly allowed housing authorities and private developers to maintain a policy "if they can prove it is necessary to achieve a valid interest.") That 2013 Rule has been proposed for reinstatement by HUD (at 86 FR 33590 (June 25, 2021)). The proposal is still pending. *See, e.g.,* https://www.hud.gov/press/press_releases_media_advisories/hud_no_22_062 (April 11, 2022).

In 2020, HUD published a revised version of the 2013 rule, at 85 FR 60288 (Sept. 24, 2020). However, prior to the effective date of that version, a U.S. District Court issued a preliminary injunction staying its implementation and postponing its effective date. *Mass. Fair Hous. Ctr. v. HUD*, 496 F. Supp. 3d 600 (2020). The court found that the 2020 rule would "constitute a massive overhaul of HUD's disparate impact standards," and that the changes "appear to make it easier for offending defendants to dodge liability and more difficult for plaintiffs to succeed." *Id.* at 607.

Further, the court found that that rule likely would be invalidated as arbitrary and capricious; that it posed a significant risk of irreparable harm if not enjoined, and that "the balance of harms and public interest supports a preliminary injunction pending a complete review of Plaintiffs' APA challenge." *Id.* at 611. Thus, the court ordered HUD to "preserve the status quo pursuant to the regulations in effect as of the date of this Order." *Id.* at 612.

² ALTERNATIVE 2 largely tracks the language of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* ("*Inclusive Communities*"), 135 S.Ct. 2507, 2522, 2524 (citing *Huntington v. Huntington Branch, NAACP*, 488 U. S. 15, 18 (1988) (per curiam) ("The availability of disparate-impact liability, furthermore, has allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units."); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("Governmental or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'"))

See, e.g., Stacy E. Seicshnaydre, *Disparate Impact and the Limits of Local Discretion After Inclusive Communities*, 24 Geo. Mason L. Rev. 663, 664 and n. 11 (2017) ("Other commentators have observed that the Supreme Court did not particularly limit or expand the disparate impact standard, but recognized and clarified it," citing Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What's New and What's Not*, 115 Colum. L. Rev. Sidebar 106, 107, 110-11 (2015) ("In many ways [*Inclusive Communities*] will not greatly alter FHA-based litigation"). posted at: <https://columbialawreview.org/content/fair-housing-litigation-after-inclusive-communities-whats-new-and-whats-not/>.

“(10) The term ‘works’ means, with respect to a person, performing work other than at the person’s home, for which the person receives compensation; or primarily occupied as a student in good standing in an institution above the grade level of high school, where the person receives in-person instruction.

(b) CONFORMING AMENDMENT.—Section 802(f) of the Fair Housing Act (42 U.S.C. 3602(f)) is amended by inserting after “806,” the following: “806A.”³

- Proposed provisions may be added to this draft, in order to define certain housing-related regulations and other practices as categorically or presumptively invalid.

³ Standing to sue under the Fair Housing Act is “as broad as is permitted by Article III of the Constitution.” *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979) (quoting *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972)). It is not subject to the “prudential” limitations on standing that federal courts have observed in dealing with other zoning and land use cases. *See, e.g., Gladstone*, 441 U.S. at 103 n. 9.