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## **How an Economic Fair Housing Act would affect minority group members**

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Despite the limitations of the federal Fair Housing Act,<sup>1</sup> residential isolation by race (especially of predominantly Black neighborhoods from predominantly White neighborhoods) has declined substantially, and fairly steadily, since that statute was enacted in 1968.<sup>2</sup>

During the same period, however, residential isolation by income level has increased markedly in metropolitan America. One major study showed that the proportion of families in America's large metropolitan areas who lived in predominantly "rich" or "poor" neighborhoods more than doubled, from 15 percent to 34 percent, between 1970 and 2012.<sup>3</sup>

Because most minority group members are on the lower end of the income and wealth spectrums, the increasing residential separation by income level disproportionately impacts the ability of minority group members to move to high-opportunity areas.<sup>4</sup> Those

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<sup>1</sup> 42 U.S.C. §§ 3601-3619 (1968, as amended). That statute prohibits housing discrimination based on race, color, religion, sex, handicap, familial status, and/or national origin.

<sup>2</sup> One major, recent study found a reduction in residential isolation of Black people from White people, "though modest" (about 4.5 percent per decade), continuing fairly steadily from the 1970's across the ensuing decades. Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 Soc. Forum 8 (2015), posted at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4808815/>; citing MASSEY, DOUGLAS S. AND DENTON, NANCY A. *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS*, HARV. U. (1993). Another major study found "in 1980, the typical Black American lived in a census tract that was 58 percent Black; by 2010, that share dropped to 45 percent." *The Rise of Residential Segregation by Income*, p. 12, Pew Research Center (August 1, 2012), posted at: <https://www.pewresearch.org/social-trends/2012/08/01/the-rise-of-residential-segregation-by-income/>.

<sup>3</sup> K. Bischoff & S. Reardon, *The Continuing Increase in Income Segregation, 2007–2012*, STANFORD CENTER FOR EDUCATION POLICY ANALYSIS 5–6, 17 (2016). The rate in smaller metropolitan areas more than doubled too, from 9.6 percent in 1970 to 21.6 percent in 2012, according to that study. *Id.*

<sup>4</sup> Douglas S. Massey and Jacob S. Rugh, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century*, ANNALS AM. ACAD. POL. SOC. SCI 2 (Mar. 8, 2016) (Massey & Rugh), posted at <https://pubmed.ncbi.nlm.nih.gov/26966459/>. From 1970 to 2010, "the socioeconomic gap between Whites and minorities has widened, even as many minority members have moved into the middle class." *The State of the Nation's Housing 2018*, JOINT CTR. FOR HOUSING STUD. OF HARV. U., p. 16 (2018). "Minorities made up half of the nation's low-wealth households in 2016, up from 39 percent in 1995. They

are areas with better opportunities for good-paying jobs, high-performing schools, and high-quality local services. Residential isolation by income therefore interferes with the goal of integration of minority group members with the rest of the population—a central purpose of the Fair Housing Act.

The increasing residential isolation by income level has been driven by soaring housing rents and sales prices, which have far outstripped income gains since the 1960's.<sup>5</sup> And those soaring housing costs have been driven largely by economically exclusionary governmental housing policies—increasingly exclusionary zoning ordinances and other regulatory barriers to housing opportunity.

State and local regulations are among the principal culprits behind the nation's persistent affordability problems. By limiting the land available for and density of new development, as well as imposing impact fees and subdivision requirements that raise production costs, state and local governments make it difficult to build affordable housing.<sup>6</sup>

The Economic Fair Housing Act (EFHA) would prohibit regulatory barriers to housing opportunity. It would open the door to much greater housing opportunities for low- and moderate-income Americans, including the disproportionate share who are minority group members. Among those opportunities would be much-improved chances to live in high-opportunity areas.

An EFHA could be enacted at the state and/or federal level. The discussion below focuses on advantages and challenges of an EFHA.

### **Advantages of EFHA for minority group members**

The EFHA predictably would improve housing opportunities for minority group members in a number of ways, compared to the current Fair Housing Act. For example:

1. *The EFHA would be the first comprehensive, statutory prohibition on regulatory barriers to housing opportunity.* The EFHA would ban all economically exclusionary housing practices by government. Those regulatory barriers to housing opportunity consist of exclusionary zoning and other regulatory barriers that function unfairly to exclude people from certain neighborhoods, without

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also accounted for more than three-quarters of the growth in low-wealth households between 1995 and 2016.” *Id.*

<sup>5</sup> The median rent payment in the United States rose 61 percent between 1960 and 2016, while the median income among renters grew only 5 percent (adjusted for inflation). *See, More U.S. households are renting than at any point in 50 years*, PEW RESEARCH CENTER (Jul. 19, 2017). Most low- and moderate-income American households rent their housing. About 36 percent of U.S. households were renters, as of 2016. *Id.* As to homeowners, between 1960 and 2016 the median home value increased 112 percent, while median income for owners rose only 50 percent.

<sup>6</sup> *The State of the Nation's Housing 2007*, JOINT CTR. FOR HOUSING STUD. OF HARV. U., p. 28 (2007).

sufficient justification. Those practices have persisted despite landmark decisions by the highest courts of a number of states that such practices are unlawful.<sup>7</sup>

2. *There would be much stronger penalties for regulatory barriers to housing opportunity practices generally.* The EFHA would incorporate the extensive remedies of the current federal Fair Housing Act, including such things as: (a) Reimbursement of the legal fees and other expenses of people who show they are victims of regulatory barriers to housing opportunity, in the court's discretion; and (b) Justice Department and other government enforcement of the EFHA. The mere existence of those remedies should have a powerful, added chilling effect on government officials responsible for zoning and other housing-related decisions.
3. *Predictably, there would be greatly increased production and preservation of housing affordable to low- and moderate-income minority group members.* The EFHA predictably will result in great improvements in the housing supply, where it's needed. That statute also should lead to much more moderate housing costs overall, and to reversal of the trend toward more lower-income Americans becoming isolated in low-income neighborhoods.
4. *There would be fewer evidentiary hurdles to proving violations, generally.* Under the current Fair Housing Act, people who claim that a zoning or other housing-related regulation has a disparate impact on them must show that the discrimination is based on race or one of the other non-economic, protected factors. And that proof generally requires presenting expert testimony and statistical analysis, because most regulations that have disparate impacts seem neutral on their face.

Expert testimony and statistical analysis tend to be quite expensive to obtain.<sup>8</sup> And plaintiffs generally have had great difficulty proving disparate impact violations to judges. For example:

Plaintiffs have received positive decisions in only 20%, or eighteen of the ninety-two [Fair Housing Act] disparate impact claims considered on appeal. Although defendants were able to have 83.8% of their positive [Fair Housing Act] disparate impact

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<sup>7</sup> See, e.g., *Southern Burlington Co. NAACP v. Mount Laurel*, 92 N.J. 158, 456 A.2d 390, 415 (1983) (“*Mount Laurel II*”) (municipalities “must remove all municipally created barriers to the construction of their fair share of lower income housing”). The highest courts of at least seven states have specifically held exclusionary zoning to be unlawful. Those states are California, Connecticut, New Hampshire, New Jersey, New York, Pennsylvania and Virginia.

<sup>8</sup> “Few litigants have the resources to hire an expert to develop the kind of statistical analysis often important to establish a prima facie case of disparate impact” under the current Fair Housing Act criteria. Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact; An Appellate Analysis of Forty Years of Disparate Impact Claims under the Fair Housing Act*, 63 AM. U. L. REV. 357, 392 (2013).

outcomes affirmed on appeal, plaintiffs were able to hold onto only 33.3% of their positive outcomes.<sup>9</sup>

By contrast, under the EFHA there would be no need to present sophisticated proof of a disparate impact based on race, gender, disability or other protected, non-economic factor. The basic questions in most cases would be:

1. Whether the housing opportunities in the local jurisdiction meet the standards of the EFHA<sup>10</sup> for the plaintiffs, or for: (a) all the low- and moderate-income people who work, have close family members, and/or have their primary support system in the jurisdiction; and
2. If those opportunities do not meet EFHA standards: (a) whether the local jurisdiction's zoning and/or other housing-related restrictions at issue are necessary to achieve a valid governmental purpose; and if they are, (b) whether a different regulation with less exclusionary effect would achieve that same purpose.<sup>11</sup>

Those questions often could be answered without sophisticated expert and/or statistical proof. However, where the issue is whether the locality is meeting its fair share of the region's housing need—an issue that covers a broader range of people than those with the contacts mentioned above—a more sophisticated, expert and/or statistical analysis usually would be required.

5. *More violations could be prohibited by rule, without needing specific evidence of adverse effects in each case.* Economically discriminatory, government housing-related regulations could be the subject of many *per se* rules that are not feasible

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<sup>9</sup> See, e.g., Seicshnaydre, *supra*, at 363. By contrast: “The affirmance rate generally for federal civil appeals is thought to be about 80%.” *Id.* at 399, citing Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 HARV. L. & POL'Y REV. 103, 106 (2009) (comparing plaintiffs' success rates generally to success rates in jobs cases in district and appellate courts from 1979 to 2006).

Our review of the disparate impact claims that Prof. Seicshnaydre analyzes indicates that more than two-thirds of those claims (63 of 92) were dismissed at the appellate level based on insufficient allegations or proof of a disparate impact on the plaintiffs. Few of those claims were dismissed because the regulation, policy, or action at issue was found to comply with Fair Housing Act requirements.

<sup>10</sup> Those standards include opportunities for each person who works, resides, has a close family member residing, or has the person's primary support system in the jurisdiction, to live in suitable housing, as close as feasible to the person's preferred place to live. Those standards also include suitable housing opportunities for a fair share of the region's population that do not have those specific contacts with the jurisdiction. Proposed EFHA, § (a)(12).

The term ‘suitable housing’ means housing that is affordable to the person, that is of a type, price, size, condition, and location that are reasonably suited to the person's circumstances, and that meets applicable standards of health and safety. Only regulatory barriers that would adversely affect housing opportunities for low- and moderate-income persons may be challenged through the provisions of the EFHA. Proposed EFHA, § (a)(10).

<sup>11</sup> Proposed EFHA, § (a)(11) (definition of “without sufficient justification”).

under the current Fair Housing Act. Under that statute, there always must be proof of disparate impact based on race or other protected, non-economic status.

6. *Minority group members could benefit from challenges to regulatory barriers to housing opportunity by others.* Because a disproportionate number of minority group members have low- or moderate incomes, they predictably will benefit from successful challenges to regulatory barriers to housing opportunity by plaintiffs who are not minority group members.

## **Challenges for minority group members under EFHA**

At least two important challenges will need to be resolved satisfactorily under the EFHA, for the benefit of minority group members (among others). Those challenges are:

- Potential adverse effects of gentrification on current, low- and moderate-income residents in urban neighborhoods where significant amounts of new housing are built or renovated; and
- Potential efforts to reduce support for current Fair Housing Act programs.

Below, we address how we believe those challenges can be resolved satisfactorily.

1. *Gentrification and displacement concerns:* A frequent concern of low- and moderate-income city dwellers is displacement from their neighborhoods as a result of gentrification. That increasingly frequent phenomenon involves an influx of higher-income people into a lower-income neighborhood—including when the quantity and/or quality of the housing there is increased.

There is some evidence that gentrification has had a positive effect overall, for most low-income residents of most neighborhoods involved.<sup>12</sup> But gentrification also brings rising housing prices, and sometimes the renovation or redevelopment of existing buildings—all of which can result in displacement of some current residents.<sup>13</sup>

Six main housing strategies that cities and other local governments can use to minimize displacement issues related to gentrification were analyzed recently by housing policy expert Jeffrey Lubell.<sup>14</sup> Those strategies are:

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<sup>12</sup> See, e.g., EHI, *Approaches to resolving displacement concerns in gentrifying, urban neighborhoods*, pp. 8-9 (2021), posted at <https://www.equitablehousing.org/images/PDFs/PDFs--2021-/EHIResolving-city-displacement-concerns-7-6-21.pdf>.

<sup>13</sup> See *id.*, pp. 7-10.

<sup>14</sup> Jeffrey Lubell, *Preserving and Expanding Affordability in Neighborhoods Experiencing Rising Rents and Property Values*, CITYSCAPE, Vol. 18, No. 3, 131 (2016). Lubell is Director of Housing and Community Initiatives at Abt Associates, a global consulting firm. Formerly, he was Executive Director of the Center for Housing Policy. See also, e.g., Ingrid Gould Ellen and Jeffrey Lubell, *Through the Roof: What Communities Can Do About the High Cost of Rental Housing in America*, LINCOLN INST. OF LAND POLICY,

- a. **Preservation.** Preserving existing affordable rental units.
- b. **Protection.** Helping long-time residents who wish to stay in the neighborhood.
- c. **Inclusion.** Ensuring that a share of new development is affordable.
- d. **Revenue generation.** Harnessing growth to expand financial resources for affordable housing.
- e. **Incentives.** Creating incentives for developers of affordable housing.
- f. **Property acquisition.** Facilitating acquisition of sites for affordable housing.<sup>15</sup>

EHI believes that three specific anti-displacement programs can be instrumental in reassuring existing, low-income urban residents and facilitating needed housing growth. Those programs are: (i) moderate rent stabilization, (ii) inclusion of new housing units affordable to low- and moderate-income residents who otherwise would be displaced, and (iii) community preferences for those residents, to facilitate their placement in affordable units that become available. Our basic analysis of those policies is contained in EHI, *Approaches to resolving displacement concerns in gentrifying, urban neighborhoods*, pp. 10-37 (2021), posted at <https://www.equitablehousing.org/images/PDFs/PDFs--2021-/EHIResolving-city-displacement-concerns-7-6-21.pdf>

Strong anti-displacement policies can avoid the serious, adverse consequences that displacement has for certain low- and moderate-income people. Those policies also can relieve debilitating anxieties about the possibility of displacement. Further, strong anti-displacement measures also can reduce city residents' resistance to needed, new housing in their gentrifying neighborhoods.

2. *Concerns about reduced support for existing Fair Housing Act programs.* There should be no reduction in funding and efforts to combat housing discrimination based on race and the other factors protected by the current Fair Housing Acts, due to the EFHA. Of course, ample funding for efforts to enforce the EFHA would be a key to maximizing progress under it. Even if EFHA programs at the federal level received as much funding as Fair Housing Act programs do—thus doubling the total federal budget for fair housing activities—that amount would have only a miniscule effect on the federal budget.<sup>16</sup>

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pp. 33-42 (2021) (giving illustrations of promising policies being used by many cities and other local governments to increase supply of affordable units and protect low- and moderate-income residents).

<sup>15</sup> Lubell (2016), *supra* n. 14 at 132.

<sup>16</sup> Even assuming that the EFHA would require doubling the funding for Fair Housing Activities in the federal budget, the total would be a miniscule part of federal discretionary budget. For example, in FY2022, of the roughly \$1.5 trillion of federal discretionary funds, all Fair Housing Activities, which includes those of the U.S. Dept. of Housing and Urban Development (HUD), were allocated \$88 million. U.S. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2022 (2021), *Consolidated Appropriations Act 2022*, Pub. L. No. 117-103, 136 Stat. 49, 726.

However, even without public funding, EFHA claims could be resolved through lawsuits by private citizens, just as alleged violations of the Fair Housing Act can be resolved that way. Private enforcement is a crucial means of combating housing discrimination. For example, according to the National Fair Housing Alliance:

- In 2016, private fair housing organizations investigated 70 percent of the complaints filed nationwide—almost twice as many as those investigated by federal, state, and local government agencies combined;<sup>17</sup> and
- Historically, 71 percent of the HUD cases in which a fair housing organization is a complainant or co-complainant result in conciliation or a finding of reasonable cause to believe that unlawful discrimination occurred—whereas only 37 percent of cases not referred to HUD by fair housing organizations result in those favorable outcomes.<sup>18</sup>

Courts would have the same discretionary authority under the EFHA that they now have under the Fair Housing Act to order reimbursement, by the party responsible for unlawful discrimination, of the legal and other expenses required for victims to prove their case. Studies support the conclusion that attorneys' fees provisions have increased substantially the ability of low- and moderate-income Americans to remedy discrimination under the Fair Housing Act and numerous other federal civil rights statutes.<sup>19</sup>

## Conclusions

The EFHA predictably would improve housing opportunities for minority group members in a number of ways, compared to the current Fair Housing Act. For example:

1. The EFHA would be the first comprehensive, statutory prohibition on regulatory barriers to housing opportunity.
2. There would be much stronger penalties for regulatory barriers to housing opportunity practices generally.

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So, even if HUD had used the total funding appropriated for all federal Fair Housing Activities for FY2022, that funding comprised only about one dollar in 17,000 (0.00006%) of the federal discretionary budget. If that total funding were doubled, it still would constitute only about one dollar in 8,500 of the federal discretionary budget.

<sup>17</sup> *2017 Fair Housing Trends Report: The Case for Fair Housing*, NATIONAL FAIR HOUSING ALLIANCE (NFHA) 50 (2018) (percentages add up to more than 100 percent, because some complaints receive multiple investigations).

<sup>18</sup> *Id.* (citing *Study of the Fair Housing Initiatives Program*, DB Consulting Group, Inc., (May 2011)).

<sup>19</sup> *See, e.g., Making Challenges to Exclusionary Housing Practices Feasible – The Role of Attorney's Fees Awards*, EQUITABLE HOUSING INSTITUTE 10-15 (June 2019), posted at [https://www.equitablehousing.org/images/PDFs/PDFs--2018-/Attys-fees-in\\_housing-related\\_litigation\\_EHI-memo-final.pdf](https://www.equitablehousing.org/images/PDFs/PDFs--2018-/Attys-fees-in_housing-related_litigation_EHI-memo-final.pdf)

3. Predictably, there would be greatly increased production and preservation of housing affordable to low- and moderate-income minority group members.
4. There generally would be fewer evidentiary hurdles in order to prove violations.
5. More violations could be prohibited by rule, rather than requiring specific evidence of adverse effects in each case.
6. Minority group members could benefit from challenges to regulatory barriers to housing opportunity by plaintiffs who are not minority group members.

At least two important challenges will need to be resolved satisfactorily under the EFHA, for the benefit of minority group members (among others). Those challenges are:

- Potential adverse effects of gentrification on current, low- and moderate-income residents in urban neighborhoods where significant amounts of new housing are built or renovated; and
- Potential efforts to reduce support for current Fair Housing Act programs.

We believe that the first challenge can be met by putting in place strong anti-displacement measures. And we believe that the second can be met by insisting that there should be no reduction in efforts and funding to combat housing discrimination based on race and the other factors protected by the current Fair Housing Acts, notwithstanding enactment of the EFHA.

By prohibiting regulatory barriers to housing opportunity and applying the extensive enforcement tools of the Fair Housing Act, the EFHA would open the door to much greater housing opportunities for the disproportionate share of low- and moderate-income Americans who are minority group members—including opportunities to live in high-opportunity areas. The time has come to enact the EFHA.