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# The Stick Over the Carrot: How Congress Can Incentivize Localities to Reform Exclusionary Zoning and Land Use Policies

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## INTRODUCTION

Amid the deadliest pandemic in a century and despite the worst economic downturn since the Great Depression, America's housing market boomed. Demand in the residential real estate market soared during the pandemic with homebuyers seeking more space for work-from-home arrangements and taking advantage of historically low interest rates.[1] This increase in demand for housing has run up against a severe shortage in supply. The National Association of Realtors reported an 18.2% year-over-year decrease in housing inventory in June 2021, marking "25 straight months of year-over-year declines."[2] This deficit in the supply of housing relative to increasing demand has caused housing prices to rise precipitously.[3] American homeowners with mortgages saw their equity

[1] Kathleen Hawley, *Why is the Housing Market Thriving in a Pandemic?*, HOUS. WIRE (Sept. 2, 2020, 6:18 PM), https://www.housingwire.com/articles/why-is-the-housing-market-thriving-in-a-pandemic/.

[2] Michael Hyman, *June 2021 Existing-Home Sales Bounce Back as Home Prices Hit Second Highest Pace*, NAT'L ASS'N OF REALTORS: ECONOMISTS' OUTLOOK (July 22, 2021), https://www.nar.realtor/blogs/economists-outlook/june-2021-existing-home-sales-bounce-back-as-home-prices-hit-second-highest-pace.

[3] Nicole Friedman, *U.S. Median Home Price Hit New High in June*, WALL ST. J. (July 22, 2021, 1:04 PM), https://www.wsj.com/articles/median-existing-home-price-hit-new-high-in-june-11626963073.

increase by $1.9 trillion in the first quarter of 2021, an increase of 19.6% over the prior year.[4]

Shortfalls in housing supply have also affected rental markets in major urban centers. Though rents in these areas decreased as the pandemic caused an exodus from large cities,[5] some of the most expensive rental markets before the pandemic were urban centers with an inadequate supply of rental units. For example, just over 2,600 units of new housing were built in San Francisco in 2018, a decrease of 41% compared to 2017.[6] This decrease in new housing construction followed an inflow of over 8,000 new residents into the city in 2017.[7] How did this deficit of new housing production relative to population increase affect the city's rents? In May 2019, the median rent for a one-bedroom apartment in San Francisco reached $3,700 per month, the highest in the country at the time by nearly $1,000.[8] As demand for rental housing in major cities returns to pre-pandemic levels, the median rent for a one-bedroom apartment in San Francisco remains the highest in country, even as other major cities experience faster growth in rents.[9]

Urban economists generally agree that local policy decisions regarding zoning and land use regulations contribute significantly to shortfalls in housing supply. There is ample economic research demonstrating that restrictive zoning and land use regulations result in higher housing prices by reducing the construction of new housing.[10] General examples of restrictive zoning and land use regulations include by-right development only for single family housing, lengthy permitting processes and timelines for multifamily development, building height limitations, and minimum lot size restrictions.[11] An empirical study suggests that restrictive zoning and land use regulations inflate housing prices during times of increased demand and are responsible for approximately 20% of variation in housing growth

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[4] *Homeowner Equity Insights: Data Through Q1 2021*, CORELOGIC https://www.corelogic.com/intelligence/homeowner-equity-insights/ (last visited Aug. 5, 2021).

[5] Kriston Capps, et al., *In the U.S., City Rents are Falling, and Suburban Rents are Climbing*, BLOOMBERG (Oct. 30, 2020, 9:00 AM), https://www.bloomberg.com/news/articles/2020-10-30/where-rents-are-falling-and-where-they-are-rising?sref=rT5Gzxsc.

[6] S. F. PLANNING, 2018 SAN FRANCISCO HOUSING INVENTORY 5 (2019).

[7] Adam Brinklow, *San Francisco Population Swells to More Than 884,000*, CURBED SAN FRANCISCO (Mar. 26, 2018), https://sf.curbed.com/2018/3/26/17165370/san-francisco-population-2017-census-increase.

[8] Crystal Chen, *Zumper National Rent Report: May 2019,* ZUMPER: RENT REPS. (Apr. 30, 2019), https://www.zumper.com/blog/zumper-national-rent-report-may-2019/.

[9] Jeff Andrews, *Zumper National Rent Report*, ZUMPER: RENT REPS. (July 28, 2021), https://www.zumper.com/blog/rental-price-data/.

[10] *See, e.g.*, Jenny Schuetz, *No Renters in My Suburban Backyard: Land Use Regulation and Rental* Housing, 28 J. POL'Y ANALYSIS & MGMT. 296 (2009); Joseph Gyourko & Raven Molloy, *Regulations and Housing Supply* (Nat'l Bureau of Econ. Rsch., Working Paper No. 20536, 2014), https://www.nber.org/papers/w20536; Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. 3 (2018).

[11] *See* Schuetz, *supra* note 10, at 302–05.

among metropolitan areas.[12] Several of America's most productive and populous metropolitan areas, including San Francisco, suffer from high housing costs in large part because their zoning and land use regulations constrain the supply of new housing production.[13]

These negative effects on housing affordability have led to increased scrutiny on how local governments formulate and implement their zoning and land use regulations. A recent book by three Boston University researchers, titled *Neighborhood Defenders*, examines how the "participatory politics" of local planning allow a privileged, unrepresentative class of homeowners, which the authors labels "neighborhood defenders," to be overrepresented in local policymaking decisions regarding zoning and land use regulations.[14] The authors argue that these neighborhood defenders "use participatory institutions and land use regulations to stop, stall, and shrink proposals for new housing."[15]

*Neighborhood Defenders* touches on a key element of any participatory political system: "[d]ecisions are made by those who show up."[16] Who shows up to local planning meetings where zoning and new development decisions are proposed and debated? *Neighborhood Defenders* demonstrates that current homeowners dramatically outnumber renters and first-time homebuyers at these meetings.[17] Considering this dynamic, it should come as no surprise that current homeowners benefit tremendously from the state of the American housing market.[18] Current homeowners show up in greater numbers to the planning meetings where local officials make decisions affecting the value of their homes and have reaped the financial benefits,[19] to the detriment of lower and middle-income individuals and families.[20] From this, we can conclude that the system of formulating and implementing zoning and land use regulations exclusively at the local level does not adequately serve all participants in the American housing market, particularly renters and first-time homebuyers.[21]

With this conclusion in mind, this article examines efforts at the state and federal level to reform local zoning and land use regulations that

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[12] Jonathan T. Rothwell, *The Effect of Density Regulation on Metropolitan Housing Markets* 25–27 (June 4, 2009) (working paper) (on file with the Woodrow Wilson Sch. Pub. & Int'l Aff. Princeton U.), https://ssrn.com/abstract=1154146.

[13] *See* Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21154, 2017), https://www.nber.org/papers/w21154; Gabriel Metcalf, *Sand Castles Before the Tide? Affordable Housing in Expensive Cities*, 32 J. ECON. PERSPS. 1 (2018).

[14] KATHERINE LEVINE EINSTEIN ET AL., NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS 4 (2020).

[15] *Id.* at 25.

[16] *West Wing: What Kind of Day Has It Been* (NBC television broadcast May 17, 2000).

[17] EINSTEIN ET AL., *supra* note 14, at 95–115. For additional discussion of the research in this book *see EconTalk: Katherine Levine Einstein on Neighborhood Defenders*, THE LIBR. OF ECONS. & LIBERTY (Dec. 14, 2020), https://www.econtalk.org/katherine-levine-einstein-on-neighborhood-defenders/.

[18] *See* CORELOGIC, *supra* note 4.

[19] EINSTEIN ET AL., *supra* note 14, at 3–4.

[20] *See id*. at 6–8.

[21] *Id.* at 95–115.

constrain the supply of housing. At the state level, several legislatures have taken proactive steps to preempt local zoning and land use regulations to allow for increased housing development.[22] Connecticut, a state that suffers from significant shortages of housing supply,[23] recently enacted House Bill 6107, which amends the state's Zoning Enabling Act to require local jurisdictions to reform their zoning and land use regulations to allow for greater construction of affordable housing options.[24] Among other reforms, HB 6107 would require municipalities to allow accessory dwelling units (ADUs)[25] on all one-unit lots and cap minimum parking requirements for new housing units.[26] While HB 6107 makes several notable changes to Connecticut's Zoning Enabling Act, the bill's scope was significantly narrowed during the legislative process to ensure that it had sufficient political support to pass.[27] In Section I of this article, I examine HB 6107 in detail and discuss how the concessions that narrowed the bill's scope highlight the political hurdles states must overcome to pass preemptive zoning and land use laws.

Further removed from the politics of local development, conditions on federal funding made available to state and local governments offer another way to reform local zoning and land use regulations. In Section II of this article, I review proposals that would condition various sources of federal funding available to states and local jurisdictions on reforming local zoning and land use regulations to allow for increased housing development. These proposals come in two forms: the carrot and the stick. Under the carrot approach, Congress would make new sources of federal funds available to jurisdictions that reform their zoning and land use regulations to allow for increased housing development. Conversely, the stick approach would condition existing sources of federal funds currently offered to states and local governments on pro-development reforms to local zoning and land use regulations.

I argue that Congress should opt for the stick over the carrot because it is a more effective and legal way to incentivize local jurisdictions to reform restrictive zoning and land use regulations. To demonstrate this point, I first examine recent proposals that would attempt to achieve this goal through the

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[22] *See generally* John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823 (2019).

[23] Jerusalem Demsas, *A fight over housing segregation is dividing one of America's most liberal states*, VOX (Mar. 29, 2021), https://www.vox.com/22335749/housing-prices-connecticut-segregation-zoning-reform-democrats-adu-parking-minimum.

[24] H.B. 6107, 2021 Conn. Acts 29 (Reg. Sess.); *see also* Michael Andersen, *A New Idea for State-led Upzoning: Letting Cities Opt Out*, SIGHTLINE INST. (May 28, 2021), https://www.sightline.org/2021/05/28/a-new-idea-for-state-led-upzoning-letting-cities-opt-out/; Jacqueline Rabe Thomas, *Senate passes controversial tenant reform bill*, THE CONN. MIRROR (May 28, 2021), https://ctmirror.org/2021/05/28/senate-passes-controversial-zoning-reform-bill/.

[25] H.B. 6107, *supra* note 24 (defining these units as "accessory apartments."). The terms "accessory dwelling units" (shortened to "ADUs") and "accessory apartments" functionally represent the same thing, for consistency, I use the term "ADU" in this article.

[26] Andersen, *supra* note 24.

[27] *Id.*

carrot approach and point out their shortcomings. I then closely analyze the Housing, Opportunity, Mobility, and Equity Act of 2019 (the "HOME Act"),[28] a bill co-sponsored by Representative Jim Clyburn (D-SC) and Senator Cory Booker (D-NJ) and identified by President Biden as a centerpiece of his housing agenda during the presidential campaign.[29] The HOME Act would adopt the stick approach by requiring state and local governments receiving two existing streams of federal funding, Community Development Block Grants (CDBG) and Surface Transportation Block Grants (STBG), to implement an affordable housing strategy that would incorporate inclusive zoning and land use regulations.[30] Local jurisdictions, including affluent areas with expensive housing, would likely be loath to lose valuable STBG funding and thus would be incentivized to implement inclusive zoning and land use regulations to make sure the federal transportation dollars keep flowing.

The HOME Act's conditioning of STBG funding on implementation of an affordable housing strategy raises questions regarding the limits of Congress's power under the Spending Clause.[31] In Section III of this article, I examine the Supreme Court's interpretations of the Spending Clause in *South Dakota v. Dole*[32] and *National Federation of Independent Business v. Sebelius*[33] and conclude that the HOME Act's conditions on STBG funding would likely be upheld as a constitutional exercise of Congress's spending power. Since the HOME Act would be more effective than policies adopting the carrot approach at incentivizing localities to reform restrictive zoning and land use regulations and would be a constitutional exercise of Congress's spending power, I conclude that Congress should adopt the stick approach embraced by the HOME Act.

At a general level, this article contributes a legal analysis of specific state and federal efforts to reform local zoning and land use regulations that is currently lacking in the commentary on this subject. It is essential that state and federal proposals to reform local zoning and land use regulations undergo analysis from several academic perspectives. As discussed above, continued shortfalls in housing supply, combined with research findings like those in *Neighborhood Defenders*, will require creative policy interventions to allow for increased housing development. Since many local governments struggle to implement these changes,[34] state and federal government actors will be forced to reform local zoning and land use regulations to increase housing supply.

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[28] Housing, Opportunity, Mobility, and Equity Act of 2019, H.R. 4808, 116th Cong. (2019).

[29] *See* THE BIDEN PLAN FOR INVESTING IN OUR COMMUNITIES THROUGH HOUSING, https://joebiden.com/housing/ (last visited Apr. 20, 2021).

[30] *Id.*

[31] U.S. CONST. art. I, § 8, cl. 1.

[32] South Dakota v. Dole, 483 U.S. 203 (1987).

[33] Nat'l. Fed'n. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[34] *See* EINSTEIN ET AL., *supra* note 14.

## I. STATE PREEMPTION OF ZONING AND LAND USE REGULATIONS

In the face of a worsening affordable housing crisis, several states have asserted greater authority over local zoning and land use regulations in an effort to increase housing supply.[35] California, which faces an extreme shortage of housing,[36] has enacted multiple preemptive laws in recent years in an effort to loosen zoning and land use regulations to allow for increased housing development.[37] Included among these laws were a series of bills passed between 2016 and 2019 resulting in "an essentially unqualified right for every homeowner in the state to add a freestanding backyard ADU of up to 800 square feet, plus a 'junior ADU' of up to 500 square feet within the envelope of an existing structure."[38] In 2019, Oregon enacted House Bill 2001, a sweeping bill that eliminated single-family zoning all over the state and mandated that denser forms housing be allowed in more populous cities.[39] The state preemption efforts have not been limited to the West Coast. Before Connecticut enacted HB 6107, both Virginia and Maryland proposed bills that would pre-empt local zoning ordinances to allow construction of denser forms of housing.[40] Maryland's up-zoning bill took a targeted approach, mandating denser housing in areas with high concentration of jobs or access to public transit, while Virginia's bill would have legalized duplexes in neighborhoods across the commonwealth.[41]

In this section, I first examine how HB 6107 preempts local zoning and land use regulation in Connecticut. Though HB 6107 mandates several promising reforms to local zoning and land use regulations that would allow for increased housing supply, significant concessions that narrowed the bill's scope were necessary to ensure that it had sufficient political support to pass. I conclude this section by discussing how the concessions necessary to pass HB 6107 highlight the political difficulties states face in passing preemptive zoning and land use legislation.

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[35] *See* Infranca, *supra* note 22; Kenneth Stahl, *Home Rule and Local Preemption of Local Land Use Control*, 50 URB. L. 179 (2021).

[36] *See* JONATHAN WOETZEL ET AL., A TOOLKIT TO CLOSE CALIFORNIA'S HOUSING GAP: 3.5 MILLION HOMES BY 2025 (2016) (estimating that California's housing supply is 2 million units short to meet demand).

[37] *See* Stahl, *supra* note 35, at n.6 (listing several California laws enacted between 2017 and 2019 that preempt local zoning and land use regulations); Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 114–24 (2019).

[38] Elmendorf, *supra* note 37, at 127.

[39] *See id.* at 181; Laura Bliss, *Oregon's Single-Family Zoning Ban Was a 'Long Time Coming*,' BLOOMBERG (July 2, 2019), https://www.citylab.com/equity/2019/07 /oregon-single-family-zoning-reform-yimby-affordable-housing/593137 ("In cities with more than 25,000 residents, duplexes, triplexes, fourplexes, and 'cottage clusters' would be allowed on parcels that are currently reserved for single-family houses; in cities of at least 10,000, duplexes would be allowed in single-family zones.").

[40] *See* Stahl, *supra* note 35, at n.7; Kriston Capps, *Denser Housing is Gaining Traction on America's East Coast*, BLOOMBERG (Jan. 3, 2020), https://www.bloomberg.com/news/articles/2020-01-03/maryland-s-ambitious-pitch-for-denser-housing; Kriston Capps, *With New Democratic Majority, Virginia Sees a Push for Denser Housing*, BLOOMBERG (Dec. 20, 2019), https://www.bloomberg.com/news/articles/2019-12-20/inside-the-virginia-bill-to-allow-denser-housing.

[41] Capps, *supra* note 40.

### *A. State Preemption of Zoning and Land Use Regulations*

Once HB 6107 takes effect, Connecticut will become the eighth state to enact state-level legislation concerning ADUs.[42] Generally, ADUs are created out of existing or newly built structures on a single-family property and may serve as granny flats or renovated garage or basement apartments.[43] More permissive regulations regarding the construction of ADUs, like those required by HB 6107, can increase flexible and affordable housing options. A report by the AARP highlights how ADUs provide affordable housing options to a broad range of residents, ranging from elderly family members who wish to live near family to younger families seeking entry-level housing options.[44] Indeed, ADUs provide ideal housing options for multi-generational households, which became increasingly more common during the COVID-19 pandemic.[45] Allowing for ADU construction also benefits homeowners, as the accessory units may be used to generate rental income.[46] One study suggests that the "addition of [accessory apartments] increases the property value of an apartment by about 50%," providing further benefits to homeowners, especially seniors who may be living on fixed incomes.[47]

While most municipalities in Connecticut already allow for the construction of ADUs prior to HB 6107 going into effect, the requirements for their construction vary significantly across local jurisdictions.[48] For example, in Greenwich, an affluent suburb of New York City in southern Connecticut, ADUs can be constructed in most parts of the town, but they must "be occupied by elderly persons or dedicated to affordable housing."[49] Conversely, the neighboring town of Stamford, which is zoned almost entirely for single-family housing, does not allow for the construction of ADUs anywhere inside its borders.[50] Granby, a town in the state's north,

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[42] *2021 Legislative Reforms*, DESEGREGATE CONN. (2021), https://www.desegregatect.org/hb6107.

[43] *See, e.g.*, Mimi Kirk, *The Granny Flats Are Coming*, BLOOMBERG (Jan. 16, 2018), https://www.bloomberg.com/news/articles/2018-01-16/the-rise-of-the-backyard-granny-flat; John Infranca, *Housing Changing Households: Regulatory Changes for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL'Y REV. 53 (2014); AHMAD ABU-KHALAF, NEW REFLECTIONS ON AFFORDABLE HOUSING DESIGN, POLICY AND PRODUCTION: OVERCOMING BARRIERS TO BRINGING ACCESSORY DWELLING UNIT DEVELOPMENT TO SCALE (2020).

[44] AARP, THE ABCS OF ADUS: A GUIDE TO ACCESSORY DWELLING UNITS AND HOW THEY EXPAND HOUSING OPTIONS FOR PEOPLE OF ALL AGES (2019). Additionally, ADUs provide housing options for older adults with disabilities who are often left out of the housing market. *See* Amy Sokolow, *Massachusetts advocates say in-law apartments will help older adults, people with disabilities*, BOS. HERALD (July 28, 2021), https://www.bostonherald.com/2021/07/28/advocates-say-in-law-apartments-will-help-older-adults-people-with-disabilities/.

[45] Michele Lerner, *'Together as a Family': Multigenerational Living Rises In Pandemic*, WASH. POST (May 13, 2021, 12:00 PM), https://www.washingtonpost.com/realestate/together-as-a-family-multigenerational-living-rises-in-pandemic/2021/05/12/bd8598f6-a900-11eb-8d25-7b30e74923ea_story.html.

[46] AARP, *supra* note 44, at 4.

[47] Sarah Thomaz, *Investigating ADUs: Determinants of Location and Effects on Property Values* (Univ. of Calif., Irvine, Working Paper), https://www.economics.uci.edu/files/docs/workingpapers/JobMarketPaper_Thomaz.pdf; AARP, *supra* note 44, at 4.

[48] *Accessory Apartments*, DESEGREGATE CONN. (2021), https://www.desegregatect.org/adu.

[49] *Connecticut Zoning Atlas*, DESEGREGATE CONN. (2021), https://www.desegregatect.org/atlas.

[50] *Id.*

allows ADUs to be detached on lots larger than two acres, while the state capital Hartford allows ADUs to be built in residential or mixed use zones.[51] Adding further complexity, some municipalities only allow ADUs to be constructed after a public hearing.[52]

Effective January 1, 2022, HB 6107 reforms the state's Zoning Enabling Act to require municipalities to allow ADUs to be developed "as of right on each lot that contains a single-family dwelling."[53] Put differently, once HB 6107 goes into effect, municipal zoning and land use regulations across the state must allow ADUs to be constructed without a permit or public hearing on any lot that contains a single-family house.[54] HB 6107 will allow construction of ADUs that are either attached to or detached from the lot's primary dwelling, and the units may be up to 1,000 square feet or 30% of the area of the lot's primary dwelling (whichever is less).[55] In addition, HB 6107 prohibits municipalities from requiring more than one parking space per ADU and from requiring the installation of a new or separate utility connection, other than to the main dwelling.[56] Finally, HB 6107 also prohibits the requirement of maximum or minimum age requirements for ADUs.[57]

HB 6107 also imposes limits on parking requirements in zoning codes, making Connecticut "the fourth state to enact state-level legislation on parking requirements in zoning."[58] Minimum parking requirements can have a significant effect on housing affordability. In many jurisdictions, municipal regulations require developers to provide a minimum number of on-site parking spaces for housing projects, resulting in the large majority of housing units coming with "bundled" parking spaces.[59] A 2016 study concluded that garage parking costs renters about $1,700 per year and bundling a garage space with a rental unit increases its cost by about 17%.[60] As a result of minimum parking requirements imposed by municipalities around the country, about 708,000 households without a car having a garage parking space bundled with their unit, resulting in "a direct deadweight loss to society estimated to be about $440 million per year."[61] An analysis by the American Planning Association found that after the city of Minneapolis eliminated minimum parking requirements for multifamily buildings, prices

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[51] *Id.*

[52] DESEGREGATE CONN., *supra* note 48. Only 56% of towns allow ADUs to be constructed as-of-right, while the rest of municipalities that allow ADU construction first require an onerous public hearing process. *See* DESEGREGATE CONN., *supra* note 49.

[53] H.B. 6107 § 6(a)(1), 2021 Conn. Acts 29 (Reg. Sess.).

[54] DESEGREGATE CONN., *supra* note 42.

[55] Conn. H.B. 6107 § 6(a)(2)–(3); DESEGREGATE CONN., *supra* note 42.

[56] Conn. H.B. 6107 § (a)(6)(C), (F); DESEGREGATE CONN., *supra* note 42.

[57] Conn. H.B. 6107 § (a)(6)(E); DESEGREGATE CONN., *supra* note 42.

[58] DESEGREGATE CONN., *supra* note 42.

[59] C.J. Gabbe & Gregory Pierce, *Hidden Costs and Deadweight Losses: Bundled Parking and Residential Rents in the Metropolitan United States*, 27 HOUS. POL'Y DEBATE 2, 3 (2016).

[60] *Id.* at 4.

[61] *Id.*

for new studio apartments decreased from around $1,200 per month to less than $1,000 per month.[62]

Effective October 1, 2021, HB 6107 will prohibit municipalities from requiring "more than one parking space for each studio or one-bedroom dwelling unit or more than two parking spaces for each unit with two or more bedrooms."[63] Prior to HB 6107, on average, municipalities in the state with minimum parking requirements required 1.73 spaces per studio apartment and 1.87 spaces per apartments with more than two bedrooms.[64] Some towns in Connecticut went so far as to require "as many as 3 parking spaces for a studio apartment."[65] Thus, HB 6107 will have the greatest impact on jurisdictions with minimum parking requirements for studio or one bedroom units by imposing a cap of one parking space per such unit.[66]

### *B. Limitations on HB 6107's Scope*

Though HB 6107 takes several steps to reform restrictive zoning and land use regulations around Connecticut, significant concessions that narrowed the scope of the bill were necessary to ensure it had enough political support to become law. Several provisions were removed from earlier versions of the bill, including language that would have required municipalities to allow as of right construction of multifamily housing around some transit stations and in downtown corridors and that would have specified how many affordable units municipalities must build.[67] Most significantly, HB 6107 provides an escape hatch to local jurisdictions that are strongly opposed to the law's preemption of local zoning and land use regulations. Municipalities can opt out of HB 6107's ADU provisions and minimum parking requirements with a two-thirds vote of the municipality's zoning or planning commission and a two-thirds vote of its city council (or equivalent legislative body).[68] Municipalities have until January 1, 2023 to opt-out of HB 6107's ADU requirements (which is one year after those provisions go into effect), whereas there is no deadline to opt-out of the law's cap on minimum parking requirements.[69]

The concessions necessary to pass HB 6107 have caused concern among housing advocates in the state. Professor Sara Bronin, founder of the advocacy group Desegregate Connecticut, called the bill's opt-out provisions a "poison pill" akin to "the same backwards thinking that allowed

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[62] Jeffrey Spivack, *People Over Parking*, AM. PLAN. ASS'N (2018), https://www.planning.org/planning/2018/oct/peopleoverparking/.

[63] H.B. 6107 § (d)(9), 2021 Conn. Acts 29 (Reg. Sess.).

[64] DESEGREGATE CONN., *supra* note 42.

[65] *Ending Costly Parking Mandates*, DESEGREGATE CONN. (2021), https://www.desegregatect.org/parking.

[66] DESEGREGATE CONN., *supra* note 42.

[67] *See* S.B. 1024, Jan. Sess. 2021 (Conn. 2021); Thomas, *supra* note 24.

[68] H.B. 6107 §§ 5, 6(f).

[69] *Id*. at § 6.

us to be segregated and economically depressed."[70] With Republican legislators united in their opposition to HB 6107 on ideological home rule grounds,[71] concessions limiting the bill's scope were necessary to secure enough support from suburban Democrats for the bill to pass.[72] As a result, municipalities with restrictive zoning and land use regulations, where HB 6107's reforms are most needed, could conceivably muster enough opposition to the bill to opt-out of its two most significant preemptive provisions.

The political opposition to HB 6107 in Connecticut is just one example of the difficulty states face in passing preemptive zoning and land use legislation, despite its advantages over concentrating all authority at local planning meetings.[73] In Virginia, the bill that would have required municipalities to allow duplexes to be constructed in neighborhoods across the commonwealth died in committee after "members raised concerns about allowing the state to exercise more influence over zoning, which is traditionally handled by local governments."[74] The Maryland bill that would have required denser forms of housing to be built in "high-opportunity" areas met resistance in committee from delegates "who expressed doubts that the state should get involved in land use, which is traditionally the purview of local government."[75] In California, proponents of local control claimed that a bill requiring local governments to allow construction of multifamily housing near rail stations and in most single-family neighborhoods was a "significant incursion by the state into local affairs" and blocked it from leaving committee.[76]

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[70] Jacqueline Rabe Thomas, *CT Legislators Underwhelmed With Housing Reform Bill That Passes House*, CONN. MIRROR (May 20, 2021), https://ctmirror.org/2021/05/20/ct-legislators-underwhelmed-with-housing-reform-bill-that-passes-house/.

[71] Thomas, *supra* note 24 ("'Towns know what's right for individual towns and I want to make sure that we protect the different areas that the town sees is important, that we protect our open spaces, that we protect just who we are in our towns,' Sen. Dan Champagne, R-Vernon.").

[72] *Id*. (H.B. 6107 passed on a near party-line vote, with every Republican member of both houses voting against the bill and nine Democrats (eight representatives and one senator) representing suburban districts joining the Republicans.); Thomas, *supra* note 70.

[73] One legal advantage states have in preempting local zoning regulations is the absence of any significant constitutional barriers, unlike those which limit the federal government's efforts to condition federal funds (discussed *infra* Section III). As a general matter, the Federal Constitution treats state and local relations as a matter within the exclusive domain of the states and does not recognize municipal governments. *See* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2008 (2018).

[74] Ally Schweitzer, *An Ambitious Housing Proposal in Virginia is Dead – For Now*, WAMU (Jan. 23, 2020), https://wamu.org/story/20/01/23/an-ambitious-housing-proposal-in-virginia-is-dead-for-now/. The failure of Virginia's duplex bill speaks to the political strength of the local control argument at the state level, considering that municipalities in Virginia had no formal home rule authority to resist the preemptive law. Stahl, *supra* note 35, at n.10.

[75] Ally Schweitzer, *A Push for Denser Housing in Maryland Faces Doubt Among Lawmakers*, WAMU (Mar. 5, 2020), https://wamu.org/story/20/03/05/a-push-for-denser-housing-in-maryland-faces-doubt-among-lawmakers/.

[76] Liam Dillon, *The Revenge of the Suburbs: Why California's Effort to Build More in Single-Family-Home Neighborhoods Failed*, L.A. TIMES (May 22, 2019), https://www.latimes.com/politics/la-pol-ca-california-sb50-failure-single-family-homes-suburbs-20190522-story.html.

Undoubtedly, it is far more difficult for "neighborhood defenders" to exploit mechanisms of participatory politics to influence zoning and land use decisions at the state level, where their concerns over individual projects affecting "neighborhood character" carry less weight than in local planning meetings.[77] Nonetheless, opponents of preemptive state zoning legislation have successfully exploited concerns regarding loss of local control of zoning and land use regulation to limit or block state legislation.[78] These concerns allow state legislators to adopt an implacable ideological high ground, embracing abstract notions of home rule and local control rather than engaging with claims that numerous municipalities exercising local control over zoning and land use decisions have negatively impacted housing affordability across a state.[79] Because zoning has historically been the prerogative of local government,[80] the argument goes, so shall it remain.

[77] EINSTEIN ET AL., *supra* note 14.

[78] *See id.*; Schweitzer, *supra* note 75; Thomas, *supra* note 24.

[79] Indeed, while HB 6107's opponents decried the bill's attempts to wrest control of zoning and land use regulations away from local governments, a compilation of zoning codes in every Connecticut municipality reveals that when left to their own devices, most local governments in the state will either not allow construction of any multi-family housing or will only allow it in select areas. *See* Thomas, *supra* note 24; DESEGREGATE CONN., *supra* note 49.

[80] Stahl, *supra* note 35, at 182 ("Local control of land use has been so unquestioned for so long that it is tempting to think it must just be a 'municipal affair.'").

## II. FEDERAL EFFORTS TO REFORM LOCAL ZONING AND LAND USE REGULATIONS

The pervasiveness and success of the "local control" argument at the state level suggests a role for the federal government in shaping local zoning and land use policy. The primary means through which the federal government can shape local zoning and land use policy is by placing conditions on federal funds that flow to local jurisdictions.[81] In this section, I first discuss the two different approaches through which the federal government can incentivize local jurisdictions to reform zoning and land use regulations by placing conditions on federal funds: the carrot approach and the stick approach. I then explain why the stick approach is a more effective way for the federal government to shape local zoning and land use policy, before turning to a constitutional analysis of the HOME Act in Section III.

### *A. The Carrot Approach*

The federal government can seek to increase affordable housing supply by offering competitive grants to local jurisdictions. These grants are designed to entice local jurisdictions to enact zoning and land use regulations that would allow for increased housing development. There are some benefits to offering grants on a competitive basis, or, as I phrase it in this article, the carrot approach. For instance, attaching conditions to new competitive grants, rather than threatening to "terminate other significant independent grants," would not raise the constitutional issues I discuss in Section III of this article.[82] In addition, the scarcity of competitive federal grants could incentivize local jurisdictions in need of a particular source of funding to enact policies desired by the federal government.[83]

In this section, I discuss policy proposals through which the federal government would employ the carrot approach to incentivize local jurisdictions to reform their zoning and land use regulations. The carrot approach has gained support from both sides of the aisle and appears to be a feature of President Biden's infrastructure plan. The carrot approach is unlikely to incentivize increased housing development where it is most needed, however, and thus is not the most effective way for the federal government to incentivize local jurisdictions to reform restrictive local zoning and land use regulations.

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[81] I discuss why the federal government would likely be prohibited on Tenth Amendment anti-commandeering grounds from simply mandating that states or local governments implement inclusive zoning and land use policies. *See* discussion *infra* Section III.B.1.

[82] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 580 (2012); *see also* Grace E. Leeper, Note, *Conditional Spending and the Need for Data on Lethal Use of Force*, 92 N.Y.U. L. REV. 2053, 2080 (2017).

[83] Race to the Top, a competitive grant program created by the 2009 American Recovery and Reinvestment Act that encouraged states to adopt education innovation, is an example of this strategy employed successfully. *See* Leeper, *supra* note 83, at 2087, n.174.

### *1. Federal Housing Policies that Adopt the Carrot Approach*

The carrot approach was popular among the housing policy platforms of candidates for the Democratic Party's nomination for president in the 2020 campaign. Then-candidate Senator Elizabeth Warren proposed "a $10 billion new competitive grant program" that would be available to state and local governments that reformed their zoning and land use regulations.[84] Recipients of these funds could use them "to build infrastructure, parks, roads, or schools" so long as they reformed their zoning and land use regulations "to allow for the construction of additional well-located affordable housing units and to protect tenants from rent spikes and eviction."[85] In her campaign for president, Senator Amy Klobuchar of Minnesota also embraced the carrot approach. Referencing the Minneapolis 2040 initiative,[86] she proposed prioritizing federal housing and infrastructure funding for jurisdictions with "updated" zoning and land use regulations.[87]

The carrot approach has also found support in proposed legislation. Most recently, a bipartisan group of senators, including Senator Klobuchar, introduced the "Housing Supply and Affordability Act" to create a competitive grant program aimed at increasing the supply of affordable housing.[88] The bill would authorize $300 million per year for the next five years for "planning grants" and "implementation grants" for local governments that commit to increase the supply of housing in their jurisdictions.[89] Specifically, local jurisdictions that plan to "(i) improve housing supply and affordability . . . (ii) reduce barriers to affordable housing development; and (iii) avoid the displacement of residents by new housing developments in the area under the jurisdiction of the eligible entity" would receive priority for the grants.[90] The bill would also prioritize local jurisdictions that seek to "increase the supply and affordability of housing" near "local transit options" and "areas in which a significant or expanding supply of jobs is concentrated."[91] In general, the bill represents a bipartisan recognition that local governments are unable to overcome obstacles to new housing development on their own and offers financial carrots that would help local governments achieve this goal.

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[84] PROTECTING & EMPOWERING RENTERS, WARREN DEMOCRATS, https://elizabethwarren.com/plans/protecting-empowering-renters?source=soc-WB-ew-tw-rollout-20191118 (last visited Apr. 7, 2021).

[85] *Id.*

[86] Patrick Sisson, *Can Minneapolis's Radical Rezoning be a National Model?*," CURBED (Nov. 27, 2018), https://archive.curbed.com/2018/11/27/18113208/minneapolis-real-estate-rent-development-2040-zoning.

[87] Amy Klobuchar, *Senator Klobuchar's Housing Plan*, MEDIUM (July 25, 2019), https://medium.com/@Amy_Klobuchar/senator-klobuchars-housing-plan-761e9f93f3a4.

[88] S.B. 5061, 116th Cong. (2020); *see also* Kriston Capps, *Bipartisan Bill Would Bring $1.5 Billion to Spur New Housing*, BLOOMBERG (Mar. 23, 2021), https://www.bloomberg.com/news/articles/2021-03-23/klobuchar-bill-would-offer-yimby-grants-to-cities?sref=rT5Gzxsc.

[89] Housing Supply and Affordability Act, H.R. 2126, 117th Cong. § 2(h), (f)(1)–(2) (2021); Capps, *supra* note 88.

[90] *Id.* at § 2(e)(A)(i)–(iii).

[91] *Id.* at § 2(d)(C)(i)(I), (II).

The idea of using the carrot approach to encourage local jurisdictions to reform their zoning and land use regulations has made its way into President Biden's proposed infrastructure package, called "The American Jobs Plan."[92] Included among the housing elements of the American Jobs Plan is a proposal to eliminate "exclusionary zoning laws" through a "$5 billion incentive program that awards flexible funding to jurisdictions that take concrete steps to reduce barriers to affordable housing production."[93] The zoning reform proposal in the American Jobs Plan appears similar in nature to the Housing Supply and Affordability Act, only that it appears to propose $5 billion in new competitive grants rather than $1.5 billion.[94] Summing up the policy, one White House official described it as "purely carrot, no stick."[95]

*2. Issues with the Carrot Approach*

While policy proposals adopting the carrot approach currently seem to be in favor with policymakers, this approach is not likely to incentivize reforms to local zoning and land use regulations where they are most needed. It is true that programs adopting the carrot approach can provide federal funding streams for smaller cities and localities to reform their zoning and land use policies.[96] While this approach may have a positive effect on housing affordability on the margins, it will not strongly incentivize reform in affluent jurisdictions with an inadequate supply of housing because of restrictive zoning and land use regimes—the very places where such reforms are most needed.[97] This is because localities with restrictive zoning regimes that contribute to expensive housing markets tend to have wealthier residents, meaning they have higher tax bases.[98] As a result, "the threat of

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[92] FACT SHEET: THE AMERICAN JOBS PLAN WILL PRODUCE, PRESERVE, AND RETROFIT MORE THAN 2 MILLION AFFORDABLE HOUSING UNITS AND CREATE GOOD PAYING JOBS, THE WHITE HOUSE (May 26, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/26/fact-sheet-the-american-jobs-plan-will-produce-preserve-and-retrofit-more-than-2-million-affordable-housing-units-and-create-good-paying-jobs/. As of this writing, the housing elements of the American Jobs Plan appear more likely to be included in a subsequent legislative package that will need to pass the Senate on a party-line, budget reconciliation vote, rather than the initial, bipartisan legislative package currently under debate. *See* Georgia Kromrei, *Biden renews push for housing in infrastructure plan*, HOUS. WIRE (July 9, 2021, 2:54 PM), https://www.housingwire.com/articles/biden-renews-push-for-housing-in-infrastructure-plan/.

[93] THE WHITE HOUSE, *supra* note 92.

[94] Andrew Ackerman & Nicole Friedman, *Biden's Infrastructure Plan Seeks to Ease Housing Shortage With Looser Zoning Rules; The Proposed Program of at Least $5 Billion Would Offer Grants to Cities and Towns That Relax Restrictions on New Construction*, WALL ST. J. (Apr. 7, 2021), https://www.wsj.com/articles/biden-seeks-to-ease-housing-shortage-with-looser-zoning-rules-11617796817 (citing an unnamed administration official on the amount of funding); Capps, *supra* note 89 (noting that the Housing Supply and Affordability Act could "eventually wind its way into the massive $3 trillion infrastructure bill.").

[95] Jonathan Allen, *All Carrot, 'no stick' in Biden's affordable housing plan*, NBC NEWS (Apr. 3, 2021), https://www.nbcnews.com/politics/white-house/all-carrot-no-stick-biden-s-affordable-housing-plan-n1262907.

[96] *See* Capps, *supra* note 88.

[97] *See* Metcalf, *supra* note 13.

[98] Emily Hamilton, *Opportunities for Better Federal Housing Policy: How the Biden Administration and Congress Can Improve Housing Affordability*, MERCATUS CTR. GEO. MASON U.

losing federal funds may not be an effective incentive" for those jurisdictions to reform their local zoning and land use regulations because "[t]he importance of federal funds to localities' ability to fund public services is roughly inversely proportional to the benefits of local zoning reform."[99] Put differently, local jurisdictions that would benefit the most from reforms to their zoning and land use regulations would benefit the least from a new source of federal funds for their public services. Because these jurisdictions have less of a need for these newly available federal funds, they would be less incentivized to enact the reforms to their zoning and land use regulations necessary to access them.

In response to the multiple proposals that have adopted the carrot approach, affordable housing practitioners have offered similar critiques. As David Dworkin, president and CEO of the National Housing Conference, put it: "[t]here's no carrot if you don't eat carrots," calling on policymakers to "go further" in order to materially affect the issue of housing supply in jurisdictions with expensive housing because of restrictive zoning and land use regulations.[100] Taking the vegetable refusal analogy further, economist Jenny Schuetz noted that "deliberately exclusionary places are unlikely to bite at fiscal carrots," like those offered by federal housing policies proposing the carrot approach.[101] Touching on a point raised by the authors in *Neighborhood Defenders*, housing analyst Jaret Seiberg noted that "[t]he problem is that local communities impose these zoning limits because voters in those neighborhoods demand them."[102] In order to make headway in these communities, Seiberg reasoned, "federal lawmakers would need to be more aggressive."[103]

Seiberg touches on a common theme among the critiques of the carrot approach from affordable housing practitioners: the federal government is not doing enough to address the issue of shortfalls in housing supply. For example, in lieu of the carrot approach, affordable housing advocates argue that grant money must be "tied to federal dollars for roads and highways" for federal efforts to be successful in wealthier areas.[104] The HOME Act, which I examine in detail in the next section, adopts the stick approach to do just that.

### *B. The Stick Approach*

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(Jan. 28, 2021), https://www.mercatus.org/publications/housing/opportunities-better-federal-housing-policy-how-biden-administration-and.

[99] *Id.*

[100] Ackerman & Friedman, *supra* note 94.

[101] Capps, *supra* note 88.

[102] Jacob Passy, '*The Biggest Proposal We've Seen in a Long Time': How Biden's $2.3 Trillion Infrastructure Plan Will Invest in America's Housing*, MARKETWATCH (Apr. 5, 2021, 9:22 PM), https://www.marketwatch.com/story/the-biggest-proposal-weve-seen-in-a-long-time-bidens-american-jobs-plan-would-make-a-major-investment-in-affordable-housing-11617395362.

[103] *Id.*

[104] Ackerman & Friedman, *supra* note 94 (citing skepticism from affordable housing advocates that the American Rescue Plan's housing proposals would be effective in wealthier areas).

Applying the stick approach, Congress can impose conditions on existing sources of funding to incentivize grant recipients to reform their zoning and land use regulations. Like the carrot approach, the issue of reforming restrictive zoning and land use regulations through the stick approach has drawn bipartisan political support at the federal level. Before changing course in an ill-fated electoral strategy to "save our suburbs,"[105] the Trump Administration's Department of Housing and Urban Development (HUD) viewed reforms to local zoning and land use regulations as an important policy tool to address the housing affordability crisis.[106] Specifically, former HUD Secretary Ben Carson proposed revisions to the Affirmatively Furthering Fair Housing Rule[107] in 2018 that would require local governments receiving CDBG funds to reform zoning and land use regulations in order to increase housing supply.[108] This line of action found support among congressional Republicans. For example, Senator Todd Young (R-IN) introduced the Yes In My Backyard Act in 2019, which would amend the CDBG statute to require grantees to provide a plan to reform "discriminatory land use policies" in order to continue receiving CDBG funding.[109]

The most prominent example of the stick approach from the political left is the HOME Act. In the next section, I provide an overview of the grant programs to which the HOME Act attaches conditions and how the Act would affect those programs. In Section III, I then turn to the potential legal issues raised by the HOME Act's conditions on STBG funds.

*1. The HOME Act*

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[105] Donald J. Trump & Ben Carson, Opinion, *We'll Protect America's Suburbs*, THE WALL ST. J. (Aug. 16, 2020, 4:02 PM), https://www.wsj.com/articles/well-protect-americas-suburbs-11597608133 (the Trump Administration's pivot months before the 2020 Presidential Election to the argument that "[i]t would be a terrible mistake" to involve the federal government in local zoning decisions was striking, considering that HUD proposed a policy in 2018 that would have done just that). *See* Kriston Capps, *Ben Carson Is a YIMBY Now and Everything's Confusing*, BLOOMBERG (Aug. 14, 2018, 4:07 PM), https://www.bloomberg.com/news/articles/2018-08-14/is-hud-secretary-ben-carson-targeting-zoning-or-fair-housing?sref=rT5Gzxsc; Archive: Ben Carson (@Secretary Carson), TWITTER (Sept. 12, 2018, 3:55 PM), https://twitter.com/SecretaryCarson/status/1039965760012132358?s=20; U.S. DEP'T OF HOUS. & URBAN DEV., OFF. OF POL'Y DEV. & RSCH., *Eliminating Regulatory Barriers to Affordable Housing: Federal, State, Local, and Tribal Opportunities* (2021).

[106] *See* Archive: Ben Carson (@Secretary Carson), TWITTER (Sept. 12, 2018, 3:55 PM), https://twitter.com/SecretaryCarson/status/1039965760012132358?s=20; U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 105.

[107] The rule has been a political football in recent years. It was first enacted by the Obama Administration in 2015; *see* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 90s), then withdrawn and replaced by the Trump Administration in 2020; *see* Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903), and as of this writing appears likely to be reinstated by the Biden Administration; *see* Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7,487 (Jan. 29, 2021).

[108] *See* Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 83 Fed. Reg. 40,713 (proposed Aug. 16, 2018) (to be codified at 24 C.F.R pts. 5, 91, 92, 570, 574, 576, and 903); Capps, *supra* note 105.

[109] Yes In My Backyard Act, S. 1919, 116th Cong. § 2 (2019) [hereinafter YIMBY Act].

The HOME Act merits close analysis for two reasons. First, President Biden explicitly pledged support for the bill in his campaign for president.[110] Marcia Fudge, President Biden's HUD Secretary, responded to a question about exclusionary zoning in her confirmation hearing by saying "[w]e have to get rid of this notion of not in my backyard . . ." and discussed the need to incentivize developers to "assist us in getting these communities to change their zoning laws."[111] Thus, it is clear that the Biden Administration has an interest in tackling restrictive zoning and land use regulations and previously expressed support for a specific bill that would accomplish this goal through the stick approach.[112] Second, the HOME Act differs significantly from earlier Republican proposals to reform local zoning and land use regulations through the stick approach, as it conditions CDBG *and* STBG funding on local implementation of an inclusionary zoning regime. Adding conditions to STBG funding is significant. As demonstrated in Table 1 below, STBG funding would have accounted for over 75% of the funding at stake between the two programs had the HOME Act been in effect in each of the last four fiscal years.

**TABLE 1.**[113]

| Fiscal Year | Total CDBG Obligations | Total STBG Obligations |
|---|---|---|
| 2017 | $1.9 Billion | $11.9 Billion |
| 2018 | $4.0 Billion | $13.1 Billion |
| 2019 | $3.9 Billion | $12.4 Billion |
| 2020 | $2.6 Billion | $13.6 Billion |

[110] THE BIDEN PLAN FOR INVESTING IN OUR COMMUNITIES THROUGH HOUSING, *supra* note 29.

[111] *Secretary and Chair, Council of Economic Advisers Nomination Hearings: The Honorable Marcia L. Fudge, of Ohio and The Honorable Cecilia E. Rouse, of New Jersey Before the Senate Comm. On Banking, Hous., & Urb. Affs.*, 117th Cong. (2021), https://www.banking.senate.gov/hearings/01/21/2021/nomination-hearing.

[112] Of course, endorsing a bill on the campaign trail requires far less political capital than shepherding it through the legislative process to its eventual passage into law. Shifting political dynamics may make the latter course of action infeasible. Nonetheless, the HOME Act's innovative approach makes it worthy of close analysis as a potential option for Congress to use its power under the Spending Clause to reform restrictive local zoning and land use regulations.

[113] *Spending Explorer*, USASPENDING, https://www.usaspending.gov/explorer/object_class (last visited Apr. 26, 2021) [hereinafter USASPENDING].

*a. The CDBG Program*

The CDBG program provides multiple forms of block grants that are appropriated directly to states and local jurisdictions "to develop viable urban communities . . . and a suitable living environment, and by expanding economic opportunities, principally for low-and-moderate income persons."[114] Of these different funding streams, most relevant for the purposes of the HOME Act is the CDBG Entitlement Program, which uses a statutory formula to allocate block grants to local jurisdictions.[115] In order to be eligible for funds from the CDBG Entitlement Program, (as well as other grants from HUD), local grantees submit a comprehensive assessment of their affordable housing and community development needs (the "Consolidated Plan") to HUD every three to five years.[116] HUD reviews the Consolidated Plan to ensure consistency with the CDBG program's purposes and compliance with various regulatory and statutory requirements.[117] In addition, grantees with an approved Consolidated Plan must submit an annual performance report (the "Annual Performance Report") detailing steps taken to achieve goals laid out in the Consolidated Plan.[118]

The Consolidated Plan is the vehicle through which the HOME Act seeks to reform local zoning and land use regulations. Specifically, the Act would require grantees receiving CDBG funds to "include in the consolidated plan . . . a strategy to support new inclusive zoning policies, programs, or regulatory initiatives that create a more affordable, elastic, and diverse housing supply and thereby increase economic growth and access to jobs and housing."[119] The Act would also require grantees to demonstrate "continuous progress" in achieving the goals of its affordable housing strategy by including reports of such progress in its Annual Performance Reports.[120]

The HOME Act lists several elements that grantees must include in their affordable housing strategy. Many of these required elements relate directly to local zoning and land use regulations. In general, the Act would require grantees to: "(A) demonstrate—

"(i) transformative activities in communities that—

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[114] *Community Development Block Grant Program*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/comm_planning/cdbg#programs (last visited Mar. 23, 2021); Jenny Schuetz, *HUD Can't Fix Exclusionary Zoning by Withholding CDBG Funds,* BROOKINGS INSTITUTE (Oct. 15, 2018), https://www.brookings.edu/research/hud-cant-fix-exclusionary-zoning-by-withholding-cdbg-funds/; *see also* 42 U.S.C. §§ 5321–5322 (2011).

[115] Schuetz, *supra* note 114; *see also* 42 U.S.C. § 5306 (2011).

[116] *Consolidated Plan Process, Grant Programs, and Related HUD Programs*, U.S. DEP'T OF HOUS. & URB. DEV. EXCH., https://www.hudexchange.info/programs/consolidated-plan/consolidated-plan-process-grant-programs-and-related-hud-programs/ (last visited Mar. 23, 2021); *see also* 42 U.S.C. § 5304; 24 C.F.R. § 91 (1995).

[117] *See* 24 C.F.R. § 91.500 (1999).

[118] *See* 24 C.F.R. § 91.520 (2020).

[119] Housing, Opportunity, Mobility, and Equality Act of 2019, S. 2684, 116th Cong. § 2(n)(1)(A) (Oct. 23, 2019).

[120] *Id*. at § 2(n)(1)(B).

"(I) reduce barriers to housing development, including affordable housing; and

"(II) increase housing supply affordability and elasticity; and

"(ii) strong connections between housing, transportation, and workforce planning."[121]

More specifically, the Act directs grantees to include specific policies "relating to inclusive land use," including, "as appropriate":

> (I) authorizing high-density and multifamily zoning;
> (II) eliminating off-street parking requirements;
> (III) establishing density bonuses, defined as increases in permitted density of a housing development conditioned upon the inclusion of affordable housing in such development;
> (IV) streamlining or shortening permitting processes and timelines;
> (V) removing height limitations;
> (VI) establishing by-right development, defined as the elimination of discretionary review processes when zoning standards are met;
> (VII) using property tax abatements; and
> (VIII) relaxing lot size restrictions . . .[122]

The Act also includes separate provisions creating a tax credit for certain renters and requiring grantees to make housing accessible to such renters.[123]

In summary, the HOME Act would significantly alter the parameters of the CDBG program. In order to be eligible for CDBG funding, grantees would be required to implement a variety of policies that would make it easier to develop new housing. The Act would take direct aim at many of the specific zoning and land use regulations identified by economists as responsible for driving up housing prices by limiting the development of new housing.[124] These provisions of the HOME Act are similar, at least in principle, to other housing proposals advanced by Republicans.[125] Taken together, they represent a bipartisan federal interest in adopting the stick approach by conditioning certain federal housing funds on the adoption of pro-development zoning and land use regulations at the local level.

Despite having bipartisan support and employing the stick approach, there is reason to believe that only conditioning CDBG funding on implementation of an affordable housing strategy would pose the same issues as proposals adopting the carrot approach. Jenny Schuetz analyzed

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[121] *Id*. at § 2(n)(2)(A).
[122] *Id*. at § 2(n)(2)(B).
[123] *Id*. at §§ 2(n)(2)(B), 3(2)(i).
[124] *See, e.g.*, Schuetz, *supra* note 10, at 302–05.
[125] *See* Ben Carson, *supra* note 106; YIMBY Act, *supra* note 109.

local jurisdictions that received CDBG funds in California and New Jersey to determine whether there was overlap between CDBG grantees and local jurisdictions with restrictive zoning and land use policies.[126] Schuetz noted that the statutory formula through which HUD calculates CDBG funding levels is influenced heavily by a jurisdiction's poverty rates and quality of housing.[127] As a result, Schuetz concluded that CDBG funds are more likely to go to lower income jurisdictions with less exclusive housing markets.[128] In California, Schuetz found that "only 17[%] of the most exclusive communities receive any CDBG funding, compared with 37[%] of less exclusive communities."[129] Moreover, those exclusive communities in California received only $5 per capita in CDBG funding, compared to $10 per capita in less exclusive communities.[130] In New Jersey, Schuetz found that none of the state's most exclusive communities received any direct CDBG funding.[131]

These findings suggest that conditioning *only* CDBG funding on implementation of an inclusive zoning regime is unlikely to increase new housing development in expensive jurisdictions that may have restrictive zoning and land use regulations. In other words, like the carrot approach, it would not go far enough to meaningfully increase housing supply in expensive jurisdictions. As Schuetz noted, "CDBG would be a blunt instrument to influence governments most in need of zoning reform."[132] Considering how HUD allocates CDBG funds, this makes sense. Jurisdictions with higher levels of poverty and lower quality housing are more likely to receive greater amounts of CDBG funds than jurisdictions with expensive housing.[133] Therefore, conditioning CDBG funding on implementation of an affordable housing strategy would likely fail to incentivize zoning and land use reforms in more affluent jurisdictions with restrictive zoning and land use regulations—where such reforms are most needed.

*b. The STBG Program*

Perhaps heeding this advice, the HOME also conditions STBG funding on the implementation of an affordable housing strategy.[134] The STBG program was created in 2015 by the Fixing America's Surface

[126] Schuetz, *supra* note 114. Schuetz focused on California because it "has some of the nation's most expensive housing" and New Jersey because it "has a decades-long history of wealthy suburbs attempting to block housing that is affordable to low-income renters."

[127] *Id.*; *see also* 42 U.S.C. § 5306 (2011).

[128] Schuetz, *supra* note 114.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *See* 42 U.S.C. § 5306 (2010).

[134] Housing, Opportunity, Mobility, and Equity Act of 2019, H.R. 4808, 116th Cong. § 3 (2019).

Transportation (FAST) Act.[135] The FAST Act only authorized appropriations for federal highway programs, including STBG, through fiscal year 2020, but Congress extended the funding through September 30, 2021.[136] The program is funded by contract authority from the Highway Account of the Highway Trust Fund, subject to statutory limits on obligations.[137] STBG funds, like CDBG funds, are structured as block grants and are meant to provide "flexible funding to address State and local transportation needs."[138]

Unlike the CDBG program, Congress does not appropriate STBG funds directly to local jurisdictions. The process through which STBG funds make their way into transportation projects is complex and closely intertwined with other federal transportation programs administered by the Federal Highway Administration (FHWA).[139] In general, Congress authorizes appropriations from the Highway Trust Fund for several surface transportation programs, including STBG funds.[140] The FWHA then apportions STBG funds for each of these programs to states pursuant to a statutory formula.[141]

States allocate a specified percentage of apportioned STBG funds among areas of the state based on population, then states sub-allocate the funds based on additional divisions of the state's population.[142] Finally, after setting aside a percentage of funds for certain bridge projects, states may use the remaining funds for projects eligible for STBG funding anywhere in the state.[143] In practice, state departments of transportation usually initiate eligible projects, receive bills from contractors for work performed, send vouchers to FHWA requesting federal funds, and then, after approval from FHWA, receive from the Treasury Department the federal share of a project's cost.[144] For STBG projects, the federal government will generally fund 80% of the project cost, unless the project is part of the Federal Interstate System, in which case the federal government will usually fund 90% of the project.[145]

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[135] Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312, 1339 (2015). More specifically, the FAST Act converted a predecessor program, the Surface Transportation Program, into the STBG program.

[136] *See* Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. No. 116-159, 134 Stat. 709, 725–26 (2020). As of this writing, the final text of a bipartisan infrastructure bill reauthorizes appropriations for federal highway programs through 2026. *See* Zachary Sherwood & Brandon Lee, *What to Know in Washington: Senate Poised to Pass Infrastructure*, BLOOMBERG GOV'T (Aug. 2, 2021), https://about.bgov.com/news/what-to-know-in-washington-senate-poised-to-pass-infrastructure/.

[137] 23 U.S.C. §§ 104(a)(1), (b)(2).

[138] 23 U.S.C. § 133(a).

[139] *See* 23 U.S.C. § 104 (providing how funds are appropriated from the Highway Trust Fund among various highway transportation programs); *see also* U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., FUNDING FED. - AID HIGHWAYS (2017).

[140] 23 U.S.C. §§ 104(a)–(b).

[141] *Id.* at § 104(b).

[142] 23 U.S.C. § 133(d).

[143] *Id.* at § 133(d)(1)(B).

[144] U.S. DEP'T OF TRANSP., *supra* note 139.

[145] *See* 23 U.S.C. §§ 120(a)–(b).

As mentioned above, STBG funding is flexible in nature. "Virtually any federally eligible mass transit use may receive STBG funds."[146] Eligible projects include federal-aid highways, bridge projects on public roads, bridge and tunnel inspection (and training of bridge and tunnel inspectors), and capital transit projects, among several others.[147] A number of transportation infrastructure projects are also eligible for STBG funding, such as railway-highway grade crossings, fringe and corridor parking facilities, and certain pedestrian and bicycle projects.[148] The emphasis on transportation infrastructure comports with Congress's intent that STBG be used for a variety of projects, beyond just the construction and maintenance of roadways. Of particular relevance to the HOME Act is a subsection titled "Transportation needs of 21st Century," which is a policy declaration that "the connection between land use and infrastructure is significant."[149]

Projects must meet a few requirements in order to be eligible for STBG funding. For instance, projects must be identified in and consistent with various state-wide transportation plans that states submit to the Department of Transportation.[150] These plans are similar in nature to the Consolidated Plan and Annual Performance Report.[151] In addition, when allocating funds for projects, states must coordinate with the relevant metropolitan or rural planning organizations and projects must comply with statutory transportation planning provisions.[152]

The HOME Act would add significant requirements for projects to be eligible for STBG funding. Specifically, the Act would add a subsection to the STBG statute providing that "[a] project under this section may not be carried out unless the community in which the project is located has implemented a strategy to increase affordable housing stock as described in subsection (n) of section 104 of the Housing and Community Development Act of 1974 (42 U.S.C. 5304)."[153] In effect, the HOME Act would incorporate by reference into the STBG statute the affordable housing strategy that the Act would require CDBG grantees to implement in order for projects to be eligible for STBG funds. Therefore, any "community" in which a transit project receiving STBG funding was to be carried out would need to implement an affordable housing strategy, as provided in Section 2 of the HOME Act and detailed above.[154]

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[146] Robert S. Kirk, CONG. RSCH. SERV., R44332, FEDERAL-AID HIGHWAY PROGRAM (FAHP): IN BRIEF (2021).

[147] 23 U.S.C. § 133(b).

[148] *Id.*

[149] 23 U.S.C. § 101(b)(3)(F).

[150] 23 U.S.C. § 133(d)(5).

[151] *See supra* Section II.B.1.a.

[152] *See* 23 U.S.C. §§ 134–135.

[153] Housing, Opportunity, Mobility, and Equity Act of 2019, S. 2684, 116th Cong. § 3. (Oct. 23, 2019).

[154] *See supra* Section II.B.1.a. I discuss how the Act's use of the term "community" would likely work in practice. *See* discussion *infra* Section III.A.2.

The Biden Administration's proposal to allocate billions of additional dollars in transportation funding to states[155] creates an ideal legislative environment to use the stick approach to condition STBG funds on reforms to local zoning and land use regulations. If the HOME Act's conditions were added to newly increased amounts of STBG funds, states would presumably be required to show that a project benefitting from those funds took place in a "community" that had implemented an affordable housing strategy in order to receive approval from the FHWA for use of the STBG funds.[156] Otherwise, states would be on the hook for the federal share of any otherwise-eligible STBG projects in these communities, which in most cases would amount to 80% of a project's cost.[157] This would create a strong incentive for states to pressure exclusionary local jurisdictions to reform their restrictive zoning and land use regulations, either by applying indirect political pressure or by enacting legislation to pre-empt restrictive zoning and land use regulations.[158] Arguments from opponents of preemptive state zoning legislation may be less influential when maintaining "local control" over zoning and land use decisions results in local governments losing access to valuable federal transportation dollars. States that refused to influence exclusionary local jurisdictions to take these steps would risk losing access to billions of dollars in flexible federal transportation funding. As a result, the transportation infrastructure in areas of these states would suffer, especially in comparison to jurisdictions in other states that were able to benefit from STBG funds.

The HOME Act's conditions on STBG funds would also effectively employ the stick approach by imposing a more difficult cost-benefit analysis directly on local jurisdictions with restrictive zoning and land use regulations. Because STBG projects "touch nearly every community," conditioning funding for these projects on implementation of an affordable housing strategy "would have a significant widespread impact" on local transportation policy.[159] Consequently, "it would be hard for a city to pass on STBG money to avoid having to reform its zoning laws."[160] Local governments may struggle to find other resources to maintain or upgrade their transportation infrastructure. Thus, losing access to previously available STBG funds could carry negative political consequences for local elected officials if they were unable to maintain or upgrade transportation infrastructure in their jurisdictions. These negative political consequences

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[155] *See* Sherwood & Lee, *supra* note 136.

[156] Housing, Opportunity, Mobility, and Equity Act of 2019 § 3; U.S. DEP'T OF TRANSP., *supra* note 139.

[157] *See* 23 U.S.C. § 120(b).

[158] *See* Infranca, *supra* note 22.

[159] Melissa Winkler, *Leveraging Federal Funds to Incentivize Land Use and Zoning Reform*, UP FOR GROWTH (Jan. 7, 2021), https://www.upforgrowth.org/sites/default/files/2021-01/UFGPolicyBriefFederalIncentives2021-01-07.pdf.

[160] Jeff Andrews, *Cory Booker and Elizabeth Warren Want to Force Cities to Adopt YIMBY Policies. Can They?*, CURBED (July 22, 2019), https://archive.curbed.com/2019/7/22/20699372/yimby-cory-booker-elizabeth-warren-election-2020.

would create a more difficult cost-benefit analysis for local officials that maintained restrictive zoning and land use regulations, despite a deterioration in local transportation infrastructure.

As compared to policies that would adopt the carrot approach, the HOME Act's conditions on STBG funding would more directly and consequentially impact a greater number of jurisdictions with restrictive zoning and land use regulations. Both state and local governments would face difficult decisions regarding whether to lose access to flexible federal transportation funding or to continue to allow restrictive zoning and land use regulations to drive up housing costs. For these reasons, the HOME Act would more effectively incentivize these jurisdictions to reform their zoning and land use regulations to allow for increased housing supply than other proposals that would adopt the carrot approach.

## III. CONSTITUTIONAL ISSUES RAISED BY THE HOME ACT

Though more likely to be effective, the HOME Act's conditions on STBG funding raise legal questions regarding Congress's authority under the Spending Clause and the Tenth Amendment. In this section, I examine the constitutionality of the HOME Act's conditions on STBG funding under both constitutional provisions, drawing primarily from the Supreme Court's decisions in *South Dakota v. Dole*[161] and *National Federation of Independent Business v. Sebelius*.[162] These two cases create a five-prong test, which I refer to as the "*Dole-NFIB*" framework.[163] I conclude that the HOME Act's stick approach to conditioning STBG funding would likely survive scrutiny under this framework, though a court applying the framework narrowly may find reason to invalidate the Act.

As I discuss in greater detail below, the limits on Congress's power under the Spending Clause have not been fully fleshed out by courts, making the *Dole-NFIB* framework more akin to a skeleton. The fifth prong of this framework, which I refer to as the "coercion prong," implicates both the Spending Clause and the Tenth Amendment's anti-commandeering doctrine. Therefore, I consider it separately from the first four prongs and in conjunction with the relevant Tenth Amendment case law.

I focus my legal analysis on the HOME Act's conditions on STBG funding, and not CDBG funding because the Act's conditions on the latter source of federal funds do not pose significant legal risk. As the discussion below will make clear, the HOME Act's conditions on CDBG funding do not raise significant issues under the Spending Clause because they are closely tied to the federal interest in the CDBG program.[164] Moreover, the amount of money at risk is small enough that it is highly unlikely that a court

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[161] South Dakota v. Dole, 483 U.S. 203, 207 (1987).

[162] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[163] Daniel S. Cohen, *A Gun to Whose Head? Federalism, Localism, and the Spending Clause*, 123 DICK. L. REV. 421, 421 (2019).

[164] *See* 42 U.S.C. §§ 5301–5322 (2018); *see also* discussion *infra* note 232.

would find conditions attached to the funding to be "coercive" and thus unconstitutional.[165] Considering both of these points, the conditions attached to CDBG funding only warrant brief discussion and I instead focus the bulk of my analysis on the conditions attached to STBG funding.

### *A. The Spending Clause*

The Spending Clause grants Congress the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and the general Welfare of the United States."[166] Starting with landmark decision of *United States v. Butler*,[167] the Supreme Court has interpreted the Spending Clause as granting Congress the power to offer monetary grants to states with certain conditions attached.[168] The Court has held that Congress can attach conditions to funds it offers to states in order to "attain" objectives not included within Article I's "enumerated legislative fields."[169] In other words, Congress can use the stick approach to condition federal funds in pursuit of policy objectives beyond those enumerated in Article I, subject to limitation by the Spending Clause. This point is especially relevant in the context of the HOME Act, since zoning and land use regulation has traditionally been thought of as an exercise of state police power.[170]

In addition to being the leading Supreme Court decision on the Spending Clause, *Dole* conveniently featured a prior instance of Congress imposing conditions on transportation funding. In 1984, Congress directed the Secretary of Transportation to withhold 5% of federal highway funds, which today would include STBG funds, from states that did not implement a minimum drinking age of twenty-one years old.[171] Legislative history for this provision indicates that Congress sought to "combat drunk driving" and cites research demonstrating that "increasing the drinking age results in a decrease in alcohol-related crashes among young people."[172] South Dakota challenged the constitutionality of § 158(a), arguing that withholding federal highway funds in this manner exceeded Congress's power under the Spending Clause.[173] The Court disagreed and upheld the conditions attached to the highway funding.[174]

*Dole* synthesized the Court's prior opinions on the Spending Clause issued after *Butler* into a four-prong test and alluded to the possibility of a fifth prong. First, *Dole* provided that Congress must exercise its Spending

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[165] *See* discussion *infra* note 313.
[166] U.S. CONST. art. I, § 8, cl. 1.
[167] United States v. Butler, 297 U.S. 1 (1936).
[168] *Id.*; Cohen, *supra* note 163, at 435.
[169] Cohen, *supra* note 163, at 436 (quoting South Dakota v. Dole, 483 U.S. 203, 207 (1987)).
[170] *See* Vill. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Stahl, *supra* note 35, at 192.
[171] *See* 23 U.S.C. § 158(a) (2012).
[172] S. REP. NO. 98-283, at 6 (1983).
[173] *See Dole*, 483 U.S. at 206–11.
[174] *Id.* at 211–12.

Clause power "in pursuit of the 'general welfare.'"[175] Second, the Court noted that Congress must "condition the States' receipt of federal funds . . . unambiguously" so that states can "exercise their choice knowingly, cognizant of the consequences of their participation."[176] Third, the conditions attached to funding must be related "to the federal interest in particular national projects or programs."[177] Fourth, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[178] The Court also noted that "in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion,'" though it also noted the difficulty of applying this inquiry.[179] This is the "coercion prong" I refer to above, and I discuss it in further detail in Section III.B.

Of the five prongs articulated by the *Dole* court, the first and fourth prongs I list above bear little relevance to this article's analysis and merit only brief discussion. With regard to the first prong, the Court stressed that "courts should defer substantially to the judgment of Congress" in interpreting this provision.[180] The issue is generally considered to be non-justiciable.[181] To illustrate the fourth prong, the *Dole* court offered as an example "a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment."[182] The HOME Act clearly does not seek to incentivize such behavior by states or localities, and thus easily satisfies this prong.

*1. The Relatedness Prong*

I begin my analysis with the third prong of the *Dole-NFIB* framework, which I refer to as the "relatedness prong," because it poses the greatest legal risk to the HOME Act. The relatedness prong requires that conditions on federal grants be related "to the federal interest in particular national projects or programs."[183] The *Dole* court held that the minimum drinking age requirement was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel."[184] In reaching this decision, the *Dole* court refused to "define the outer bounds of the 'germaneness' or 'relatedness' limitation" or to "address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power."[185] Subsequent Supreme Court

[175] *Id.* at 207.
[176] *Id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).
[177] *Id.* at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).
[178] *Id.* at 208.
[179] *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 550 (1937)).
[180] *Id.* at 207.
[181] Lynn A. Baker, *The Spending Power After NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL'Y 71, 74 (2014).
[182] *Dole*, 483 U.S. at 210.
[183] *Id.* at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).
[184] *Id.* at 208 (citing 23 U.S.C. § 101(b)).
[185] *See supra* text accompanying note 3.

decisions do not provide more clarity. In *New York v. United States*, the Court cited *Dole* for the proposition that conditions on federal funds must "bear some relationship" to the purpose of the spending.[186] In *NFIB*, the Court cited *Dole's* holding that the minimum-drinking age condition was "directly related" to a federal interest in highway spending but focused its analysis on different prongs of the *Dole-NFIB* framework.[187] Notably, the Supreme Court has "[n]ever overturned Spending Clause legislation on relatedness grounds."[188]

In the absence of clear boundaries, there are multiple ways to interpret Congress's authority under the relatedness prong of the *Dole-NFIB* framework. The Supreme Court's decisions do seem to implicitly create a workable standard of review. To articulate the relatedness prong of its framework, the *Dole* court relied on an earlier decision, *Massachusetts v. United States*, which provided that the federal government may impose conditions on federal funding that are "*reasonably* related to the federal interest in particular national projects or programs."[189] Elsewhere in its *New York* opinion, issued five years after *Dole*, the Court approvingly described conditions on federal funds offered to states as "*reasonably* related to the purpose of the expenditure."[190] It is also noteworthy that in her dissenting opinion in *Dole*, Justice O'Connor disagreed with the majority's "application of the requirement that the condition imposed be *reasonably* related to the purpose for which funds are expended."[191] Taken together, it seems plausible to summarize the Supreme Court's holdings as implicitly requiring, at a minimum, that conditions on federal grants be "reasonably related" to "the federal interest in particular national projects or programs" to satisfy the relatedness prong. For example, the *Dole* court judged that the minimum-drinking age condition was "directly related" to a federal interest in highway spending (namely, highway safety).[192] Thus, adopting this implicit standard, the condition satisfied the relatedness prong of the *Dole-NFIB* framework because two things that are "directly related" bear a closer relationship to each other than two things that are "reasonably related."

Of course, simply establishing an implicit standard that conditions on federal funds must be "reasonably related" to the federal government's interest in a program does not offer much guidance. Decisions in lower courts are instructive here, where numerous courts have adopted the Supreme Court's implicit standard to uphold a number of spending conditions under the relatedness prong of the *Dole-NFIB* framework. In their 2003 critique of *Dole*, Professor Baker and Professor Berman catalogued a

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[186] New York v. United States, 505 U.S. 144, 167 (1992).

[187] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 580 (2012) (plurality opinion); *see also infra* Section III.B. (discussing the NFIB plurality's application of the coercion prong).

[188] Barbour v. Wash. Metro. Area Transit Auth., 374 F.3d 1161, 1168 (D.C. Cir. 2004).

[189] Massachusetts v. United States, 435 U.S. 444, 461 (emphasis added).

[190] New York v. United States, 505 U.S. at 172 (emphasis added) (citing Massachusetts v. United States, 435 U.S. at 461).

[191] South Dakota v. Dole, 483 U.S. 203, 213 (1987) (O'Connor, J., dissenting) (emphasis added).

[192] *Id.* at 208.

number of decisions in which lower courts upheld challenged conditions on federal funds as "reasonably related to the federal interest" in a wide variety of programs.[193] Professor Baker and Professor Berman noted that a number of these upheld conditions did not bear "a clearly explained relationship to the underlying legislation."[194] Examples included "the condition that the state provide emergency medical services to illegal aliens in order to receive Medicaid funds" and "the condition that the state comply with a heightened standard of free exercise of religion for prisoners and other individuals in its institutions in order to receive federal funds for those institutions."[195]

A seemingly looser standard has emerged from a line of lower court decisions determining whether states waived Eleventh Amendment immunity from suit by accepting federal funds under the § 504 of the Rehabilitation Act with anti-discriminatory conditions attached.[196] In *Koslow v. Pennsylvania*, the Third Circuit held that anti-discriminatory conditions on federal funds received by a state prison were not unconstitutional so as to preclude a waiver of Eleventh Amendment immunity from suit by Pennsylvania.[197] In reaching this decision, the *Koslow* court reasoned that because *Dole* had declined to explicitly define the outer limit of the relatedness prong, "one need *only* identify a *discernible* relationship" between conditions added to funding and a federal interest in the program funded.[198] Since Congress had expressed "a clear interest in eliminating disability-based discrimination in state departments or agencies," the court found that a "discernible relationship" existed between that interest and the anti-discriminatory conditions on funding received by Pennsylvania.[199] The Third Circuit has adopted the *Koslow* "discernible relationship" approach in subsequent challenges[200] under the Spending Clause to Eleventh Amendment waivers of immunity, as have the Fifth and Tenth Circuits.[201]

Despite the seemingly low bar spending legislation needs to clear to satisfy the standards articulated by *Dole* and *Koslow*, lower courts have

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[193] Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 466–67 (2003) (quoting Kansas v. United States, 24 F.Supp. 2d 1192, 1196 (D. Kan. 1998)).

[194] Baker & Berman, *supra* note 193, at 466.

[195] *Id.* at 466–67.

[196] *See* U.S. CONST. amend. XI; 42 U.S.C. § 2000d-7; Hans v. Louisiana, 134 U.S. 1, 13 (1890) (providing states with immunity from suits brought by their own citizens); Lane v. Pena, 518 U.S. 187, 200 (1996) (recognizing that § 504 of the Rehabilitation Act was an "unambiguous waiver of the States' Eleventh Amendment immunity").

[197] Koslow v. Pennsylvania, 302 F.3d 161, 176 (3d Cir. 2002).

[198] *Id.* at 175 (emphasis added).

[199] *Id.* at 175–76.

[200] *See* M.A. *ex rel.* E.S. v. State-Operated Sch. Dist. of Newark, 344 F.3d 335, 351 (3d Cir. 2003); A.W. v. Jersey City Pub. Schs., 341 F.3d 234, 241 (3d Cir. 2003).

[201] *See* Miller v. Tex. Tech Univ. Health Scis. Ctr., 421 F.3d 342, 349–50 (5th Cir. 2005) (holding that conditions on education funds were sufficiently related to the goals of § 504 to be constitutional under Dole); Arbogast v. Kansas, Dep't Lab. 789 F.3d 1174, 1187 (10th Cir. 2015) (finding a sufficient link between Congress's intent to eliminate disability-based discrimination and the Rehabilitation Act's condition requiring waiver of sovereign immunity).

invalidated conditions placed on federal funds under the Spending Clause in recent Sanctuary City decisions.[202] In 2017, the Department of Justice (DOJ), acting on President Trump's direction, required local jurisdictions to "allow federal immigration access to detention facilities, and provide 48 hours' notice before they release an illegal alien wanted by federal authorities" in order to continue receiving certain federal law enforcement grants.[203] In response, several local jurisdictions filed lawsuits against the administration alleging, among other issues, that the DOJ's order violated the relatedness prong of the Spending Clause, as interpreted by *Dole* and its progeny.[204] The DOJ generally responded to these claims by arguing that immigration enforcement and law enforcement were sufficiently related to survive scrutiny under the relatedness prong and pointing to a number of statutes illustrating the intersection of criminal and immigration law.[205]

One district court applied the *Koslow* court's analysis narrowly to invalidate immigration enforcement conditions added to federal law enforcement grants under the relatedness prong. In *City of Philadelphia v. Sessions*, the court held, in part, that these conditions failed to satisfy the relatedness prong of the *Dole-NFIB* framework because there was not a "discernible relationship" between the immigration enforcement-related conditions and the federal interest in certain law enforcement grants.[206] The court emphasized that "framing the Court's inquiry as whether a discernible relationship exists between immigration law and law enforcement, as the Attorney General seeks to do, situates the discussion at much too general a level."[207] Instead, the *Sessions* court noted that "[t]he relevant question, under *Koslow*, is whether this Court can 'identify a discernible relationship' between a grant condition on a department or agency and 'a federal interest in a program'" funded by the law enforcement grants.[208]

Viewing the conditions through this narrow lens, the *Sessions* court found that it was "difficult to discern" a relationship between the federal law enforcement grant program and a federal interest in immigration enforcement conditions attached to the funds.[209] The court reached this conclusion by reasoning that "the fact that immigration enforcement depends on and is deeply impacted by criminal law enforcement does not mean that the pursuit of criminal justice in any way relies on the enforcement of immigration law."[210] In subsequent litigation between local jurisdictions

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[202] *See* Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8,799 (Jan. 30, 2017) (revoked by Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7,051 (Jan. 25, 2021)).

[203] Cohen, *supra* note 163, at 431 (quoting Kathryn Watson, *DOJ Cracking Down on Sanctuary City Funding*, CBS NEWS (July 25, 2017), https://perma.cc/N6D4-64TS).

[204] *See* Cohen, *supra* note 163, at 431.

[205] *See, e.g.*, City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 637–38 (E.D. Pa. 2017).

[206] *Id.* at 639–44.

[207] *Id.* at 641.

[208] *Id.*

[209] *Id.* at 641–43.

[210] *Id.* at 642. The court's logic can be demonstrated through a hypothetical; a murder will be prosecuted as a murder whether an illegal alien or a United States citizen commits it. In the former case,

and the DOJ over the Sanctuary City issue, three district courts relied in part on the *Sessions* court's reasoning to invalidate certain immigration enforcement conditions placed on federal law enforcement grants under the relatedness prong of the *Dole-NFIB* framework.[211]

Before attempting to apply any decisions interpreting the relatedness prong to the HOME Act, it is important to identify the scope of the federal government's interest in the STBG program. The congressional declaration of intent that "the connection between land use and infrastructure is significant," is of particular relevance to this analysis.[212] Also relevant is the broad range of projects eligible for STBG funding, including a number of transportation infrastructure projects, and the flexible nature of the program.[213] Taken together, these factors evidence a federal interest in the STBG program broader in scope than just the construction and maintenance of roadways. Therefore, it is reasonable to conclude that the federal government has an interest in the general transportation infrastructure of a community that benefits from STBG funding, including how a community's land use policies affect that infrastructure. Despite this broad interest in a community's transportation infrastructure, however, there is no reference in the STBG statute or other relevant statutes to matters of affordable housing or community development.[214]

Since there is no explicit connection between affordable housing and the STBG program, it is unlikely that a court would conclude that the affordable housing conditions imposed by the HOME Act are "directly related" to a federal interest in the STBG program.[215] The minimum drinking age condition at issue in *Dole* bore a direct relationship to highway safety. "[V]arying drinking ages among the States" frustrated the federal interest in a safe interstate highway system because underage drivers would "commut[e] to border States where the drinking age is lower," thus increasing the risk of underage drunk driving.[216] Even interpreting the federal interest in the STBG program broadly to include all local issues related to land use, it is still difficult to discern a direct relationship to affordable housing. Land use policy is critical to affordable housing, and, as discussed above, less restrictive zoning and land use regulations can make housing more affordable by increasing its supply.[217] Land use policy,

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there may be ancillary immigration consequences, but they would be separate from the criminal legal proceeding.

[211] *See* City & County of San Francisco v. Sessions, 349 F.Supp. 3d 924, 958–61 (N.D. Cal. 2018) (*rev'd in part on other grounds* by City & County of San Francisco v. Barr, 965 F.3d 753 (9th Cir. 2020)); City & County of San Francisco v. Sessions, 372 F.Supp. 3d 928, 947–48 (N.D. Cal. 2019); Colorado v. U.S. Dep't Justice, 455 F.Supp. 3d 1034, 1055–56 (D. Colo. 2020), *appeal dismissed*, No. 20-1256, 2021 WL 3026820 (10th Cir. May 6, 2021).

[212] 23 U.S.C. § 101(b)(3)(F).

[213] *See* 23 U.S.C. § 133(b).

[214] *See* Federal-Aid Highways, 23 U.S.C. ch. 1.

[215] South Dakota v. Dole, 483 U.S. 203, 208 (1987).

[216] *Id.* at 209 (alteration in original) (citation omitted).

[217] *See supra* Introduction.

however, touches a broad range of issues related to local development.[218] When Congress declared in § 101(b)(3)(F) that "the connection between land use and infrastructure is significant," it is likely that they were speaking to the broad scope issues related to local land use policy, including and in addition to affordable housing. Such a broad interest that touches all aspects of local land use policy cannot be said to bear the sort of direct relationship to the HOME Act's conditions on STBG funding like that present in *Dole*.

Nonetheless, the absence of a direct relationship between the federal interest in the STBG program and the HOME Act's affordable housing conditions would not render those conditions invalid under the relatedness prong. A court could certainly find that the two concepts are "reasonably related" and thus satisfy the Supreme Court's implicit standard for the relatedness prong. This is especially true if a court adopts a loose interpretation of the relatedness prong, as many courts did in the cases catalogued by Professor Baker and Professor Berman.[219] As they note, lower courts have upheld a wide variety of conditions on federal funding, even when they lacked "a clearly explained relationship to the underlying legislation."[220] Congress's declaration of policy in § 101(b)(3)(F) would likely provide a sufficient relationship to satisfy a court engaging in such a cursory analysis under the relatedness prong to uphold the HOME Act's affordable housing conditions on STBG funding.

Moreover, the HOME Act's conditions on STBG funding would likely satisfy the relatedness prong under the standard articulated by *Koslow*. Congress's policy declaration in § 101(b)(3)(F) expresses a "clear interest" in the connection between land use and infrastructure.[221] A court adopting the permissive reading of the relatedness prong suggested by *Koslow* would seek to "only identify a discernible relationship" between the HOME Act's affordable housing conditions and a federal interest in the STBG statute.[222] Under that standard, the "clear interest" expressed by the § 101(b)(3)(F) declaration would likely be enough for a court to determine that the HOME Act's conditions satisfy the relatedness prong.

If a court were to adopt a narrower reading of the *Koslow* decision, as did the *Sessions* court and other courts in sanctuary city decisions, the HOME Act's affordable housing conditions on STBG funding could be at risk of being overturned. Adopting the *Sessions* court's analysis, a court may find that simply establishing a link between transportation and affordable housing would "situate[] the discussion at much too general a level."[223] A court applying the relatedness prong narrowly could find no discernible relationship between the condition that STBG funded projects take place in

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[218] *See, e.g.*, William J. Stull, *Land Use and Zoning in an Urban Economy*, 64 AM. ECON. REV. 337 (1974).

[219] Baker & Berman, *supra* note 193, at 466–67.

[220] *Id.* at 466.

[221] 23 U.S.C. § 101(b)(3)(F); Koslow v. Pennsylvania, 302 F.3d 161, 176 (3d Cir. 2002).

[222] *Id.*

[223] City of Philadelphia v. Sessions, 280 F.Supp. 3d 579, 641 (E.D. Pa. 2017).

a community that has implemented an affordable housing strategy and a federal interest in the STBG program. Though Congress has recognized the "significant" connection between "land use and infrastructure,"[224] there is no mention of affordable housing or community development in the STBG statute or other federal highway statutes.[225] A court could conclude that Congress's stated interest in the connection between land use and infrastructure is too broad to establish a discernible relationship with any specific element of local land use policy, such as affordable housing. Under such an analysis, the federal interest in STBG funding would be too broad, like the DOJ's interest in the law enforcement grants, to justify conditions attached to the funds requiring the implementation of an affordable housing plan.

There is a key distinction in the relationship between housing and transportation, as compared to immigration and law enforcement, that may allow the HOME Act's conditions to survive even a narrow application of the relatedness prong. As the *Sessions* court notes, "the pursuit of criminal justice" does not rely on federal immigration law and the relationship between the two does not "operate in both directions."[226] Local governments enforce criminal law and prosecute violations of it separate and independent of the workings of federal immigration law.[227] In contrast, the relationship between affordable housing and the federal interest in local transportation infrastructure *does* "operate in both directions." Local decisions regarding whether to develop more affordable housing have a downstream effect on a community's transportation infrastructure.[228] A community may need to make changes to its transportation infrastructure to support the differentiated travel behavior resulting from the new housing units coming online.[229] Many of these transportation projects a community would need to undertake would likely be eligible for funding under the STBG program's flexible terms.[230] Thus, under the *Sessions* court's reasoning, there would be a discernible relationship between affordable housing and the federal interest in local transportation infrastructure because the relationship "operate[s] in both directions."[231] This could allow the HOME Act to survive even a narrow application of the relatedness prong, like that adopted by the *Sessions* court and courts in other Sanctuary City decisions.

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[224] 23 U.S.C. § 101 (b)(3)(F).

[225] A court could find this point especially relevant in light of the numerous statutory connections between law enforcement and federal immigration, which were not sufficient to establish a discernible relationship. *See Sessions*, 280 F.Supp. 3d at 637–38.

[226] *Id.* at 641–42.

[227] *See supra* hypothetical at note 211.

[228] *See, e.g.*, Amanda Howell et al., *Transportation Impacts of Affordable Housing: Informing Development Review with Travel Behavior Analysis*, 11 J. TRANSP. & LAND USE 103 (2018) (finding changes in travel behavior in urban communities that built more affordable housing).

[229] *Id*. at 104–05.

[230] *See* 23 U.S.C. § 133(b).

[231] *Sessions*, 280 F.Supp. 3d at 641.

In summary, it is likely that the HOME Act's requirement that STBG funded projects take place in a community that has implemented an affordable housing strategy would satisfy the relatedness prong of the *Dole-NFIB* framework. Courts have varied in their application of the relatedness prong, but they generally have opted to uphold conditions attached to funding. In the recent Sanctuary City cases, multiple lower courts invalidated conditions attached to funding, and a court could rely on these decisions to invalidate the HOME Act's conditions under a narrow application of the relatedness prong. It is worth noting, however, that these decisions premised their analysis on a relationship between local criminal justice and federal immigration law that is fundamentally different than the relationship between affordable housing and the federal interest in local transportation infrastructure. Since this relationship flows in both directions, a case involving the HOME Act's conditions would be distinguishable from the sanctuary city cases and thus should survive even a narrow application of the relatedness prong.[232]

*2. The Clear Notice Prong*

As interpreted by *Dole*, the clear notice prong of the *Dole-NFIB* framework would appear to be fairly straightforward. The *Dole* court explained this prong as requiring that Congress "unambiguously" express its desire to condition federal funds meant for states, so that states could "exercise their choice knowingly, cognizant of the consequences of their participation."[233] This prong is derived from *Pennhurst State School and Hospital v. Halderman*, a 1981 decision in which the Court analogized spending power legislation as "much in the nature of a contract."[234] The *Pennhurst* court reasoned that "Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepted the terms of the 'contract.'"[235] Applying this "contract" framework, *Pennhurst* upheld conditions on federal funds that required states to provide certain institutionalized persons "appropriate treatment in the least restrictive environment."[236] The *Dole* court concluded that the minimum drinking age condition on federal highway funds "could not be more clearly stated by Congress" and thus satisfied *Pennhurst's* articulation of the clear notice prong.[237]

After the Court decided *NFIB*, it appeared that the clear interest prong had taken on a new meaning. Though the bulk of the plurality's opinion

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[232] The conditions on CDBG funding would easily survive even a narrow application of the relatedness prong because the issues of affordable housing and community development are closely intertwined with the CDBG program's statutory grant formula. *See* 42 U.S.C. §§ 5301-5322.

[233] South Dakota v. Dole, 483 U.S. at 207 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[234] 451 U.S. 1, 17 (1981).

[235] *Id*.

[236] *Id*. at 17–18; Baker, *supra* note 181, at 76.

[237] *Dole*, 483 U.S. at 208.

invalidating the Affordable Care Act (the ACA)'s Medicaid expansion focused on the program's coercive nature,[238] the plurality seemed to conclude that the ACA's Medicaid expansion did not satisfy the clear notice prong. Shortly after *NFIB* was decided, Professor Baker noted that the plurality opinion "read the *Dole* test's *Pennhurst* prong in an entirely new way."[239] Specifically, Chief Justice Roberts considered the Medicaid expansion to be, in effect, a "new health care program."[240] Many analysts, including Professor Bagenstos, concluded that Justice Roberts specifically reasoned that states had not received notice upon originally entering the Medicaid program that, and that "Congress would later condition their continued participation on their agreement to *also* participate in" the new program.[241] The plurality opinion concluded that Congress had violated the "contract-based principle" from its previous Spending Clause jurisprudence against "surprising States with post-acceptance or 'retroactive' conditions on federal spending."[242] Professor Baker read the *NFIB* opinion as posing "a significant threat to any new condition on previously available funds, even if the condition is both clear and entirely prospective in its application."[243]

Neither the Supreme Court nor lower courts have further developed this supposed new reading of the clear notice prong. In his article also published shortly after the Court decided *NFIB*, Professor Bagenstos noted that "Congress does in fact make changes to federal spending programs all the time" and "[s]tates never had any reason to expect that Medicaid would be exempt from these sorts of changes."[244] Thus, he reasoned, Chief Justice Roberts' "opinion is not best read as prohibiting large, fundamental, or unanticipated changes to ongoing spending programs."[245] Professor Bagenstos' analysis appears to have been vindicated by the courts. In a 2020 decision, the Fifth Circuit rejected an argument from a state university that conditions attached to federal funds offered under Title IX violated the clear notice prong of the Spending Clause and concluded that the university had waived Eleventh Amendment immunity by accepting the funds.[246] Writing eight years after *NFIB* had been decided, the court concluded that "*NFIB* does not unequivocally alter *Dole's* conditional-spending analysis" and could not find "any case holding that *NFIB* marks such a transformation of Spending Clause principles."[247]

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[238] *See infra* Section III.B.

[239] Baker, *supra* note 181, at 76.

[240] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. at 584.

[241] *Id*.; Samuel R. Bagenstos, *The Anti-Leveraging Principle and The Spending Clause After NFIB*, 101 GEO. L.J. 861, 870 (2013).

[242] *Nat'l Fed'n Indep. Bus.*, 567 U.S. at 584 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981)); Bagenstos, *supra* note 241, at 870.

[243] Baker, *supra* note 181, at 76.

[244] Bagenstos, *supra* note 241, at 888–89.

[245] *Id*. at 891–92.

[246] Gruver v. La. Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll., 959 F.3d 178, 184 (5th Cir. 2020).

[247] *Id*. At the time of this writing, the Gruver court's point remains true.

It does not appear that courts have interpreted the clear notice prong after *NFIB* to prohibit new conditions on previously available funds. Thus, it appears likely that the HOME Act's conditions on STBG funds would satisfy the clear notice prong, as articulated by *Dole* and *Pennhurst*. The HOME Act is unambiguous in adding additional conditions to STBG funds; communities in which projects funded by STBG are located must have implemented an affordable housing strategy as prescribed in § 2 of the Act.[248] As detailed in Section II.A.1, § 2 of the HOME Act lists numerous specific policies related to zoning and land use that local jurisdictions must include in this affordable housing strategy.[249] States entering into a "contract" with the federal government to accept STBG funds would have clear notice of the new conditions attached to those funds by the HOME Act.[250]

Even if the Supreme Court or a lower court were to apply Professor Baker's interpretation of *NFIB* to the HOME Act, it would probably still survive scrutiny under the clear notice prong. States have different expectations from the federal government with regard to STBG funds, as compared to Medicaid funds. STBG funds are a form of discretionary spending made available to states for a specified period of time by Congress.[251] Thus, if Congress opted to add the HOME Act's conditions to reauthorized STBG funds, they would not be adding "new condition[s] on previously available funds."[252] Congress would make new funds available by reauthorizing the program, and states would "voluntarily and knowingly accept[] the terms of the 'contract'" if they chose to use the newly available STBG funding with additional conditions attached.[253] In contrast, Medicaid funds are a permanent entitlement program with funding authorized for states in perpetuity.[254] Congress does not make new Medicaid funds available to states through reauthorization, so any conditions are necessarily added to "previously available funds."[255]

One potential ambiguity in the HOME Act's conditions on STBG funding is the meaning of the term "community." The Act requires that the "community" in which the STBG project is to be carried out has implemented an affordable housing strategy. The HOME Act does not

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[248] Housing, Opportunity, Mobility, and Equality Act of 2019, H.R. 4808, 116th Cong. § 2 (2019).

[249] *Id.*

[250] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. at 17 (1981).

[251] *See* FAST Act, Pub. L. No. 114-94, 139 Stat. 1312 (2015) (authorizing STBG funds through fiscal year 2020); Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. No. 116-159, 134 Stat. 709 (2020) (reauthorizing appropriations for STBG funds previously made available under the FAST Act until September 30, 2021).

[252] Baker, *supra* note 181, at 76.

[253] *Pennhurst*, 451 U.S. at 17.

[254] *See generally Policy Basics: Introduction to Medicaid*, CTR. ON BUDGET & POL. PRIORITIES (Apr. 14, 2020), https://www.cbpp.org/research/health/introduction-to-medicaid#:~:text=Medicaid%20is%20an%20%E2%80%9Centitlement%E2%80%9D%20program,cost%20of%20their%20Medicaid%20programs; 42 U.S.C. § 1396d (providing the statutory minimum and maximum federal share of a state's Medicaid expenditures).

[255] Baker, *supra* note 181, at 76.

define the term "community," however, nor is the term defined elsewhere in federal highway statutes.[256] Thus, it is not immediately clear from an initial reading of the Act to which unit of government the Act's affordable housing conditions on STBG funds would attach. In contrast, it is clear that the HOME Act would require local governments receiving CDBG funding to include an affordable housing strategy in their Consolidated Plan submissions to the federal government.[257]

This ambiguity could be cleaned up with more precise drafting, but it likely does not pose any legal risk to the Act under the clear notice prong. STBG funds flow to projects differently than CDBG funds flow to grantees. As discussed in Section II.A.2., the funds are allocated directly to states and then sub-allocated among different areas of the state based on population pursuant to a statutory formula.[258] This means that the HOME Act is imposing obligations onto states, since they will determine where STBG funds will be used for projects and ultimately will seek payment from the federal government for the federal share of those projects.[259] In order to receive reimbursement for the federal share of these projects from STBG funds, states must ensure that projects take place in local jurisdictions that have implemented an affordable housing strategy, as prescribed by the HOME Act. If the HOME Act became law, the FHWA would presumably not approve a project as eligible for STBG funds if it took place in a community that had not implemented an affordable housing strategy, and the state would then be on the hook for the federal share of the project.

The HOME Act should easily satisfy the clear notice prong. Courts do not appear to have taken up the *NFIB* court's expansion of the clear notice prong's requirements and instead rely on the more lenient standard articulated by *Dole* and *Pennhurst*. Even if a court did adopt such an expansive reading of the clear notice prong, the HOME Act's conditions on STBG funding would probably pass muster because Congress could add new conditions to reauthorized funds. Some provisions of the HOME Act could be more precisely drafted to reduce ambiguity, but the conditions it places on federal funds are sufficiently clear and unambiguous for states to know what is required to maintain access to STBG funds.

### *B. Coercion and the Tenth Amendment*

In *NFIB*, seven justices across two opinions held that the conditions attached to the ACA's Medicaid expansion unconstitutionally coerced the states and thus violated the Spending Clause.[260] It marked "*the first time*

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[256] *See generally* 23 U.S.C. ch. 1 – Federal-Aid Highways.

[257] *See* Housing, Opportunity, Mobility, and Equity Act of 2019, H.R. 4808, 116th Cong. § 2 (2019); *supra* Section II.B.1.a.

[258] *See* 23 U.S.C. § 104; *see also* U.S. DEP'T OF TRANSP., *supra* note 139, at 17.

[259] *See* 23 U.S.C. § 133(d).

[260] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (plurality opinion), 689 (Scalia, J., dissenting) (2012).

*ever*" that the Court invalidated a spending condition as too coercive.[261] Though the *NFIB* plurality invoked the Spending Clause to invalidate the ACA's Medicaid expansion, it grounded its analysis in the anti-commandeering doctrine under the Tenth Amendment.[262] As a result, the coercion prong of the *Dole-NFIB* framework blends Spending Clause and Tenth Amendment anti-commandeering principles.[263] Specifically, the *NFIB* plurality relies on *New York v. United States*[264] and *Printz v. United States*[265] for its coercion analysis. In this section, I first summarize these two cases, before turning to a more detailed analysis of the *NFIB* opinion. After fully developing the coercion prong, I then apply it to the HOME Act and conclude that the Act would satisfy its requirements with no issue.

*1. The Anti-Commandeering Doctrine*

The *New York* decision is often referred to as the dawn of the "federalist revival," an era in which the Rehnquist Court issued a number of decisions that attempted to tip the scales of power back towards states after decades of decisions increasing federal power.[266] In *New York*, the Court considered the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPAA), which required states to take certain steps to dispose of radioactive waste.[267] The provisions at issue were incentives designed to encourage states to comply with the LLRWPAA's disposal requirements.[268] The first provision at issue under the LLRWPAA provided for fees that states which received radioactive waste from other states could collect from the federal government (the "monetary incentives").[269] The second provision (the "access incentives") levied penalties against states that failed to formulate a plan to develop a disposal facility for radioactive waste.[270] The third provision (the "take title provision") required states to either dispose of waste within its borders within ten years of the LLRWPAA's passage or to take title to any waste remaining after that period upon notice from the owner and "becom[e] liable

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[261] *Id.* at 625 (Ginsburg, J., concurring in part and dissenting in part).

[262] *See* Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 592 (2013). Professor Pasachoff noted that the *NFIB* plurality did not rely on *Dole* to detail its limits on the Spending Power. I interpret *NFIB*'s coercion analysis differently and discuss how the *NFIB* plurality used the spending conditions at issue in *Dole* as a point of comparison for the ACA's Medicaid expansion. *See* discussion *infra* Section III.B.2.

[263] Courts have adopted this framework to analyze the coercion prong. *See, e.g.*, City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 647 (E.D. Pa. 2017) (analyzing issue of coercion under Spending Clause in connection with Tenth Amendment).

[264] New York v. United States, 505 U.S. 144 (1992).

[265] Printz v. United States, 521 U.S. 898 (1997).

[266] Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 460 (2003).

[267] New York v. United States, 505 U.S. at 149.

[268] *Id.* at 152.

[269] *Id.*

[270] *Id.* at 153.

for all damages waste generators suffer as a result of the States' failure to do so promptly."[271]

The Court sought to determine "the circumstances under which Congress may use the States as implements of regulation; that is whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way."[272] Ultimately, the Court determined that the take title provision offered states an untenable "choice of either accepting ownership of waste or regulating according to the instructions of Congress."[273] The Court determined that both courses of action were "beyond the authority of Congress."[274] The former would "commandeer state governments into the service of federal regulatory purposes," while the latter would amount to "a simple command to state governments to implement legislation enacted by Congress," which the Constitution did not authorize Congress to issue.[275] Since both courses of action were unconstitutional, Congress could not "offer the States a choice between the two."[276]

In *Printz*, the Court considered whether provisions of the federal Brady Handgun Violence Prevention Act (the "Brady Act") imposed unconstitutional obligations on state officers to execute federal law.[277] The Brady Act provisions at issue would have required local law enforcement officials to conduct background checks and perform related investigative tasks until a national system came online.[278] Writing for the majority, Justice Scalia found these provisions to be unconstitutional because they "purport[ed] to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme."[279] The Court relied on prior decisions that "made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[280]

Before turning to how the *NFIB* plurality incorporated these two decisions into its coercion prong analysis, it is worth examining whether the HOME Act faces legal risk from an anti-commandeering challenge. The brief answer is likely no, at least with regard to a direct challenge under either *New York* or *Printz*. This is because the HOME Act is fundamentally

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[271] *Id.* at 153–54, 175.

[272] *Id.* at 161.

[273] *Id.* at 175 (internal quotations omitted).

[274] *Id.* at 176.

[275] *Id.* at 174–175 (internal quotations omitted). *See also* Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 579 (2012) ("The States are separate and independent sovereigns. Sometimes they have to act like it.").

[276] New York v. United States, 505 U.S. 144, 176 (1992). Elsewhere in the opinion, the Court found that the monetary incentives and the access incentives were lawful exercises of Congress's power under the Commerce Clause.

[277] Printz v. United States, 521 U.S. 898, 902 (1997).

[278] *Id.*

[279] *Id.* at 904.

[280] *Id.* at 925–26 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Fed. Energy Regul. Comm'n v. Mississippi, 456 U.S. 742 (1982); New York v. United States, 505 U.S. 144 (1997)).

different than the LLRWPAA or the Brady Act. It imposes conditions on funding offered to state and local governments from Congress, rather than establishing affirmative obligations to which states must adhere. For example, if the HOME Act simply mandated that states or local jurisdictions implement inclusive zoning and land use policies, it would likely raise commandeering issues under both *New York* and *Printz* because the federal government would be compelling local jurisdictions to enact a federal regulatory program through legislation.[281] As the *New York* court notes, the relationship between states and the federal government is different in the conditional spending context, because state governments can decline to accept the federal funds if they do not wish to comply with the associated conditions.[282] What if the conditions attached to funding or the amount of money at stake reach a point that states cannot simply refuse the funds? *NFIB* takes up this question in the context of the ACA's Medicaid expansion.

### *2. The Coercion Prong*

While the *Dole* court spends little time discussing the issue of coercion in its Spending Clause analysis, the issue becomes the "central show" in the *NFIB* court's Spending Clause discussion.[283] At issue was the "Medicaid expansion" provision of the ACA, "which would have increased the number and categories of individuals that participating states must cover."[284] States risked losing both the new Medicaid funding offered by the ACA *and* previously available Medicaid funds if they did not comply with the ACA's expanded coverage requirements.[285] At the time, Medicaid spending accounted "for over 20[%] of the average State's total budget, with federal funds covering 50 to 83[%] of those costs."[286] Medicaid spending generally was the highest line item in the average state's budget, with most states receiving more than $1 billion per year in Medicaid funds from the federal government, and a quarter of all states receiving over $5 billion per year.[287]

In holding that the ACA expansion's conditions on Medicaid funds were coercive, the *NFIB* plurality cited *Printz* and *New York* for the proposition that Congress may not "commandeer[] a State's legislative or administrative apparatus for federal purposes."[288] Chief Justice Roberts then analogized commandeering legislation to coercive Spending Clause legislation, which he said the Court must "scrutinize . . . to ensure that

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[281] *See* New York v. United States, 505 U.S. at 175; *Printz*, 521 U.S. at 925–26.

[282] New York v. United States, 505 U.S. at 168.

[283] Pasachoff, *supra* note 262, at 591.

[284] Lynn A. Baker, *The Spending Power After NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL'Y 71, 73 (2014); Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 576 (2012) (plurality opinion).

[285] *Nat'l Fed'n Indep. Bus.*, 567 U.S. at 576 (plurality opinion).

[286] *Id.* at 581.

[287] *Id.* at 682 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[288] *Id.* at 577 (citing Printz v. United States, 521 U.S. 898, 933 (1997); New York v. United States, 505 U.S. 144, 174–75 (1997)).

Congress is not using financial inducements to exert a 'power akin to undue influence.'"[289] The plurality opinion reasoned that "when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds," there is no danger that Spending Clause legislation will insulate federal officials "from the electoral ramifications of their decision."[290] "But when the State has no choice," the plurality opinion noted, "the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*."[291]

According to the *NFIB* plurality,[292] the question whether a state has a "legitimate choice" between taking the conditional federal money or walking away depends on "whether the financial inducement offered by Congress was so coercive as to pass the point at which pressure turns into compulsion."[293] Here, Chief Justice Roberts compared the spending conditions at issue in *Dole* with those imposed by the ACA's Medicaid expansion. While "the threat of losing [5%] of highway funds" constituted "relatively mild encouragement to the States," the risk of losing *all* of a state's Medicaid funding if it did not comply with the ACA's Medicaid expansion was "a gun to the head."[294] Chief Justice Roberts then detailed the significant portion of state budgets for which federal Medicaid funding accounts.[295] He employed another colorful metaphor to describe the effect of a "threatened loss of over 10[%] of a State's overall budget," equating it to "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."[296] The joint dissent, which agreed with the plurality on the issue of coercion, noted that in *Dole*, South Dakota stood to lose "less than 1% of its annual expenditures," and the total amount of highway funding conditioned amounted to 0.19% of all state expenditures combined.[297] In *NFIB*, the joint dissent noted, South Dakota stood to lose "28.9% of its annual state expenditures," and the total amount at stake "equaled 21.86% of all state expenditures combined."[298]

Though the "line where persuasion gives way to coercion" is not precisely fixed, we can deduce from the plurality and joint dissent opinions in *NFIB* that it probably lies somewhere between less than 1% and 10% of a state's overall annual expenditures.[299] One way to approximate where this

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[289] *Nat'l Fed'n Indep. Bus.*, 567 U.S. at 577 (plurality opinion) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

[290] *Nat'l Fed'n Indep. Bus.*, 567 U.S. at 578 (internal citation omitted).

[291] *Id.*

[292] The joint dissent also agreed that spending conditions could violate the commandeering prohibition and cited *New York* and *Printz* to support this position. *See id.* at 677–78 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[293] *Id.* at 580 (quoting South Dakota v. Dole, 483 U.S. 203, 211 (1987)) (internal quotations omitted).

[294] *Id.* at 580–81.

[295] *Id.* at 581.

[296] *Id.* at 582.

[297] *Id.* at 684–85 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); Pasachoff, *supra* note 262, at 606.

[298] *Nat'l Fed'n Indep. Bus.*, 567 U.S. at 685 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[299] Pasachoff, *supra* note 262, at 651.

line falls is to apply the coercion prong of the *Dole-NFIB* framework to other spending programs. In the wake of the *NFIB* decision, Professor Pasachoff did so in the context of conditions attached to federal grants to states for elementary and secondary education.[300] She concluded that conditional federal spending on elementary and secondary education would likely survive the *NFIB* plurality's coercion analysis because the amounts at issue are not large enough to be coercive.[301] Professor Pasachoff's conclusion is significant because, at the time, federal education spending was second only to Medicaid spending in terms of federal dollars provided to states.[302] In general, Professor Pasachoff found that "[f]ederal education funding plays a significantly smaller role in state budgets than does federal Medicaid funding."[303] For example, in fiscal year 2010, "the state least affected by federal Medicaid funds still relied on these funds for 10% of its state expenditures," whereas "the state least affected by federal funds for elementary and secondary education relied on these funds for only 1.2% of its state expenditures."[304] Due to the fact that these numbers "are far closer to *Dole's* figures than the Medicaid figures in *NFIB*," Professor Pasachoff concluded that "[t]here are thus very good reasons to think that the laws conditioned on all federal education funding fall within 'the outermost line where persuasion gives way to coercion.'"[305]

Professor Pasachoff's analysis provides a useful framework for determining whether the HOME Act's conditioning of STBG funds would be considered coercive. The National Association of State Budget Officers (NASBO) estimated in its 2020 State Expenditure Report (NASBO 2020 Report) that elementary and secondary education would remain the second largest source of state spending from federal funds in fiscal year 2020, above state spending on transportation from federal funds.[306] This is significant because states spent more in total on elementary and secondary education than transportation in each of those fiscal years. Put differently, the sum of *all* federal dollars that flow to state transportation spending, which includes additional federal transportation programs other than STBG, was lower than the federal share of state spending on elementary and secondary education from fiscal years 2015 to 2019.[307] And, just as in Professor Pasachoff's

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[300] Professor Pasachoff examined the Elementary and Secondary Education Act, which at the time was reauthorized as No Child Left Behind, the Individuals with Disabilities Education Act, and civil rights laws prohibiting discrimination against protected classes. *See id.* at 581–82.

[301] *Id.* at 582.

[302] *Id.* at 613.

[303] *Id.* at 648.

[304] *Id.* at 649.

[305] *Id.* at 625, 651 (quoting Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012) (plurality opinion)).

[306] NAT'L ASS'N OF STATE BUDGET OFFICERS, FISCAL YEAR 2020 STATE EXPENDITURE REPORT: EXAMINING FISCAL YEARS 2018-2020, 15 (2020) [hereinafter NASBO 2020 REPORT], available at https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/2020_State_Expenditure_Report_S.pdf.

[307] Specifically, the NASBO 2020 REPORT illustrated that federal funds accounted for a higher percentage of actual elementary and secondary education spending by states than actual spending on transportation in each fiscal year between 2015 and 2019. *Id.* at 13, tbl.3.

article, the federal share of total state spending on elementary and secondary education remained far lower than the federal share of total state spending on Medicaid during that period.[308] Therefore, it is apparent that the HOME Act's conditions on STBG funding would fall well within the "the outermost line where persuasion gives way to coercion."[309]

Looking at specific state budgets further demonstrates how unlikely it is that a court would find conditions on STBG funding to be coercive. Table 2 includes the following data points from Texas, California, and New Jersey in fiscal year 2019[310]: the total amount of STBG funds apportioned to each state, the total amount of expenditures by each state, 10% of each state's total expenditures,[311] and the percentage of total state expenditures comprised by STBG funds.

**TABLE 2.**[3]

| State | Apportioned STBG Funds | Total Expenditures | 10% of Total Expenditures | STBG Percentage of Total Expenditures |
|---|---|---|---|---|
| TX | $1.1 Billion | $120.1 Billion | $12.01 Billion | 0.9% |
| CA | $649.1 Million | $294.7 Billion | $29.47 Billion | 0.22% |
| NJ | $313.6 Million | $61.9 Billion | $6.2 Billion | 0.5% |

Even if the HOME Act were to condition *all* of a state's STBG funding on implementing an affordable housing strategy, the amount at risk would likely account for less than 1% of a state's budget.[313] Since the HOME Act would only withhold STBG funds from projects in a "community" that did not implement an affordable housing strategy, the actual conditional spending would be withheld on a project-by-project basis, and thus the amounts at risk would likely be even lower than the figures in Table 2.

[308] *Id.*

[309] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 591 (1937)) (internal quotations omitted).

[310] I use Texas as an example because it consistently receives the highest amount of STBG funding from the federal government. *See* SPENDING EXPLORER, *supra* note 113. I use New Jersey and California as an example for the same reasons that Schuetz does in her policy brief discussed earlier: both states have issues with housing affordability and could potentially lose STBG funding under the HOME Act. *See* Schuetz, *supra* note 114. I use figures from fiscal year 2019 to avoid any irregularities in state budgeting caused by the COVID-19 pandemic.

[311] I use 10% of a state's overall budget as a data point because conditions on funds that exceed this amount risk being labeled "economic dragooning" by Chief Justice Roberts, and thus too coercive. *See Nat'l Fed'n Indep. Bus.*, 567 U.S. at 582 (plurality opinion).

[312] USASPENDING, *supra* note 113; NASBO 2020 REPORT, *supra* note 306, at 108, tbl.A-1.

[313] The total amount of funding appropriated annually for CDBG is significantly less than STBG. *See supra* Table 1. Therefore, the HOME Act's conditions on CDBG funds would almost certainly not be considered coercive, since the amount of STBG funds at risk is far larger in amount but not large enough to be considered coercive.

Clearly, the amount of STBG funds conditioned by the HOME Act "are far closer to *Dole's* figures than the Medicaid figures in *NFIB*,"[314] and thus the Act should easily satisfy the coercion prong of the *Dole-NFIB* framework.

To summarize this article's legal analysis, the HOME Act's stick approach would likely withstand scrutiny from courts under the Spending Clause and the Tenth Amendment. The relatedness prong of the *Dole-NFIB* framework would pose the greatest legal risk to the Act. But affordable housing and the federal government's interest in local transportation infrastructure are probably sufficiently related to survive even a narrow application of the relatedness prong. The Act should easily satisfy the clear notice and coercion prongs of the *Dole-NFIB* framework. Policymakers considering the HOME Act or similar legislation that would adopt the stick approach to tie affordable housing conditions to STBG funding can move forward with plans to implement it without significant risk of invalidation by the courts.

## CONCLUSION

As the *Neighborhood Defenders* authors demonstrate, existing homeowners are overrepresented in the participatory politics of local zoning and land use.[315] They can exert their outsized influence over the local planning process to prevent or delay new housing from being constructed, which contributes to supply shortages that drive up housing prices.[316] Because decisions at the local level regarding zoning and land use policy have a significant effect on housing affordability,[317] this outsized influence distorts the housing market by making it prohibitively expensive for renters and first-time homebuyers. In effect, the current system of local planning serves a privileged class of participants in the housing market, to the detriment of less fortunate participants.

Though state legislation to preempt local zoning and land use regulations can overcome the distorting effect existing homeowners have on the local planning process, states have struggled to overcome political opposition to passing such laws that is rooted in a desire to maintain local control over zoning and land use decisions. At the federal level, policy interventions that would attempt to incentivize local governments to reform their zoning and land use regulations to alleviate shortages in housing supply have bipartisan support. But policymakers currently appear to prefer

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[314] Pasachoff, *supra* note 262, at 625 (citing *Nat'l Fed'n Indep. Bus.*, 567 U.S. at 585 (plurality opinion)).

[315] EINSTEIN ET AL., *supra* note 14, at 95–114.

[316] *Id.*

[317] *See* Jenny Schuetz, *No Renters in My Suburban Backyard: Land Use Regulation and Rental Housing*, 28 J. POL'Y. ANALYSIS & MGMT. 296 (2009); Joseph Gyourko & Raven Molloy, *Regulations and Housing Supply* (Nat'l Bureau of Econ. Research Working Paper No. 20536); Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPECTIVES 3 (2018).

offering fiscal carrots to local jurisdictions, rather than threatening them with a stick. This approach is less likely to increase housing supply in jurisdictions with expensive housing because of restrictive zoning and land use regimes—the very place where reforms are most needed to increase the supply of housing and alleviate price pressures. Because it is both a more effective and legal way to incentivize local zoning and land use reforms, Congress should adopt the stick approach embodied by the HOME Act. Doing so is more likely to lead to reforms in exclusionary and expensive jurisdictions because the Act would create a more difficult cost-benefit analysis for states and local governments that wish to maintain restrictive zoning and land use regulations. The stick approach is also more likely to result in a housing market that better serves all participants, an outcome to which policymakers should aspire.