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TO LICENSE A LULU:  
SCALING PREEMPTION-DRIVEN RESPONSES  
TO THE REGULATION OF RECOVERY HOMES

In land-use law and policy, local governments regularly bear the burden of making unpopular decisions. Local governments enjoy some level of home rule — understood as legislative and regulatory authority over the municipal domain — by virtue of their respective state constitutions or state legislation.<sup>1</sup> One of the powers central to home rule is the regulation of local land use, which puts local governments in regular communication and often contestation with residents, business owners, and other organizations who wish to reside in or develop property within the locality. The burden of unpopular decisionmaking is most plainly captured in the siting — the zoning and permitting processes guiding where and under which terms facilities operate — of locally undesirable land uses (LULUs).

Despite their benefits to society writ large, LULUs either impose or are publicly perceived to impose negative externalities and risks on the community in which they are located,<sup>2</sup> whether they “decrease neighboring property values, increase noise, odors, pollution[,] and congestion, [or] stigmatize the community.”<sup>3</sup> But not all LULUs are created equal. Group homes, factories, and waste processing facilities all constitute LULUs responding to specific public needs, but with varying actual and perceived costs that serve as “spillover effects” of their siting and render the facilities locally undesirable.<sup>4</sup> These economic, social, and environmental impacts become part of the respective local government’s siting decisions on where to permit a LULU to operate, or whether to allow the facility within the bounds of the locality at all.

LULUs are thus frequent targets of and litigants against local land-use laws that either limit or preclude their siting in neighborhoods that do not want them, examples of the “not in my backyard” (NIMBY) response.<sup>5</sup> These local land-use conflicts loom large in the context of group homes, especially with respect to a more specialized type of group home known as recovery homes, or sober living facilities. Recovery homes aim to provide residents with stable, alcohol- and drug-free

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<sup>1</sup> Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 253, 257 (2004).

<sup>2</sup> See Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1001–02 (1993).

<sup>3</sup> *Id.* at 1002 n.4.

<sup>4</sup> See *id.*

<sup>5</sup> See ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 740 (3d ed. 2005); see also Brian J. Connolly & Dwight H. Merriam, *Planning and Zoning for Group Homes: Local Government Obligations and Liability Under the Fair Housing Amendments Act*, 47 URB. LAW. 225, 228 (2015).

housing normally after completion of a substance use disorder treatment program, while prioritizing long-term recovery and community integration.<sup>6</sup> Still, recovery homes often receive widespread stigma, largely directed toward their clientele, that negatively affects local siting and ultimately results in disproportionate numbers of facilities in low-income and minority neighborhoods.

However, new forms of state regulation of recovery homes may offer protection from the threats of NIMBYism. In general, nonclinical recovery homes largely operate within a regulatory gap, as no federal laws or regulations govern the operation of these facilities and few state legislatures have imposed formal operational requirements.<sup>7</sup> But the rise of voluntary and mandatory state licensing schemes, the most recent significant regulation of recovery homes within the last decade, has elevated the role of states in the broader regulatory field governing recovery homes.<sup>8</sup> These new regulations create mechanisms for recovery homes to be accredited either by state agencies or by designated third-party stakeholder organizations with industry expertise.<sup>9</sup> However, unlike local zoning laws for group homes and recovery homes,<sup>10</sup> these licensing schemes have not yet been tested in the courts.

As with many state laws, the licensing schemes at issue here do not expressly intend to invalidate local laws regulating recovery homes, but proponents of recovery homes can seize on these regulations, arguing they implicitly preempt or “displace” conflicting local laws. When a court is presented with a possible case of implicit preemption, the state law could be interpreted as either effectively preempting and invalidating a preexisting local regulation if that local regulation undermines the new state regulation, or as supplementing the local regulation and

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<sup>6</sup> See NAT'L COUNCIL FOR BEHAVIORAL HEALTH, BUILDING RECOVERY: STATE POLICY GUIDE FOR SUPPORTING RECOVERY HOUSING 2 (2018), [https://www.thenationalcouncil.org/wp-content/uploads/2018/05/18\\_Recovery-Housing-Toolkit\\_5.3.2018.pdf](https://www.thenationalcouncil.org/wp-content/uploads/2018/05/18_Recovery-Housing-Toolkit_5.3.2018.pdf) [<https://perma.cc/FTJ3-NQDK>] [hereinafter NAT'L COUNCIL FOR BEHAVIORAL HEALTH RECOVERY REPORT]. Recovery homes do not provide formal treatment themselves, but they can mandate or strongly encourage participation in outpatient programs such as twelve-step groups as well as education and job training as part of the residency term. See *id.* at 15; Douglas L. Polcin & Diane McAllister Henderson, *A Clean and Sober Place to Live: Philosophy, Structure, and Purported Therapeutic Factors in Sober Living Houses*, 40 J. PSYCHOACTIVE DRUGS 153, 154 (2008).

<sup>7</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-315, SUBSTANCE USE DISORDER: INFORMATION ON RECOVERY HOUSING PREVALENCE, SELECTED STATES' OVERSIGHT, AND FUNDING 1 (2018), <https://www.gao.gov/assets/gao-18-315.pdf> [<https://perma.cc/T9C6-FYV3>] [hereinafter GAO RECOVERY HOME REPORT]; see ERIC MARTIN ET AL., THE MENTAL HEALTH & ADDICTION CERT. BD. OF OR., NATIONAL OVERVIEW OF RECOVERY HOUSING ACCREDITATION LEGISLATION AND LICENSING 2-3 (2020), [https://mhacbo.org/media/filer\\_public/2e/fd/2efd1a20-9558-4329-8683-0e2367cbbc2b/nationaloverviewrecoveryhousingjanuary2020.pdf](https://mhacbo.org/media/filer_public/2e/fd/2efd1a20-9558-4329-8683-0e2367cbbc2b/nationaloverviewrecoveryhousingjanuary2020.pdf) [<https://perma.cc/GCT5-5Q3G>].

<sup>8</sup> See GAO RECOVERY HOME REPORT, *supra* note 7, at 12.

<sup>9</sup> MARTIN ET AL., *supra* note 7, at 3.

<sup>10</sup> See, e.g., *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728-29 (1995).

creating another level of restrictions beyond what the locality already requires.<sup>11</sup> Preemption may also be relevant in the recovery home context because of compelling state interests in healthcare and insurance regulation.

Implicit preemption has the potential downside of undercutting local home rule.<sup>12</sup> However, when conceptualizing preemption as a distribution of power across state and local governments, “disaggregating” preemption through a sliding-scale framework can allow courts to properly balance competing state and local interests and distribute power between them accordingly.<sup>13</sup> These state interventions may also assist in reversing trends of predominantly siting LULUs in low-income and minority neighborhoods when localities have exclusive authority. With respect to regulating the siting of LULUs, a sliding scale comprised of two axes acknowledges the importance of two dynamics in the nature of regulating a given type of LULU. First, courts would consider whether the perceived “harms” imposed by siting or operating the facility in a particular location have purely local effects, broader state implications, or something in between. Second, courts would look to the degree to which the primary harms of the LULU are rooted in abstract, stigma-rich NIMBY sentiments rather than tangible, conventionally accepted negative externalities. Both of these factors captured in the sliding scale help define the contours of what renders a facility a locally undesirable land use. When stigma predominates in siting controversies between LULU developers and local governments and the LULU primarily imposes local effects, courts may allow states more preemptive authority to intervene in siting.

This Note explores the use of state licensing schemes for recovery homes as an exercise of implicit preemption. It argues that preemption analysis of state regulations should incorporate a sliding scale that grants broader preemption power to a state’s intervention in the siting of LULUs when the negative externalities associated with the LULU are based more on abstract societal prejudice at the local level — as is the case with recovery homes. This sliding-scale preemption framework would work to mitigate the role of stigma in regulations over recovery home siting and facilitate broader state intervention in siting policies over stigma-rich LULUs engaged in social-service provision. Rather than evaluating state and local interests in absolute terms to determine a regulatory “winner” and “loser,” a sliding-scale framework broadens siting authority to include more state participation so that actual spillover harms are better distributed across relevant localities and the

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<sup>11</sup> ELLICKSON & BEEN, *supra* note 5, at 732. In circumstances where the state regulation is supplemental, the state and locality each retain independent veto power. *Id.*

<sup>12</sup> See Briffault, *supra* note 1, at 264.

<sup>13</sup> Cf. Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENV'T L. REV. 293, 317 (2016) (proposing this approach).

role of stigma in distorting local siting policy is reduced. The result of the sliding-scale framework would thus be a more functional regulatory field for recovery homes, with applications to other LULUs in which stigma predominates in the decision to classify the use as undesirable.

Part I discusses the growth of the recovery home industry and its function as a matter of policy. Part II expands on the local siting trends of LULUs, the development of legal protections for recovery homes as a subtype of group homes, and the nature of subsequent local regulation. Part III introduces the recent phenomena of robust state licensing and accreditation schemes intended to regulate recovery homes and assesses the legal bounds of coercive licensing models, given Fair Housing Act<sup>14</sup> (FHA) safeguards against discrimination. Part IV presents a sliding-scale framework for understanding the potential legality of state licensing schemes and then expands the application of the framework to propose systemic scaling of state and local regulation of LULUs based on their purported spillover harms.

## I. RECOVERY HOMES IN POLICY AND PRACTICE

Recovery homes have existed in some form in the United States since the mid-nineteenth century.<sup>15</sup> As part of the temperance movement, informal rooms and boarding houses for alcoholics became parts of a large network of “inebriate homes” affiliated with religious groups, state-sponsored asylums, and private “cure institutes.”<sup>16</sup> The first sober living homes approximating those that are seen today proliferated in 1960s Los Angeles via “twelfth step” houses that, despite offering no treatment services, provided programming by “either mandat[ing] or strongly encourag[ing] attendance at [Alcoholics Anonymous (AA)] meetings to facilitate residents’ recovery.”<sup>17</sup> Oxford House, Inc., a recovery home network established in 1975, widely expanded the trend of transforming single-family houses in neighborhoods into “self-governed, financially self-supported recovery residences” with a focus on community as the core component of long-term recovery.<sup>18</sup> While there is no record of the

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<sup>14</sup> 42 U.S.C. §§ 3601–3619.

<sup>15</sup> NAT’L ASS’N. OF RECOVERY RESIDENCES, A PRIMER ON RECOVERY RESIDENCES: FAQs 6 (2012), <https://narronline.org/wp-content/uploads/2014/06/Primer-on-Recovery-Residences-09-20-2012a.pdf> [<https://perma.cc/9P9F-WY28>] [hereinafter NARR PRIMER ON RECOVERY RESIDENCES].

<sup>16</sup> *Id.*

<sup>17</sup> Polcin & Henderson, *supra* note 6, at 154.

<sup>18</sup> NARR PRIMER ON RECOVERY RESIDENCES, *supra* note 15, at 7. Oxford House has over 2,000 houses across over forty states in its network. *Id.*; *The Purpose and Structure of Oxford House*, OXFORD HOUSE, [https://www.oxfordhouse.org/purpose\\_and\\_structure](https://www.oxfordhouse.org/purpose_and_structure) [<https://perma.cc/RM4H-TQV7>].

total number of recovery homes nationwide due to limited federal regulation,<sup>19</sup> the National Alliance of Recovery Residences (NARR) represents over 2,500 recovery residences certified according to its own standards for operation.<sup>20</sup>

Today, sober living facilities are considered a “central component of successful long-term recovery” because they provide a structured, sobriety-affirming living environment for individuals with substance use disorders to bridge clinical treatment experiences to a self-guided lifestyle in long-term recovery.<sup>21</sup> Homelessness and lack of social support for sobriety are two common triggers for relapse to drugs and alcohol.<sup>22</sup> The flexible housing and community-based resources offered by recovery homes aim to counteract both of these high risks to recovery by allowing individuals to take up residence for months or even years.<sup>23</sup> Studies have shown that participation in recovery residences “decreases in-treatment and post-treatment relapse rates and significantly increases recovery outcomes” in areas such as abstinence and employment rates for up to two years.<sup>24</sup>

However, these benefits often come at a high price. Some recovery homes have successfully used Section 8 vouchers through the U.S. Department of Housing and Urban Development (HUD) to fund stays.<sup>25</sup> Nonetheless, recovery homes generally have limited financial support and require private pay by their residents, often locking out low-income individuals most at risk of homelessness with few safe alternatives.<sup>26</sup> While not typical, individuals living at recovery residences may be able to pay for housing and services depending on the terms of their private insurance.<sup>27</sup> But the terms of Social Security Disability Insurance (SSDI) strictly limit eligibility with respect to addiction, and most states do not extend Medicaid funds for “recovery housing or for any type of recovery support services.”<sup>28</sup>

<sup>19</sup> See GAO RECOVERY HOME REPORT, *supra* note 7, at 1, 6.

<sup>20</sup> *About Us*, NAT'L ASS'N OF RECOVERY RESIDENCES, <https://narronline.org/about-us> [<https://perma.cc/FW5S-2EFZ>].

<sup>21</sup> See NAT'L COUNCIL FOR BEHAVIORAL HEALTH RECOVERY REPORT, *supra* note 6, at 2.

<sup>22</sup> See Polcin & Henderson, *supra* note 6, at 153.

<sup>23</sup> NARR PRIMER ON RECOVERY RESIDENCES, *supra* note 15, at 17–18.

<sup>24</sup> Soc'y for Cmty. Rsch. & Action, Policy Statement, *The Role of Recovery Residences in Promoting Long-Term Addiction Recovery*, 52 AM. J. CMTY. PSYCH. 406, 408 (2013). Longer-term follow-up studies have yet to be conducted. *Id.*

<sup>25</sup> NAT'L COUNCIL FOR BEHAVIORAL HEALTH RECOVERY REPORT, *supra* note 6, at 11.

<sup>26</sup> See Kim Barker, *A Choice for Recovering Addicts: Relapse or Homelessness*, N.Y. TIMES (May 30, 2015), <https://www.nytimes.com/2015/05/31/nyregion/three-quarter-housing-a-choice-for-recovering-addicts-or-homelessness.html> [<https://perma.cc/6CBL-CX7G>].

<sup>27</sup> See NARR PRIMER ON RECOVERY RESIDENCES, *supra* note 15, at 8.

<sup>28</sup> NAT'L COUNCIL FOR BEHAVIORAL HEALTH RECOVERY REPORT, *supra* note 6, at 10. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code), expanded coverage for treatment for mental illness and substance use disorders by establishing it as an “essential benefit[]” that the majority of

Insurance is also a common venue for fraud and abuse in the recovery home industry, as fraudulent operators recruit recovering individuals to their facilities and bill patients' insurance "for extensive and medically unnecessary urine drug testing" for profit.<sup>29</sup> Similar fraud can extend into deceptive relationships with credible treatment providers in a practice known as "patient brokering," in which recovery homes refer their residents to treatment centers in exchange for money or other benefits.<sup>30</sup> Recovery home fraud inflicts reputational risk on the industry and imposes high costs on states to investigate and thwart fraudulent practices.<sup>31</sup> Outside of direct financial support for recovery homes through HUD and insurance, states have access to funding through the Substance Abuse and Mental Health Services Administration (SAMHSA), an agency within the U.S. Department of Health and Human Services (HHS).<sup>32</sup> Thus, while states do not currently have an expansive role in the regulation of recovery homes, they play a notable role in the funding and supervision of these facilities through their access to federal dollars and their investigatory capabilities when issues of fraud arise.

## II. DISPROPORTIONATE DYNAMICS IN LOCAL SITING OF LULUS AND THE LIMITATIONS OF LEGAL PROTECTIONS FOR RECOVERY HOMES

Individual recovery homes largely remain creatures of their local communities and local governments. When urban planning became a core policy focus in the postwar era, local land-use laws often deployed siting strategies that weaponized LULUs to perpetuate segregation and socioeconomic class stratification, through which Black and low-income neighborhoods were forced to absorb a variety of nonresidential

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group plans must offer to plan seekers. Zachary Rothenberg, *Trends in Combating Fraud and Abuse in Substance Use Disorder Treatment*, J. HEALTH CARE COMPLIANCE, Sept.–Oct. 2018, at 13, 13.

<sup>29</sup> GAO RECOVERY HOME REPORT, *supra* note 7, at 9. The U.S. Government Accountability Office (GAO) reported that Florida's NARR affiliates estimated the state's recovery housing fraud to sum "\$1 billion in fraudulent private insurance billing in 1 year." *Id.* at 8 n.18.

<sup>30</sup> *Id.* at 8.

<sup>31</sup> See, e.g., Lizette Alvarez, *Haven for Recovering Addicts Now Profits from Their Relapses*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/us/delray-beach-addiction.html> [<https://perma.cc/43UR-JUN6>].

<sup>32</sup> GAO RECOVERY HOME REPORT, *supra* note 7, at 1, 17–18; see also *Substance Abuse Prevention and Treatment Block Grant*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Apr. 16, 2020), <https://www.samhsa.gov/grants/block-grants/sabg> [<https://perma.cc/9DPV-54TM>]. In the 2019 fiscal year, approximately \$1.26 billion in Substance Abuse Prevention and Treatment Block Grant funding was spent on treatment and recovery support services. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-58, SUBSTANCE USE DISORDER: RELIABLE DATA NEEDED FOR SUBSTANCE ABUSE PREVENTION AND TREATMENT BLOCK GRANT PROGRAM 57 (2020), <https://www.gao.gov/assets/gao-21-58.pdf> [<https://perma.cc/9N4X-QLAW>].

facilities deemed unsuitable for middle-class, residential white neighborhoods.<sup>33</sup>

Siting selection processes, which are highly vulnerable to NIMBYism, similarly produce disproportionate siting of recovery homes, which carry some of the lowest levels of social acceptance among transitional living arrangements.<sup>34</sup> In order for recovery home developers to successfully integrate their facilities into preexisting communities, they must typically seek variances or special permitting to locate in residential zones.<sup>35</sup> These requests require significant administrative procedure and community buy-in, and the local zoning authority typically adjudicates after opportunities for comment from the public.<sup>36</sup> Within the process, hyperlocal political pressure and community backlash can derail developers' applications to site in the locality.<sup>37</sup> These disputes often become a battle of resources. Research suggests that wealthier, white suburban communities are more politically empowered and successful in organizing to block the siting of transitional housing in their neighborhoods.<sup>38</sup> Common tactics include creation of neighborhood opposition groups, lobbying of local politicians and media outlets, and demonstrations, often coordinated with the zoning variance process to sway the variance decision in a resistant community's favor.<sup>39</sup>

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<sup>33</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 455 (1985) (Stevens, J., concurring) ("The record convinces me that this permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in respondent's home."); see also RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 50 (2017) (describing the mid-twentieth-century zoning in St. Louis that clustered, among others, high-pollution industry and liquor stores in Black neighborhoods and used industrial zones to "create a buffer" from white neighborhoods). Environmentally hazardous LULUs deserve special note. Nationally, toxic waste facilities were more likely to be sited in Black residential areas compared to white residential areas. See *id.* at 55. As the inverse to NIMBY policy, the "[o]nly in [t]heir [b]ackyard," Robert L. Bentleyewski & Mina Juhn, Comment, *Race, Place, and Pollution: The Deep Roots of Environmental Racism*, 89 *FORDHAM L. REV. ONLINE* 74, 79 (2020), and the "put it in [B]lacks' backyards," Been, *supra* note 2, at 1003, approaches to siting LULUs became common urban policy in the mid- and late-twentieth century.

<sup>34</sup> Laurie C. Malkin, Comment, *Troubles at the Doorstep: The Fair Housing Amendments Act of 1988 and Group Homes for Recovering Substance Abusers*, 144 *U. PA. L. REV.* 757, 795 & n.180 (1995) (citing Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 *J. AM. PLAN. ASS'N* 288, 291 (1992)).

<sup>35</sup> Dear, *supra* note 34, at 290; see also Leonard A. Jason et al., *Counteracting "Not in My Backyard": The Positive Effects of Greater Occupancy Within Mutual-Help Recovery Homes*, 36 *J. CMTY. PSYCH.* 947, 955 (2008) (identifying maximum occupancy laws as a common hurdle that recovery homes must overcome to site in local neighborhoods).

<sup>36</sup> See, e.g., Matthew J. McGowan, *Location, Location, Mis-location: How Local Land Use Restrictions Are Dulling Halfway Housing's Criminal Rehabilitation Potential*, 48 *URB. LAW.* 329, 354 (2016).

<sup>37</sup> See Malkin, *supra* note 34, at 800.

<sup>38</sup> See S.E. Costanza et al., *Are Minority Areas Disproportionately Targeted for Halfway House Placement?*, 11 *J. ETHNICITY CRIM. JUST.* 256, 262–63, 267–69 (2013).

<sup>39</sup> Dear, *supra* note 34, at 291.

Community backlash to the facilities, often invoking concerns over safety and threats to community character, runs counter to impact studies' findings that such homes, when not clustered on the same block, do not pose adverse impacts.<sup>40</sup> Nonetheless, the resistance can prove effective alongside zoning restrictions themselves. Studies show that facilities housing clients deemed particularly undesirable neighbors tend to be located in neighborhoods with higher percentages of minorities and with lower levels of education and income,<sup>41</sup> supporting arguments that siting strategies disproportionately place the concentrated costs of LULUs on people of color and the poor when they are a responsibility to be shared by the broader community.<sup>42</sup> As an optimization tactic, a locality may consider siting the LULUs based on which communities need the facilities most.<sup>43</sup> However, this approach is likely to produce the disproportionate siting in low-income communities that siting reform aims to reduce, as "considerations of need are likely to relegate many social-service LULUs to poor communities . . . where a disproportionate number of clients live."<sup>44</sup> Need-based measurements may also incentivize communities to expel their poorest or neediest residents to prevent siting of social-service LULUs within their bounds.<sup>45</sup> Moreover, recovery homes depend on siting in middle-class neighborhoods in order to allow clients to avoid triggers of relapse, which often means separation from their home environment, family, and friends through residence elsewhere.<sup>46</sup> A need-based model arguably eschews broader community responsibility for social-service provision.

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<sup>40</sup> Daniel Lauber, *A Real Lulu: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments Act of 1988*, 29 J. MARSHALL L. REV. 369, 402 (1996) (summarizing large bodies of research that confirm community residences "do not generate adverse impacts on the surrounding community," including on property values and safety).

<sup>41</sup> See Been, *supra* note 2, at 1013–14. There is some speculation about whether siting strategies or market forces subsequent to siting are responsible for the trend of LULUs predominating in low-income and minority neighborhoods. See generally Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994) [hereinafter Been, *Locally Undesirable Land Uses*]. However, some studies have still identified the siting process as having a disproportionate effect on low-income and minority neighborhoods. See *id.* at 1398–1406; Costanza et al., *supra* note 38, at 270. Even if it were the case that market forces led to neighborhoods gaining more low-income and minority residents *after* siting, that would not explain why percentage of white residents and suburban designation are indicators for less siting of transitional housing. Costanza et al., *supra* note 38, at 268–69.

<sup>42</sup> See Been, *supra* note 2, at 1028–29 ("Because exemptions from social burdens are benefits, it follows that burdens such as LULUs should be proportionally distributed." *Id.* at 1029.).

<sup>43</sup> *Id.* at 1036.

<sup>44</sup> *Id.*

<sup>45</sup> See *id.*

<sup>46</sup> See Herbert A. Eastman, *War on Drugs or on Drug Users? Drug Treatment and the NIMBY Syndrome*, 5 B.U. PUB. INT. L.J. 15, 26–27 (1995) (highlighting that the need for recovering addicts to live in middle-class neighborhoods to be separated from triggers of relapse exacerbates local backlash to recovery homes).

Federal protections established in the late twentieth century helped block some of the most egregious acts of discriminatory siting, but many practices allowing for the disproportionate distribution outlined above are still able to slip through the cracks. The 1988 amendments to the FHA — also known as the Fair Housing Amendments Act<sup>47</sup> (FHAA) — marked a paradigm shift for the treatment of group homes and recovery homes. The FHAA prohibits private and public discrimination against people with disabilities — specified as a “handicap” in the statute<sup>48</sup> — in public and private housing.<sup>49</sup> In addition to covering people with “developmental disabilities, mental illness, physical disabilities, [and] contagious diseases like tuberculosis or HIV,” the “handicap” definition in the FHAA, now embedded within the FHA itself, also covers individuals with substance use disorders so long as they are not currently using any controlled substance.<sup>50</sup> To supplement this establishment of a new protected class under the act, the FHAA also expanded the definition of “discrimination” beyond standard housing transactions to include “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”<sup>51</sup>

The legal protections afforded by the FHAA led to voluminous, costly litigation, often brought by group home developers challenging local variance procedures as violating the FHAA’s requirement that localities provide reasonable accommodations.<sup>52</sup> However, courts often rule in favor of the local government when it merely offers a “nonfutile opportunity to vary the usual zoning requirements.”<sup>53</sup> Localities also enjoy cover from heightened burdens of proof in discriminatory intent cases, since there is rarely a significant enough record to demonstrate discriminatory animus.<sup>54</sup> Reasonable accommodations were at issue in

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<sup>47</sup> 42 U.S.C. §§ 3601–3631.

<sup>48</sup> *Id.* §§ 3602, 3604–3606.

<sup>49</sup> Arlene S. Kanter, *A Home of One’s Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 933 (1994).

<sup>50</sup> Lauber, *supra* note 40, at 374; *see also* 42 U.S.C. § 3602(h) (“[S]uch term does not include current, illegal use of or addiction to a controlled substance . . .”).

<sup>51</sup> Lauber, *supra* note 40, at 389 (quoting 42 U.S.C. § 3604(f)(3)(B)).

<sup>52</sup> *See* Connolly & Merriam, *supra* note 5, at 227, 261–63; *see also* Nikki Leon, *Pathways from Pacific Shores: The Power of “Direct” Proof of Disparate Treatment in Group Home Litigation*, 39 T. JEFFERSON L. REV. 33, 45–46 (2016) (noting that applications for permits and reasonable accommodations can be so burdensome and costly that group homes with limited funding are ultimately unable to operate); Megan Nicolai, *Newport Beach Settles Legal Battle over Sober-Living Homes*, ORANGE CNTY. REG. (July 15, 2015, 7:58 PM), <https://www.oregister.com/2015/07/15/newport-beach-settles-legal-battle-over-sober-living-homes> [<https://perma.cc/QD3U-2H6A>] (recounting \$5.25 million settlement of federal discrimination lawsuit by recovery homes against City of Newport Beach).

<sup>53</sup> Connolly & Merriam, *supra* note 5, at 262.

<sup>54</sup> *Cf.* *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 793 (6th Cir. 1996) (finding that statements by city council members about the effect of adult foster care homes on property values

*City of Edmonds v. Oxford House, Inc.*,<sup>55</sup> in which the city refused to exempt a recovery home that could not site in a single-family residential zone because the city code defined “family” as “persons related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons.”<sup>56</sup> The Court held that the definition of “family” in the code was not a maximum occupancy restriction exempt from the FHA, as it caps the number of residents only if they are unrelated.<sup>57</sup> By contrast, an unlimited number of related persons could live together under the ordinance. In the Court’s view, the city’s family composition rule constituted a “family values preserver,” and it consequentially denied the definition an exemption from FHA scrutiny as a maximum occupancy restriction.<sup>58</sup> By virtue of its holding, *City of Edmonds* confirmed that single-family zoning was subject to FHA scrutiny and, in particular, could be reviewed to uphold the statutory protections for recovery homes.<sup>59</sup> But notably, the Court did not invalidate the city’s ordinance or regulations imposing family values more broadly,<sup>60</sup> highlighting how much flexibility localities still have to deploy exclusionary site selection practices at the margins.

The limitations of litigation have allowed nimble local governments to tailor regulations that both disproportionately limit the siting of recovery homes and can survive challenges under the FHAA, particularly through the use of maximum occupancy limits;<sup>61</sup> application of building, fire, and safety codes without accommodation;<sup>62</sup> and “[r]eliance on a local comprehensive plan” in its actions.<sup>63</sup> These codes may also be modified in order to close preexisting facilities.<sup>64</sup> Thus, when left to regulate LULUs on their own, with the lack of intervention by the judicial and executive branches,<sup>65</sup> local governments disproportionately charge

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and other critical comments did not constitute “significant evidence of discriminatory or paternalistic statements regarding the handicapped”).

<sup>55</sup> 514 U.S. 725 (1995).

<sup>56</sup> *Id.* at 728. Oxford House argued that recovery homes require “8 to 12 residents to be financially and therapeutically viable.” *Id.* at 729.

<sup>57</sup> *Id.* at 736–37.

<sup>58</sup> *Id.* at 737–38.

<sup>59</sup> *See id.*; *see also* Connolly & Merriam, *supra* note 5, at 237–38 (“All of the federal appeals courts that have addressed the question have expressly held that the [FHAA] applies to local zoning.”).

<sup>60</sup> *See City of Edmonds*, 514 U.S. at 738.

<sup>61</sup> *See id.* at 737 (“Edmonds additionally contends that subjecting single-family zoning to FHA scrutiny will ‘overturn Euclidian zoning’ and ‘destroy the effectiveness and purpose of single-family zoning.’ This contention . . . exaggerates the force of the FHA’s antidiscrimination provisions.” (citation omitted)).

<sup>62</sup> Connolly & Merriam, *supra* note 5, at 264.

<sup>63</sup> *Id.* at 251.

<sup>64</sup> Jason et al., *supra* note 35, at 955.

<sup>65</sup> *See* ROTHSTEIN, *supra* note 33, at 51–54 (noting both the pro-segregationist housing policies promoted by the Hoover Administration and the exceedingly high barrier to judicial relief established by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development*

low-income neighborhoods and communities of color with absorbing the actual costs of operating these facilities when they are permitted to site within their boundaries at all. And neighborhoods that are able to exclude recovery homes benefit because they do not have to share in that community responsibility.

### III. THE ADVENT OF STATE LICENSING SCHEMES UNDER THE LENS OF IMPLICIT PREEMPTION

As an alternative to protections available under federal housing legislation, some LULU developers and operators, including those of group homes, have raised arguments that restrictive local land-use laws are implicitly preempted by more favorable state legislation when it exists.<sup>66</sup> Because of powerful presumptions of local home rule in local government law, state legislatures are hesitant to “make[] any highly visible incursions on local powers” and therefore craft legislation that does not explicitly address preemption issues by default.<sup>67</sup> Proponents of implicit preemption note that state regulation can uniquely tailor spillover benefits and harms of certain land-use activities by using an “efficiency-maximizing approach” that considers the needs and vulnerabilities of multiple localities in tandem, whereas local governments do not have incentives to do the same.<sup>68</sup> As one example, implicit preemption considerations frequently intervene in disputes over local land-use regulation of LULUs with environmental impacts, particularly in states with more robust environmental regulations.<sup>69</sup>

Courts can infer state intent to preempt a local regulation from a “comprehensive or detailed scheme in a given area,”<sup>70</sup> but they can also look to whether “the subject area inherently requires uniform regulation” and “whether the continuation of local regulation would impair

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*Corp.*, 429 U.S. 252 (1977), which required plaintiffs to prove discriminatory intent in challenges to siting policies under the Equal Protection Clause); *see also* Been, *supra* note 2, at 1003–05 (discussing the difficulty of litigation by community groups against local governments and LULU developers because of the *Arlington Heights* standard).

<sup>66</sup> *See, e.g.*, Don Munton, *Introduction: The NIMBY Phenomenon and Approaches to Facility Siting*, in *HAZARDOUS WASTE SITING AND DEMOCRATIC CHOICE* 1, 12 (Don Munton ed., 1996) (noting the development of state preemption in siting matters in order to “stem a tide of NIMBY movements”); *cf.* Sarah Clinton, Note, *Evicting the Innocent: Can the Innocent Tenant Defense Survive a Rucker Preemption Challenge?*, 85 B.U.L. REV. 293, 321 (2005) (“[I]t is a common practice to give deference to state regulations involving housing law issues, particularly where states give greater protection to tenants.”).

<sup>67</sup> ELLICKSON & BEEN, *supra* note 5, at 745; *see also* Briffault, *supra* note 1, at 264 (“State displacement of local action should be limited to cases of clear conflict or clearly stated preemption. Implied preemption should be strongly disfavored.”).

<sup>68</sup> *See* ELLICKSON & BEEN, *supra* note 5, at 746.

<sup>69</sup> *See id.*

<sup>70</sup> *Incorporated Village of Nyack v. Daytop Village, Incorporated*, 583 N.E.2d 928, 930 (N.Y. 1991).

achievement of explicit statutory objectives.”<sup>71</sup> In *City of New York v. Town Blooming Grove Zoning Board of Appeals*,<sup>72</sup> a New York appeals court ordered a locality to approve a homeless shelter’s application for modifications in its special permit, based on the state’s “comprehensive[] regulat[ion]” of adult-care facilities that precludes local zoning authorities “from using zoning ordinances or permit requirements to control the details of shelter operations.”<sup>73</sup> Successful litigation in this area turns not only on the particulars of the state law at issue, but also on whether the local regulation actually conflicts with the interests of the state legislature in enacting the law.<sup>74</sup> State legislation can serve as a viable mediator in siting controversies.<sup>75</sup>

Given concerns about patient brokering and general client abuse, advocates for the recovery home industry frequently call for additional state government participation.<sup>76</sup> More recently, a surge of state reform has converged around the establishment of state licensing schemes for recovery homes, with either voluntary or mandatory terms.<sup>77</sup> As of January 2020, twenty-six states use “private third-party accreditation” of recovery homes either through “provider associations or private [substance use disorder] professional certification boards.”<sup>78</sup> Six states run their own licensing schemes through health or administrative agencies,<sup>79</sup> and two states now reliant on private third-party accreditation have proposed transitions to state licensing in 2020 legislation.<sup>80</sup>

<sup>71</sup> ELLICKSON & BEEN, *supra* note 5, at 745.

<sup>72</sup> 761 N.Y.S.2d 241 (N.Y. App. Div. 2003).

<sup>73</sup> *Id.* at 242. New York’s regulations over adult-care facilities have repeatedly been a conduit for successful implicit preemption challenges of this nature. *See, e.g., DeStefano v. Emergency Hous. Grp., Inc.*, 722 N.Y.S.2d 35, 37–38 (N.Y. App. Div. 2001) (finding municipality’s special permit requirement under its zoning ordinance as applied to “shelters for adults” preempted by state regulations). *But see Nyack*, 583 N.E.2d at 931 (rejecting recovery home’s argument, based on the state statute’s explicit preemption of local control over facilities for the “mentally disabled,” that the statute also preempted restrictions on “substance abuse facilities”).

<sup>74</sup> *See, e.g., Nyack*, 583 N.E.2d at 931 (“Both the State and the Village have important interests at stake in this controversy — the State in promoting its substance abuse policy, the Village in controlling its present shape and future growth. But these interests are not necessarily contradictory.”).

<sup>75</sup> While this Note primarily discusses implicit preemption, explicit preemption still remains a useful, though underutilized, strategy at the state level. Some states have enacted mandates that group homes, usually with fewer than ten residents, be considered single-family residential uses in local zoning regulations. ELLICKSON & BEEN, *supra* note 5, at 727. Such mandates allow these facilities to bypass local variance, special permit, and reasonable accommodation processes.

<sup>76</sup> *See, e.g., NAT’L COUNCIL FOR BEHAVIORAL HEALTH RECOVERY REPORT*, *supra* note 6, at 3.

<sup>77</sup> *See GAO RECOVERY HOME REPORT*, *supra* note 7, at 12.

<sup>78</sup> MARTIN ET AL., *supra* note 7, at 2.

<sup>79</sup> *See id.* at 5–6. This category does not include New Jersey’s requirement that sober living homes obtain Class F licenses in compliance with state rooming and boarding laws through its Department of Community Affairs. *Id.* at 6, 36.

<sup>80</sup> *Id.* at 2. As a key stakeholder in the industry, NARR is an active collaborator in certification efforts: at least thirty-six states, including both states with private third-party accreditation and state-run licensing schemes, use or reference NARR standards. *Id.* at 3.

For many states with either state-run or third-party accreditation schemes that are merely voluntary, referrals serve as a major incentive for recovery homes to seek licensing. Recovery homes may obtain referrals from any combination of licensed or state-funded treatment providers and state agencies that will only send their patients to “recovery homes certified or licensed by their state program.”<sup>81</sup> Since these populations make up large percentages of a recovery home’s potential client base, this mechanism in voluntary programs tends to be successfully coercive. Similarly, voluntary certification may be required to access state funding and federal grants.<sup>82</sup>

The majority of the few state-run licensing schemes existing today are voluntary with referral and/or funding incentives for recovery home participation in place.<sup>83</sup> Arizona, Utah, and New Jersey uniquely require licensing for operation, although none of them have identical mechanisms.<sup>84</sup> Arizona, for example, requires sober living homes to be certified either by the state or by a state-approved certifying organization that is affiliated with NARR.<sup>85</sup> In New Jersey, recovery home operators must obtain “Class F” licenses designated for “cooperative sober living residences” from the state Department of Community Affairs to operate, with a cap of ten residents per facility excluding staff.<sup>86</sup> Utah similarly manages its mandatory licensing program within its own Office of Licensing, requiring prospective recovery homes to obtain “social detoxification licenses” from the state as well as compliance with operational specifications for items such as staffing, referral services, and client amenities within the facility.<sup>87</sup>

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<sup>81</sup> GAO RECOVERY HOME REPORT, *supra* note 7, at 13; *see also, e.g.*, MASS. GEN. LAWS ch. 17, § 18A(h) (restricting state agencies or vendors with statewide contracts providing treatment for substance use disorders from referring patients to “alcohol and drug free housing unless the [housing] is certified” under the state’s voluntary program). The Massachusetts Department of Public Health contracted the Massachusetts Alliance for Sober Housing, a third-party NARR affiliate, to oversee certification. *Certification*, MASS. ALL. FOR SOBER HOUS., <https://mashsoberhousing.org/certification> [<https://perma.cc/2DVY-KVG2>].

<sup>82</sup> *See, e.g.*, 71 PA. STAT. AND CONS. STAT. ANN. § 613.12(a) (West 2021) (restricting eligibility for federal or state funding to licensed or certified drug and alcohol recovery houses).

<sup>83</sup> *See* NAT’L COUNCIL FOR BEHAVIORAL HEALTH RECOVERY REPORT, *supra* note 6, at 21–30.

<sup>84</sup> *See id.* at 26–27. At least three municipalities have local ordinances requiring certification in order for recovery homes to operate within their jurisdiction, including Delray Beach, Florida, and Costa Mesa, California. *Id.* at 24–25. Costa Mesa’s ordinance has been the subject of ongoing lawsuits by recovery home operators alleging that the ordinance violates the FHA. *See, e.g.*, Ohio House, LLC v. City of Costa Mesa, No. 19-01710, 2020 WL 4187764, at \*6–7 (C.D. Cal. June 11, 2020) (partially denying City’s motion to dismiss complaint based on plaintiff’s sufficient pleading for discriminatory treatment and disparate impact claims).

<sup>85</sup> *See* ARIZ. REV. STAT. ANN. §§ 36-2061(1), -2062(E), -2064(A) (2020).

<sup>86</sup> *See* N.J. ADMIN. CODE §§ 5:27-1.4, -1.5(c) (2018).

<sup>87</sup> *See* UTAH ADMIN. CODE r. 501-18-4(3), 501-11 (LexisNexis 2021).

Because of the legal protections under the FHAA, the legality of mandatory state licensing schemes in which recovery homes cannot operate without the state's certification is ambiguous,<sup>88</sup> especially where these regulations may impose substantial financial penalties for noncompliance.<sup>89</sup> Few lawsuits have proceeded in court to settle the question of whether these schemes are permissible without reasonable accommodations. Recovery homes operating in these states may face challenges balancing the obligations of a mandatory licensing requirement and additional zoning and special-use permit regulations to site in desired neighborhoods, posing administrative and financial barriers to their potential operation and existential threats to the industry in their respective states.<sup>90</sup>

While these schemes are vulnerable to arguments that they violate the FHA, which applies to both state and local governments, such arguments face sizable barriers. Last year, in its denial of a temporary restraining order against Arizona's enforcement of the state licensing scheme against the state NARR affiliate,<sup>91</sup> the district court suggested some preliminary standards for what a plaintiff must bring to assert viable FHA claims against mandatory licensing. For facial discrimination claims, a plaintiff could "point[] to other licensing statutes and rules and demonstrat[e] that the regulatory scheme [at issue] singles out persons recovering from alcoholism or drug addiction for the most onerous treatment."<sup>92</sup> Such comparisons imply that operational specifications required to obtain a license are excessive compared to those for other licensed facilities or that the fees and fines associated with the scheme are disproportionately burdensome. In states like New Jersey, where recovery homes are embedded into a general regulation over rooming and boarding houses and are given applicable exemptions, a disparate

<sup>88</sup> Rothenberg, *supra* note 28, at 20 ("Whether the new crop of laws [establishing mandatory licensure programs] can withstand legal challenges under these federal laws and their state counterparts remains to be seen.")

<sup>89</sup> See, e.g., ARIZ. REV. STAT. ANN. § 36-2062(B) (2021) (imposing a civil penalty of up to \$1,000 on an individual operating a sober living home without an active license obtained pursuant to state regulations).

<sup>90</sup> See *Hansen Found., Inc. v. City of Atlantic City*, 504 F. Supp. 3d 327, 336, 345 (D.N.J. 2020) (enjoining enforcement of facially discriminatory distance requirement ordinance against recovery house); see also Jenny Wagner, *Recovery Houses in New Jersey Caught in Legal Limbo with State*, BURLINGTON CNTY. TIMES (Apr. 18, 2016, 6:00 AM), <https://www.burlingtoncountytimes.com/article/20160418/NEWS/304189752> [<https://perma.cc/NH94-GJGK>].

<sup>91</sup> *Ariz. Recovery Hous. Ass'n v. Ariz. Dep't of Health Servs.*, 462 F. Supp. 3d 990, 1003 (D. Ariz. 2020).

<sup>92</sup> *Id.* The court also cast doubt on whether a state's mere adoption of NARR standards as mandatory requirements for licensing eliminates a claim of discriminatory intent by a NARR affiliate like the plaintiff in this case, suggesting that an inquiry into whether the policy "benefits persons recovering from alcoholism or drug addiction" would still be necessary despite the purported intent of the law. *Id.*

treatment claim may prove more difficult.<sup>93</sup> The court also cast preliminary doubt on reasonable accommodation claims, at least as they apply to requests for total fee waivers, although it gave the plaintiff latitude to further develop its argument in future proceedings.<sup>94</sup>

At the same time, mandatory state licensing schemes possibly provide a viable shield against comparatively more punitive local regulations by bringing implicit preemption arguments to the fore and tempering NIMBY responses to recovery home siting. If states' mandatory licensing schemes can prevail against FHA claims, in part because of the strength of the rationale that their requirements benefit individuals with substance use disorders or "respond[] to legitimate [and non-stereotype-based] safety concerns raised by the affected individuals,"<sup>95</sup> recovery home plaintiffs may be able to argue that the state intended to preempt any local zoning and special-use permit regulations that contradict operational specifications included in the state's provisions for certification.

A similar argument succeeded in *Hawthorne v. Village of Olympia Fields*,<sup>96</sup> in which the Supreme Court of Illinois ruled that the state's licensing scheme governing operation of childcare facilities implicitly preempted a locality's authority "to use its zoning ordinance to impede the operation of day-care homes authorized by the state."<sup>97</sup> The Village regularly enforced a zoning ordinance that permitted only businesses that met the definition of a "home occupation" to site in residential zoning districts, and determined that day-care homes did not satisfy the definition, thus denying the plaintiff a variance.<sup>98</sup> In finding preemption, the court held that the zoning ordinance rendered the state licensing system "a nullity."<sup>99</sup>

Perhaps the most promising resources that proponents of implicit preemption can wield against local regulations that enforce special-use permits or variances to significantly curtail recovery home siting are the potential linkages to comprehensive state regulations outside of the housing context.<sup>100</sup> The most intuitive connection would be to state

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<sup>93</sup> See generally N.J. ADMIN. CODE § 5:27 (2018). New Jersey regulations exempt Class F licensees from requirements including certificates of occupancy and the duty to report information to relevant police agencies "upon learning of a criminal act committed, or alleged to have been committed, against the person or property of a resident." *Id.* §§ 5:27-1.5(c); -6.3(a)-(b).

<sup>94</sup> See *Ariz. Recovery Hous. Ass'n*, 462 F. Supp. 3d at 1002-03.

<sup>95</sup> *Connolly & Merriam*, *supra* note 5, at 245 (identifying the standard observed by most federal appellate courts with respect to whether a facially discriminatory code is objectively legitimate).

<sup>96</sup> 790 N.E.2d 832 (Ill. 2003).

<sup>97</sup> *Id.* at 836.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 843.

<sup>100</sup> *Cf. Inc. Vill. of Nyack v. Daytop Vill., Inc.*, 583 N.E.2d 928, 930 (N.Y. 1991) (describing the potential for comprehensive state regulation to implicitly preempt an entire field).

healthcare laws and regulations, since most of the mandatory and voluntary licensing schemes exist in large part to facilitate patient referrals from state-run and state-approved treatment centers. A case for implicit preemption may be stronger in states that elected to extend Medicaid funding for recovery housing.<sup>101</sup> Another avenue may be state regulations on insurance, given concerns about patient brokering through improper referrals from treatment centers.<sup>102</sup> A court may be unwilling to infer the state's intent to preempt local land-use regulations, however, where a state has passed separate patient brokering laws that have no relation to preexisting laws and regulations of private insurance.<sup>103</sup>

Although a case like *Hawthorne* provides support, an implicit preemption argument is hardly airtight. While not necessarily dispositive for the applicability of *Hawthorne*-style arguments, the court noted that Olympia Fields is a “non-home-rule unit of government,” exercising only the powers granted by the Illinois state legislature.<sup>104</sup> Presumptions of home rule still persist, and land-use regulation is among one of the most fundamental legal powers retained by local governments.<sup>105</sup> State licensing schemes should also not be seen solely as a beneficial tool for recovery home advocates. As the analysis of potential FHA claims suggests, state licensing schemes still run the risk of erring on the side of being impermissibly burdensome and thwarting the potential of more progressive state participation in recovery home regulation.<sup>106</sup>

Still, the detrimental effects of local land-use regulations on regional development, particularly around issues of affordable housing, are well-documented, persisting challenges in law and policy, even by champions of localism.<sup>107</sup> Similar issues plague recovery home policy and practice, where the need for safe, sobriety-affirming housing outpaces the supply given national data on rates of addiction and the number of people

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<sup>101</sup> Cf. NAT'L COUNCIL FOR BEHAVIORAL HEALTH RECOVERY REPORT, *supra* note 6, at 10 (noting most states have not done so).

<sup>102</sup> See GAO RECOVERY HOME REPORT, *supra* note 7, at 8.

<sup>103</sup> See Rothenberg, *supra* note 28, at 18. Utah, a mandatory license state, is one such state that criminalized patient brokering practices as of 2018. *Id.* There may be viable arguments that criminalization statutes should be treated differently than civil regulatory statutes in preemption analysis. Cf. *Nyack*, 583 N.E.2d. at 931 (noting the absence of preemptive language addressing residential substance abuse facilities in the state Mental Hygiene Law despite the presence of such language for facilities serving individuals with mental illness).

<sup>104</sup> *Hawthorne*, 790 N.E.2d at 843.

<sup>105</sup> See Briffault, *supra* note 1, at 271.

<sup>106</sup> Some recovery home advocates do not advocate for state licensing schemes and instead encourage state collaboration with third-party organizations either offering accreditation services like state NARR affiliates or organizations with internal standards for associated facilities like Oxford House. See NAT'L COUNCIL FOR BEHAVIORAL HEALTH RECOVERY REPORT, *supra* note 6, at 4.

<sup>107</sup> Briffault, *supra* note 1, at 271.

seeking treatment. In turn, the need for recovery homes should be considered an extension of the broader call for affordable housing nationwide and a regulatory area where states may have better capacity to coordinate regional policy through more involvement in siting.<sup>108</sup>

#### IV. CONSIDERING A SLIDING-SCALE FRAMEWORK FOR STATE AND LOCAL SITING REGULATIONS OF SOCIAL-SERVICE LULUS

##### A. *The Mechanics of the Sliding Scale*

Currently, preemption analysis primarily focuses on the comprehensiveness and explicit statutory objectives of a state regulatory scheme or whether a policy area requires uniform regulation at the state level.<sup>109</sup> This more binary approach diminishes the potential for shared responsibility in favor of granting the state the regulatory field at the expense of local control. But when courts allow the state to influence the siting process, they need not overcorrect to that degree. For LULUs, the primary issue in local governance is siting. And for LULUs in the business of social-service provision, including but not limited to recovery homes, a sliding-scale approach — distributing regulatory siting authority based on how localized and actual the harm that the LULU poses is — could reduce the likelihood that stigma distorts localities' siting regulations or promotes disparate allocations of LULUs across neighborhoods. Courts also are stakeholders in these deficiencies because conflicts between LULU operators and localities produce costly litigation that could have been reduced in volume and scope by broader state participation.

Mechanically, the sliding scale would have two axes for assessing the perceived “harm” central to a facility’s classification as locally undesirable. On the horizontal axis, the scale assesses how broad the immediate harms posed by the LULU’s siting and operation are, with hyperlocal negative impact (such as noise or odor) in the leftmost position and diffuse, statewide negative impact (such as water or air pollution) in the rightmost position. On the vertical axis, the scale measures how much of the nature of the LULU’s perceived harm reflects tangible, non-NIMBY considerations by the locality. While abstract, this axis would distinguish those stigma-rich LULUs for which perceived spillover harms are based on widely held societal stereotypes from those LULUs

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<sup>108</sup> See NAT’L COUNCIL FOR BEHAVIORAL HEALTH RECOVERY REPORT, *supra* note 6, at 4 (“Recovery housing fits along a continuum of supportive housing models, . . . [which] include a housing intervention that combines affordable housing assistance with wrap-around supportive services for people experiencing homelessness, as well as people with disabilities.”); cf. Matthew M. Gorman et al., *Fair Housing for Sober Living: How the Fair Housing Act Addresses Recovery Homes for Drug and Alcohol Addiction*, 42 URB. LAW. 607, 614 (2010) (positing whether local efforts to limit siting of recovery homes violate “obligations to maintain adequate affordable housing and to meet regional housing needs allocations”).

<sup>109</sup> See ELLICKSON & BEEN, *supra* note 5, at 745.

that primarily have concrete and widely accepted negative externalities.<sup>110</sup> Thus, four zones are created: zone 1 (hyperlocal, low stigma), zone 2 (hyperlocal, high stigma), zone 3 (statewide, high stigma), and zone 4 (statewide, low stigma).

In zones 3 and 4, LULUs posing sufficiently broad spillover harms would reasonably trigger a state interest that justifies a finding that a state siting regulation preempts the local government, regardless of whether stigma predominates in the classification of a certain type of facility as a LULU.<sup>111</sup> On the opposite end of the spectrum, in accordance with zone 1, local regulations targeting LULUs that primarily impact only the local community with relatively low stigma distorting the assessment of the harm would reasonably be expected to survive a preemption challenge. However, it is the close cases in zone 2 where there are direct local impacts yet very high levels of abstract prejudice animating the perception of the LULU's harm that the sliding scale could intervene to justify a finding of preemption in state interventions on siting policy. This sliding-scale approach is especially suited to social-service LULUs because they balance both hyperlocal and statewide impacts on the horizontal scale, yet often carry higher levels of stigma distorting the nature of the harm they pose at the local level, which has some influence on their disproportionate siting across neighborhoods.<sup>112</sup> Moreover, when NIMBY responses block their siting entirely, the locality runs the risk of losing tax dollars to fund these supplemental programs that many residents depend on.<sup>113</sup>

For recovery homes, which face disproportionately high stigma responses based on negative perceptions of recovering addicts,<sup>114</sup> the framework would place them in the left-middle of the horizontal scale because they balance hyperlocal community integration with state interests over the healthcare system and the elimination of insurance

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<sup>110</sup> Cf. Been, *supra* note 2, at 1034 ("Some criteria [for evaluating LULUs' burdens], such as health risk or loss in property value, are obvious grounds for comparison. But others, such as psychological harms or interference with social networks, are controversial.")

<sup>111</sup> Such a conclusion is not meant to oversimplify the calculations involved in assessing the burdens of environmental LULUs such as hazardous waste facilities. Indeed, measurement problems in assessing the benefits and burdens of LULUs are well documented. See *id.* at 1033-40. Although there is often controversy in calculating the exact value of the burden of LULUs with pollutive externalities, the sliding scale is meant to merely acknowledge that those spillover harms are non-zero and capable of measurement even if "line-drawing . . . is somewhat arbitrary" and "relies upon measurements that are primitive," *id.* at 1033.

<sup>112</sup> See *id.* at 1081 ("[T]he theory of equal physical distribution [of social-service LULUs] is difficult to implement on a local level because jurisdictional and political boundaries can wreak havoc on any attempt to ensure fair siting." (footnote omitted)).

<sup>113</sup> Dear, *supra* note 34, at 288.

<sup>114</sup> See, e.g., Malkin, *supra* note 34, at 757, 795 & n.180; cf. Been, *Locally Undesirable Land Uses*, *supra* note 41, at 1388 n.19.

fraud.<sup>115</sup> State interests alone may not be sufficient for a finding of implicit preemption for a state siting regulation over recovery homes given the horizontal position on the scale, but the high level of stigma represented by the vertical axis would place them in zone 2.

While a LULU's presence in zone 2 may suggest that a state has not enacted preemptive regulations over siting, it is more justifiable for a court to allocate more authority to the states because the rationales underlying why the facility is disfavored are not rooted in tangible, measurable terms through which a locality can assess and foster fair, well-distributed siting across neighborhoods. Metaphorically, the high levels of community stigma toward the facility and the hyperlocal nature of its perceived harms (whether reputational risk or lowered property values) poison the well. Unlike the locality, which is beholden to its constituents on a more direct basis, a state has a better vantage point to regional considerations in allocating facilities and is less vulnerable to opposition from communities opposed to taking a share of LULUs, increasing the capacity for fairer siting.

This distinction is especially true for social-service LULUs, because the state has an interest in adequate and equitable social-service provision for its citizens within its entire jurisdiction — a principle that a locality cannot manage alone yet can undermine if it does not facilitate the siting of its fair share of locally undesirable social-service facilities. Most state licensing schemes would thus serve as a subtype of state-assisted siting supported by the sliding-scale framework. As another example of a policy supported by the framework, some states employ precise “dispersion mechanisms,” which establish voluntary or mandatory caps on how many group homes can be located within a particular municipality.<sup>116</sup> State-assisted siting also better reflects the character of recovery homes as healthcare-adjacent service providers and tailors the scope of supplemental municipal regulation to reasonable, efficient levels of contestation between local governments and LULU operators.

This approach has already been considered in energy law, where “disaggregation” of preemption could facilitate legislative and judicial inquiries into “which level of government — local, state, or federal — is

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<sup>115</sup> The GAO reported that recovery housing fraud in Florida alone has amounted to approximately “\$1 billion in fraudulent private insurance billing in [one] year.” GAO RECOVERY HOME REPORT, *supra* note 7, at 8 n.18; *see also* Alvarez, *supra* note 31. While a recovery home may be undesirable to a locality because of actual or perceived harms, the state may also identify harms associated with their siting, particularly when localities are not equipped to respond to harms that only the state can absorb, such as investigations into fraudulent practices and any resulting prosecution or strain on state healthcare resources. *Cf.* GAO RECOVERY HOME REPORT, *supra* note 7, at 8–12 (detailing states’ responses to fraud in the industry).

<sup>116</sup> *See* Been, *supra* note 2, at 1069 (describing New Jersey and Wisconsin as some of the few states using these tactics, and Alabama as a state using dispersion mechanisms for commercial hazardous waste processing sites).

best suited to regulate a particular activity or risk” involved in a given component of energy regulations, including financial, technological, and land-use-based segments.<sup>117</sup> A sliding-scale approach, where the allocation of authority reflects the diffuse nature of the risk of harm of LULUs, may encourage more thorough and tailored preemption rulings.<sup>118</sup> And as a first-order concern, the approach may also foster more deliberate state legislation that specifies partial preemption rather than broad preemption of “a complex regulatory area through a simplified binary decision, in which one level of government prevails.”<sup>119</sup>

The recovery home context may further warrant a sliding-scale approach to reflect the involvement of an FHA-protected class in siting controversies, in which validating stigma against housing recovering addicts in local communities may violate their FHA rights as in cases like *City of Edmonds v. Oxford House*. While such a rationale could not reasonably justify state preemption over the entire field of regulation of recovery homes, it could inform the scoping of which disputes are best suited for operators to have with localities rather than with the state.<sup>120</sup> Siting decisions, while undeniably affecting neighbors who must contend with them, highlight the need to balance local concerns with broader regional commitments that LULUs satisfy, such as social-service provision, processing of waste, and environmental hazards.

### B. *The Role of Localism in the Framework*

Strong defenders of home rule may be concerned that the proposed sliding scale would unduly trammel on the principles of localism that empower local governments to exercise authority over their domain with some degree of independence from the state. But some scholarship has shown that obedience to localism does not always require heavily limited

<sup>117</sup> Wiseman, *supra* note 13, at 293; *see id.* at 317–22.

<sup>118</sup> *See id.* at 297.

<sup>119</sup> *Id.* Binary decisionmaking in preemption analysis tends to polarize the inquiry into whether uniform or decentralized control is more desirable. *Id.* One successful example of disaggregated preemption in legislation and judicial decisionmaking is showcased in *Thayer v. Town of Tilton*, 861 A.2d 800 (N.H. 2004). There, the Supreme Court of New Hampshire denied a preemption challenge to a local ordinance establishing specific sludge quality requirements. *Id.* at 803, 807. While state law authorized a state agency’s authority to establish a permit system governing “the removal, transportation, and disposal of sludge,” *id.* at 805, the regulations “expressly permit[ted] local government regulation of sludge through health and land use ordinances,” *id.* at 804.

<sup>120</sup> The protected-class rationale for a sliding-scale approach might also have overlap with the governance mechanism that Professor Barak D. Richman and Christopher Boerner define as “process-enhancing regulations” if the state elects to structure how siting negotiations take place even though decisionmaking authority is retained by the locality and the developer. Barak D. Richman & Christopher Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, 23 YALE J. ON REG. 29, 60 (2006). For example, operators of group homes have argued that extensive negotiation and hearing procedures in which operators and clients must appear before the public subject them to further prejudice and discrimination. *See* Malkin, *supra* note 34, at 806.

state government participation. While acknowledging local land-use authority as a legal bedrock, Professor Richard Briffault argues that states ought to “take a greater role in spelling out permissible and impermissible forms of land-use regulation, and in deciding what types of land-use controls are appropriate for particular areas.”<sup>121</sup> Briffault suggests this may involve state creation of institutions that have the capacity to “broker interlocal deals that would facilitate regional sharing arrangements.”<sup>122</sup> That, too, may be an option for state intervention rather than a state siting intervention.

Conventionally, locally undesirable land uses “provide benefits to a relatively large and diffuse group of consumers, clients, or citizens, but impose significant burdens on a much smaller group,” whether their immediate neighbors or the residents of the larger locality.<sup>123</sup> As Briffault’s proposal suggests, aspiring operators of known LULUs or governments aiming to site them may elect to negotiate to compensate local residents affected by their siting.<sup>124</sup> But with recovery homes, NIMBY concerns such as lowering property values and neighborhood safety are augmented,<sup>125</sup> and often superseded, by prejudice toward recovery homes and their clientele.<sup>126</sup> Proposals for negotiation and compensation are less promising because of the upending of two seemingly necessary presumptions for their success: (1) that individuals in the host community are rational economic actors and, most importantly, (2) that the gap between the larger social benefits of siting the LULU and the costs borne by the affected community is the actual source of local opposition.<sup>127</sup> Additionally, for LULUs offering social services, perceived threats of stigmatizing the community are harder to quantify than an environmental LULU’s tangible production of pollution, noise, or odors, which localities have more capacity to assess due to their proximity.

That said, the sliding-scale framework does not completely eschew important localism principles. The framework expands states’ authority over the regulation of LULUs only where local control is especially

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<sup>121</sup> Briffault, *supra* note 1, at 271.

<sup>122</sup> *Id.* at 272. *But see* Richman & Boerner, *supra* note 120, at 46 (“[M]uch of the normative literature addressing the NIMBY challenge has been too quick to criticize preemptive regulations and perhaps too confident in compensation or negotiation strategies.”).

<sup>123</sup> ELLICKSON & BEEN, *supra* note 5, at 740.

<sup>124</sup> Briffault, *supra* note 1, at 271–72; Richman & Boerner, *supra* note 120, at 40–41.

<sup>125</sup> As previously referenced, allegations that group homes for people with disabilities negatively impact local property values has been disputed and even contradicted by studies. *See* Jason et al., *supra* note 35, at 949; Lauber, *supra* note 40, at 402; NARR PRIMER ON RECOVERY RESIDENCES, *supra* note 15, at 11 (noting study that identified increases in property values near Oxford House properties).

<sup>126</sup> *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985); Connolly & Merriam, *supra* note 5, at 228 (noting that local opposition to group homes is often traceable to lack of education around these facilities and their function, fear of negative community impacts, limited community participation in siting, and “outright prejudice and bias toward people with disabilities”).

<sup>127</sup> Munton, *supra* note 66, at 16–17.

likely to underperform at the states' expense: siting. A court could hypothetically accept a state's rationale that laws governing healthcare services for people with substance use disorders warrant uniform state regulation around certification of healthcare-adjacent facilities like recovery homes that receive patients immediately exiting state-run or state-certified treatment facilities, but not extend that rationale to state regulations that exceed mere certification to operate, including building specifications.<sup>128</sup> This distinction would leave other regulations, should they survive FHA challenges, to localities to develop and implement, thus reinforcing localism principles albeit with a narrowed scope.

### CONCLUSION

The limited development of mandatory state licensing schemes in the legislatures and the courts in turn limits the comprehensiveness of this Note's exploration of whether implicit preemption guarantees their continued enforcement or potential expansion to other states. However, the application of implicit preemption theories to these schemes presents an opportunity to consider how the doctrine could be modified to better allocate regulatory authority between state and local governments in broader regulation of recovery homes, as well as similar LULUs where harms to localities may disproportionately have prejudicial origins or are lesser in degree than the harms absorbed by the state.

The sliding-scale framework proposed here for recovery homes undoubtedly requires more analysis tailored to state regulations in relevant sectors of housing, health, and insurance, but presents a potential path forward to resolve the siting controversies that plague expanded operation of effective, ethical recovery homes that comply with all relevant regulations. The framework may also have applicability to other types of group homes and transitional living arrangements that do not exclusively house protected classes under the FHA but nevertheless respond to needs for affordable housing and supplemental social services.<sup>129</sup> Since these legal frameworks may be even more critical to support advocacy for progressive social policy relating to community-based forms of care, reductions in prison populations, and broader calls for abolition, their exploration in the narrower context of recovery homes may have extensive value in housing policy writ large.

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<sup>128</sup> This scenario could implicate a licensing scheme with extensive operational requirements. See *supra* p. 745.

<sup>129</sup> See Gorman et al., *supra* note 108, at 614 (“[N]o cases have addressed whether the FHA applies to ‘specialized’ residential sites, such as locations which exclusively house parolees or probationers, locations which house sex offenders, or locations commonly known as ‘reentry facilities,’ which serve as transitional housing for those recently released from prison who are seeking to transition into ‘normal’ life.”); Emily Palmer, *In Harlem, a Shelter That Gives Young Men the Tools to Succeed*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/nyregion/in-harlem-a-shelter-that-gives-young-men-the-tools-to-succeed.html> [<https://perma.cc/S9V-KS95>] (profiling a transitional housing program primarily housing men who have aged out of the foster care system).