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OPPORTUNITY TO PURCHASE POLICIES: PRESERVING THE
AFFORDABILITY OF MANUFACTURED HOME COMMUNITIES

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ABSTRACT

“Manufactured homes,” otherwise known as “mobile homes,” are one of the last vestiges of truly affordable housing in the United States. With funding drying up for government-subsidized rental programs, manufactured homes are an attractive form of naturally occurring affordable housing that enable low-income communities to attain homeownership and build equity.

Manufactured home owners are simultaneously owners and renters. Although they own their homes, they rent the land underneath, and remain vulnerable to eviction. Manufactured homes are no longer mobile, and once the structure is placed on a lot and hooked up to plumbing, it is nearly impossible to move. Many residents of manufactured housing communities live on fixed-incomes and cannot afford the rent spikes that are now commonplace when park ownership switches from individual landlord to corporate ownership. When rent increases, many tenants have no choice but to abandon their homes. Landlords do not experience a loss of rental income because they can find a replacement tenant willing to live in the abandoned home.

Opportunity to Purchase (OTP) policies hold the potential to stop this cycle. OTP policies require park owners to provide residents notice when they intend to sell the park. Landlords must allow tenants to make a bid, and in some states, are required to accept the residents’ bid on the park if tenants are able to match the best and final offer.

OTP policies must be swiftly adopted, but advocates and policymakers remain fearful of legal challenges under the Takings Clause. Two lower court rulings have held that OTP policies take private property without just compensation because of the policy’s infringement of the owner’s right to dispose or sell the property to a party of their choosing. The “essentialist” rationale of these and other courts, upholding a single property

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right as fundamental, and therefore impenetrable, is fundamentally flawed. At a time when an essentialist application of the Fifth Amendment threatens any policy that challenges the status quo, a more integrated view of property rights must be utilized by courts to safeguard OTP and other policies from takings challenges.

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INTRODUCTION

MANUFACTURED homes (also known as mobile homes), provide affordable housing to seniors on fixed incomes, low-income families, immigrants, people with disabilities, veterans, and others in need of low-cost housing.¹ Over the past decades, private equity firms have been purchasing manufactured home communities in unprecedented numbers, leading to increased displacement of residents.² When private equity firms have replaced individual landlords, rents have spiked, accompanied by owner-disinvestment from basic maintenance.³ Unable to afford rent

1. In this Article, I will use the term “manufactured homes” and “mobile homes” interchangeably. “Manufactured home” is the preferred term because it more accurately reflects the “immobile” status of the home, making “mobile homes” a misnomer. Kenneth K. Baar tracks the historical evolution of manufactured homes in his article, *The Right to Sell the “Im” Mobile Manufactured Home in Its Rent Controlled Space in the “Im” Mobile Home Park: Valid Regulation or Unconstitutional Taking?*, 24 URB. LAW. 157, 165–70 (1992), with the average size of mobile homes tripling from 1955 to 1980 as federally-mandated uniform safety standards swept across the country. However, “mobile home” is the term that is commonly used in several sources cited in this Article, so it will be used interchangeably with “manufactured home.”

2. There has been a consistent rise in corporate purchase of manufactured housing communities in the past decades. See Sheelah Kolhatkar, *What Happens When Investment Firms Acquire Trailer Parks*, NEW YORKER (Mar. 8, 2021), <https://www.newyorker.com/magazine/2021/03/15/what-happens-when-investment-firms-acquire-trailer-parks> [<https://perma.cc/2X2M-ENBE>]; see also Julie Reynolds, *The Vulture Fund That Picked American Newspapers Apart Has a New Target*, COLUM. JOURNALISM REV. (May 9, 2023), https://www.cjr.org/special_report/alden-smith-mobile-homes-west-virginia.php [<https://perma.cc/SC3G-WMC3>]. The manufactured home sector is the only major real estate asset class that has not experienced a decline in net operating income in any year since 2000, even during the recession. Between 2004 and 2018, operating income from mobile home parks rose eighty-seven percent. See Peter Whoriskey, *A Billion-Dollar Empire Made of Mobile Homes*, WASH. POST (Feb. 14, 2019, 1:10 PM), https://www.washingtonpost.com/business/economy/a-billion-dollar-empire-made-of-mobile-homes/2019/02/14/ac687342-2b0b-11e9-b2fc-721718903bfc_story.html [<https://perma.cc/4B73-L9FR>]. The rise in private equity firm purchases of Manufactured Home Communities has raised the concern of local officials and popular media outlets alike. See *Brown Demands Information From Fannie and Freddie on Private Equity Investment in Manufactured Housing*, U.S. SENATE COMM. BANKING, HOUS. & URB. AFFS. (Jan. 22, 2020), <https://www.banking.senate.gov/newsroom/minority/brown-demands-information-from-fannie-and-freddie-on-private-equity-investment-in-manufactured-housing> [<https://perma.cc/896Z-DV54>]; see also John Oliver, *Mobile Homes: Last Week Tonight with John Oliver*, YOUTUBE (Apr. 8, 2019), [https://www.youtube.com/watch?v=\]CC8fPQOaxU](https://www.youtube.com/watch?v=]CC8fPQOaxU) [<https://perma.cc/BV8E-9CGD>].

3. See Jim Baker, Liz Voigt & Linda Jun, *Private Equity Giants Converge on Manufactured Homes*, PRIV. EQUITY STAKEHOLDER PROJECT 1, 7 (Feb. 2019), <https://pe-stakeholder.org/wp-content/uploads/2019/02/Private-Equity-Giants-Converge-on-Manufactured-Homes-PESP-MHAction-AFR-021419.pdf> [<https://perma.cc/47NW-VKUQ>]. Private equity firms run with the express intent of profiting in the short term, not to maintain housing as affordable in the long-run. “Private equity firms generally seek to generate 15–25% annualized returns on their investments.” *Id.* With manufactured housing communities, the typical way to make a fast profit is to increase rents and disinvest in maintenance of the community. If tenants are evicted due to non-payment of rent, many end up leaving their homes due to the

and fees, many residents abandon their homes because it is extremely difficult to transport to new locations—the structures cannot withstand the move, the costs of uprooting are unaffordable, and finding a new spot to place their pads is nearly impossible.⁴

Opportunity to Purchase (OTP) policies hold the potential to keep manufactured housing communities affordable and prevent homeowners from displacement.⁵ The term “Opportunity to Purchase” encompasses both right of first purchase and right of first refusal (ROFR) policies.⁶ In right of first purchase policies, a park owner is required to give resident homeowners notice when intending to sell the park. Before finalizing a sale with an outside party, landlords must allow tenants to make a bid, and in some states, negotiate in good faith. The park price is voluntarily negotiated between the landlord and tenants, and tenants are not offered an economic discount. Landlords are free to walk away if they decide to sell

near impossibility of transporting them. A new resident can quickly replace that source of rental income for the park owner.

4. Baar, *supra* note 1, at 158; *see also* *Manufactured Housing Resource Guide: Protecting Fundamental Freedoms in Communities*, NAT’L CONSUMER L. CTR., 1 (Oct. 2010), <https://prosperitynow.org/sites/default/files/resources/groundwork.pdf> [<https://perma.cc/3HJK-AAQR>].

5. Even with Opportunity to Purchase (OTP) policies in place, tenants must overcome the hurdle of acquiring funding to afford to purchase their parks for market rate. Without outside funding sources, most low-income communities would be unable to make a market-rate bid on their parks. Organizations like Resident-Owned Community (ROC) USA help connect tenant groups to available funding, obtained through a variety of sources. *See* Telephone Interview with Mike Bullard, Vice President of Communications, Resident Owned Cmmtys. U.S. (June 27, 2022) (notes on file with author). ROC USA helps finance these purchases through a lending subsidiary called ROC USA Capital, CDFI. It has a narrow focus, only lending to Manufactured Housing Communities that buy with a ROC-affiliated organization. ROC USA is able to collect funds from grants, equity from other properties, loans from foundations, and from institutional investors. ROC also helps connect the Manufactured Housing Communities to cheaper financing when available from state housing authorities. Housing authority funds are available to manufactured housing communities in certain states such as Washington, Minnesota, and New York, for example, where state financing has played an active role in manufactured housing communities being able to make market-rate offers. In other states, this funding is reserved for conventional rentals. Funding options for this community characterized by low incomes and poor credit scores are not readily available. Even after The Housing and Economic Recovery Act of 2008 mandated that Fannie Mae and Freddie Mac have a “Duty to Serve” underserved markets, including manufactured housing communities, FNMA funding (Federal National Mortgage Association funding provided by Fannie Mae) has been used to assist private equity firms rather than cooperatively-held tenants associations to purchase these parks. *See* *Brown Demands Information From Fannie and Freddie on Private Equity Investment in Manufactured Housing*, *supra* note 2.

6. Right of first purchase policies are generally less controversial than right of first refusal (ROFR) policies because the former pose little threat under a takings challenge. In right of first purchase policies, owners voluntarily accept or reject the bid with the option of selling to a private party if they so wish. In ROFR policies, landlords are obligated to sell to tenants if tenants match the last and best offer. ROFR can be viewed by owners as infringing on their rights to sell the property to whichever party they choose.

to a private party instead. ROFR policies go a step further and require park owners to accept the residents' bid if tenants are able to match the best and final offer. Although landlords get the same market return on their property, some have challenged ROFR policies as a Fifth Amendment taking because they are restricted from selling to the party of their choosing. Property owners have objected to these policies for a number of reasons, including potential delays in the sales process, the alleged chilling effect on private parties from making a bid, and the belief that these policies amount to restraints on commerce.⁷

The Takings Clause of the Fifth Amendment of the U.S. Constitution states: “[n]or shall private property be taken for public use, without just compensation.”⁸ Originally intended to prevent physical takings through eminent domain without market-rate compensation, the Fifth Amendment is now interpreted by courts to require compensation if a regulation or policy goes “too far” to effectively rob owners of their property rights. The court’s role is to determine when a state is legitimately exercising its police powers or when the regulation justifies just compensation by the government. When a government policy goes “too far” in depriving owners of their property rights, it is the functional equivalent of eminent domain, and a taking is found.⁹

At least two lower courts have ruled that ROFR policies constitute a government taking of private property according to the Fifth Amendment and individual State Constitutions.¹⁰ This has led to a chilling effect on ROFR policies being passed in other jurisdictions. Advocates fear a takings challenge and therefore prefer right of first purchase policies or incentive policies, which do not require landlords to accept their tenants’ offers.¹¹

While manufactured home communities are in need of greater protections, takings jurisprudence is continuing to expand, threatening regulations like ROFR policies. The Supreme Court decision *Cedar Point Nursery v. Hassid*¹² used an essentialist view of property to uphold individual strands of the bundle of property rights as fundamental, striking down

7. See, e.g., Minn. House of Representatives, *Video Archives of Opportunity to Purchase Bill (HF 112) Hearings*, MINN. LEGISLATURE (Mar. 3, 2021, 3:00 PM), <https://www.house.leg.state.mn.us/hjvid/92/893538> [<https://perma.cc/ZNP2-SCN4>].

8. U.S. CONST. amend. V.

9. Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 DUKE J. CONST. L. & PUB. POL’Y 1, 5 (2022).

10. See *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183, 185 (Wash. 2000); *Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47, 58 (Ct. App. 1983).

11. One advocate who wishes to remain anonymous shared that because of potential legal challenges, their preferred legislative strategy is to advocate for tax incentives for property owners who choose to sell property to tenants rather than third parties, as already exists in four states: Montana, Oregon, Rhode Island, and Vermont.

12. 141 S. Ct. 2063 (2021).

any policy that even minimally infringes on the owner's right to exclude, regardless of whether that infringement is of limited duration, purpose, or impact, thereby changing decades of precedent.¹³

The Eighth Circuit applied the expanded takings doctrine from *Cedar Point* in *Heights Apartments, LLC v. Walz*,¹⁴ denying a Rule 12(b)(6) motion to dismiss regarding the claim that Minnesota's eviction moratorium constituted a government taking of private property because the state had prevented an owner from repossessing his land and ejecting tenants for nonpayment of rent.¹⁵ The court remanded the case for further consideration to determine whether an eviction moratorium meant to protect the health and safety of its residents during a global pandemic was a legitimate exercise of state police power, or if it was a Fifth Amendment taking according to the expanded *Cedar Point* standard. If ROFR policies are similarly interpreted as regulations limiting the landowner's ability to exclude tenants at the conclusion of their leases, policies preserving tenants' right to purchase their parks and therefore indefinitely possess the land as mobile home parks may be challenged anew.

Juxtaposed with the essentialist view of property upheld in *Cedar Point*, *Heights Apartments*, and the 1983 and 2000 OTP cases analyzed below, the Supreme Court has held correctly in *Andrus v. Allard*¹⁶ that "the denial of [just] one traditional property right does not always amount to a taking."¹⁷ *Allard* holds that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle" should not require just compensation under the Fifth Amendment "because the aggregate must be viewed in its entirety."¹⁸ This is the standard and philosophy that the Court must adopt today to prevent the intent of the Fifth Amendment from running astray.¹⁹

13. *Id.* at 2074–75 (striking down a policy that allowed union organizers the right to enter the private property of a farmer up to three hours per day, 120 days per year, in order to meet with migrant workers—a right guaranteed to them in the California Agricultural Labor Relations Act of 1975). See generally Bethany R. Berger, *Property and the Right to Enter*, 80 WASH. & LEE L. REV. 71 (2023) for her analysis of *Cedar's* influence on constitutional takings, breaking with precedent. "*Cedar Point* . . . announced for the first time that government-authorized entries to private property were per se takings regardless of their duration, purpose, or impact." *Id.* at 72.

14. 30 F.4th 720 (8th Cir. 2022).

15. *Id.* at 732–35.

16. 444 U.S. 51 (1979).

17. *Id.* at 65.

18. *Id.* at 65–66.

19. *Cedar Point* incorrectly labels *Allard* as a case dealing with use restrictions, similar to zoning ordinances, thus meriting the relaxed *Penn Central* regulatory takings standard. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). For that reason, Judge Roberts distinguishes the relaxed *Penn Central* standard from the per se test to be applied to restrictions on the right to exclude. However, this is the incorrect interpretation. *Allard* dealt with a restraint on alienation and could have similarly been ruled a taking if the Court used an essentialist justification, defining the right to dispose of property for profit a fundamental right. See *infra*

Although several of the cases analyzed in this Article were decided years or decades ago, the question of protecting ROFR policies against a takings challenge is now especially relevant after the 2021 *Cedar Point* decision. In the early 2000s, the Supreme Court indicated through its holdings that the *per se* takings doctrine would not be further expanded, meaning that challenges to property regulations merited a fact-specific analysis in accordance with the standards set out in *Penn Central Transportation Co. v. New York City*.²⁰ *Palazzolo v. Rhode Island*²¹ and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*²² affirmed that belief.²³ The *Tahoe-Sierra* court stated, “[t]he temptation to adopt what amount to *per se* rules . . . must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances”²⁴ Now, the *Cedar Point* decision reverses the Court’s steady trajectory away from *per se* expansion, placing important policies like OTP policies at risk.

In this Article, Part I examines the importance of manufactured housing as one of the last vestiges of affordable housing. OTP policies hold the potential to preserve affordability of this housing model as well as that of other conventional forms of housing. These policies must be protected from takings challenges and upheld as constitutional.

Part II analyzes the treatment of ROFR policies by various lower courts. Because the analysis was different in each OTP case examined, Part II determines the correct takings test for OTP policies: a fact-specific analysis using the *Penn Central* factors. The *Penn Central* rule is the correct takings test for these types of regulations, not a *per se* analysis, regardless of the new *Cedar Point* standard.

Part III asserts that an integrated view of property, as pronounced by the *Allard* Court, is the correct theory to apply to future takings challenges. The regulation promulgated by California’s Agricultural Labor Relations Board that was struck down in *Cedar Point* allowed union organizers to enter a private farm to organize workers up to three hours per day, 120

Part III. Limitations on the right to use are commonly associated with zoning regulations, which are presumed a legitimate exercise of police power. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). But limitations on the right to use are also the basis of Fifth Amendment takings rulings. *See* United States v. Causby, 328 U.S. 256 (1946) (where the U.S. government’s infringement of owners’ quiet use of a home and chicken farm through the municipal airport’s invasion of the homeowner’s airspace was a taking); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (where the limitation on a beachfront landowner’s right to develop residential homes was a *per se* taking). Further, the right to use is inextricably linked with every other property right, even the right to exclude (imagine the property owner using her property as she sees fit without third-party interference).

20. 438 U.S. 104 (1978).

21. 533 U.S. 606 (2001).

22. 535 U.S. 302 (2002).

23. *Palazzolo*, 533 U.S. at 635–36; *Tahoe-Sierra*, 535 U.S. 321–27.

24. *Tahoe-Sierra*, 535 U.S. at 326 n.23 (O’Connor, J., dissenting) (quoting *Palazzolo*, 533 U.S. at 636).

days per year.²⁵ The regulation should not have been deemed a taking; neither should Minnesota's eviction moratorium in *Heights Apartments*.²⁶ The minimal infringement of a single property right does not require just compensation if owners' other property rights remain intact.

In examining the importance of OTP policies, as well as the correct takings theory to be applied, these regulations have a greater probability of being safeguarded from possible takings challenges in the future.

I. OPPORTUNITY TO PURCHASE POLICIES' POTENTIAL TO PROTECT THE AFFORDABILITY OF MANUFACTURED HOUSING COMMUNITIES

The story of a mobile home park owner in Park Plaza, Minnesota, deciding to sell his land to tenants in one of his properties, but not to tenants of another park just eight miles away, illustrates the need for greater regulation in the sale of mobile home parks.

When Park Plaza residents learned that their mobile home park was put up for sale, most did not know where they would go—there were few neighboring parks with available spots, and others could not afford the cost of uprooting.²⁷

An organization called Northcountry Cooperative Foundation (the Foundation), an affiliate of Resident Owned Community USA (ROC USA), learned of the situation and helped call a tenant meeting. They presented an alternative: homeowners could purchase the nine acres collectively as a nonprofit cooperative through the financing that they would

25. Note that California's Agricultural Labor Relations Act authorized union leaders to enter the private farms one hour before the start of the work day, one hour during lunch time, and one hour after work, minimizing possible disruption to business. The three hours per day and 120 days per year were limited to the months that workers were typically assisting with growing and picking fruit on the farm. The statute authorized organizers' entry to communicate with vulnerable migrant workers, and the limitation on the owner's right to exclude to accomplish these goals was minimal. See Berger, *supra* note 13, at 119–20 (referencing California Agricultural Labor Relations Act, CAL. CODE REGS. tit. 8, §§ 20900(b), (c) (2022)).

26. Although the Eighth Circuit held that plaintiff property owner stated a plausible per se takings claim based on the *Cedar Point* standard, several other courts have failed to apply the *Cedar Point* standard in this context, ruling that the COVID-19 eviction moratoria were a legitimate exercise of a state's police power. See, e.g., *Williams v. Alameda Cnty.*, No. 22-cv-01274, 2022 WL 17169833, at *11–12 (N.D. Cal. Nov. 22, 2022) (citing *Gallo v. District of Columbia*, No. 21-cv-03298, 2022 WL 2208934, at *8–10 (D.D.C. June 21, 2022); *S. Cal. Rental Hous. Ass'n v. Cnty. of San Diego*, 550 F. Supp. 3d 853, 865–67 (S.D. Cal. 2021); *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 163–64 (S.D.N.Y. 2020) (holding that an eviction moratorium is not a physical taking)).

27. Daniel Zwerdling, *When Residents Take Ownership, a Mobile Home Community Thrives*, NAT'L PUB. RADIO (Dec. 27, 2016, 4:08 PM), <https://www.npr.org/2016/12/27/503052538/when-residents-take-ownership-a-mobile-home-community-thrives> [<https://perma.cc/P6Z4-TLKC>]; *The Park Plaza Story . . .*, PARK PLAZA COOP., <http://www.parkplaza.coop/the-park-plaza-story.html> [<https://perma.cc/FZC6-BD95>] (last visited June 1, 2023).

help secure.²⁸ Tenants could create a Board of Directors and receive technical and financial assistance from the Foundation to purchase the land and govern their community democratically.²⁹ The community formed a limited equity co-op as applied to manufactured home communities, a model that was developed in New Hampshire in 1984, and has spread around the United States.³⁰

Although Park Plaza tenants were successful in converting their park from a rental to cooperative in that instance, the same corporate owners of the land arbitrarily refused to sell the manufactured home park Lowry Grove to a nonprofit, even as it was just eight miles away.³¹ There was no OTP policy in Minnesota that mandated owners to negotiate with tenants

28. Organizations like ROC USA help provide loans and legal and technical assistance to manufactured home owners so that they might bid on the land if it is put up for sale. Even in circumstances when a right of first refusal is not required by law, ROC USA helps tenants make a market-rate bid to be considered alongside other offers. Without support for financing, purchasing the park would not be an option for communities often plagued by poor credit scores and low incomes. See generally Robert Solomon, *How to Increase Our Affordable Housing Stock*, in LEGAL SCHOLARSHIP FOR THE URBAN CORE: FROM THE GROUND UP 117, 117–38 (Peter Enrich & Rashmi Dyal-Chand eds., 2019) for a discussion on the harm resulting from the designation of manufactured homes as chattel rather than real property, therefore ineligible for mortgages with favorable loan terms. Solomon profiles one innovation in providing favorable loan terms to low-income manufactured homes, even while they are designated as chattel. A pilot program offered under the U.S. Department of Agriculture's (USDA's) section 502 Direct and Guaranteed loans for manufactured homes in land-lease communities offers favorable financing terms for moderate, low, and very low-income buyers of energy-efficient manufactured and modular homes in resident-owned or nonprofit-owned land-lease communities in eligible rural areas. The USDA section 502 Direct and Guaranteed programs offer eligible applicants 100% financing, affordable fixed rates, a thirty-year mortgage term, with no private mortgage insurance requirement. Historically, until the introduction of the pilot program, the 502 program was not available for manufactured homes titled as personal property in land-lease communities.

29. Zwerdling, *supra* note 27.

30. Each Resident-Owned Community (ROC) is a neighborhood of manufactured homes that are owned by a cooperative of homeowners. *What Is a ROC? How is it Different?*, RESIDENT OWNED CMTYS. U.S., <https://rocusa.org/whats-a-roc/whats-a-roc-how-is-it-different/> [<https://perma.cc/B6J5-6BXF>] (last visited June 2, 2023). Under this model, the manufactured home owners only need to purchase shares of the land, rather than splitting the price of the park purchase. Park residents own the cooperative as a group securing a blanket mortgage on the entire property. Members pay a one-time share in the cooperative, not to exceed \$1,000, as well as the monthly site fees, also called lot rent. Members live in the park in which they own, setting the monthly maintenance fees, budgeting, and prioritizing the improvements to be made. E-mail Correspondence with Emily Stewart, Lending & Coop. Dev. Manager at Northcountry Coop. Found., (Oct. 6, 2022, 9:55 AM) (on file with author). This model of ownership has spread to over 294 resident-owned communities, benefitting more than 20,800 manufactured homes in a total of twenty states. Telephone Interview with Mike Bullard, *supra* note 5.

31. Hannah Covington & Miguel Otárola, *As Mobile Home Parks Close, Attention Turns to How to Protect Them*, STARTRIBUNE (July 17, 2017, 9:18 AM), <https://www.startribune.com/as-mobile-home-parks-close-attention-turns-to-how-to-protect-them/434708163/> [<https://perma.cc/JKS9-BJXM>].

before finalizing a sale.³² Therefore, nearly 100 manufactured home owners in Lowry Grove were displaced.³³ Some of the Lowry Grove residents were able to move to Park Plaza with relocation assistance that was guaranteed to them by law, but many had nowhere to go.³⁴ One mobile home owner from Lowry Grove took his life days before the eviction sentence was to be carried out from sheer desperation.³⁵

Without a policy requiring landowners to negotiate with tenants in good faith, Lowry Grove tenants were left out of the process entirely as the park was sold to a new owner who repurposed the land for condominiums.³⁶ The owner's decision to negotiate with tenants in one of the owner's properties, but not in the other, sheds light on the importance of passing robust OTP policies nationwide rather than leaving the process to arbitrary and voluntary preferences.

Many states, like Washington, have legislation that "encourages" park owners to negotiate in good faith, but the fate of Lowry Park demonstrates the need for more. The National Consumer Law Center counts twenty states that give manufactured home owners some level of protection from eviction, ranging from ROFR policies, OTP policies, notice requirements, and even tax abatements for manufactured home park owners that choose to sell to park residents.³⁷ Some variations of legislation require the community owner to negotiate in good faith with the residents; others require notice to be given only if there is a residents' association in place.³⁸ If there is no residents' association, or if the owner does not have constructive notice of its existence, no notice to tenants is required in most states.

Other notice requirements are triggered only if the owner professes the intent to sell to a new owner that would repurpose the land for uses other than manufactured home residency, and if the change of purpose is carried out within the first year after sale. These safeguards do not apply if the landlord fails to declare intent to convert the purpose of the park.

32. Edward G. Goetz, Rashad A. Williams, Yi Wang, Adriana Arce Martin & Ana Vergara, *Seeking Closure: The Lowry Grove Report*, CTR. URB. & REG'L AFFS., UNIV. MINN. (Sept. 22, 2022), <https://www.cura.umn.edu/research/seeking-closure-lowry-grove-report> [<https://perma.cc/GY2U-5GMM>].

33. Covington & Otárola, *supra* note 31.

34. *See* Goetz, Williams, Wang, Martin & Vergara, *supra* note 32.

35. Covington & Otárola, *supra* note 31.

36. *Id.*

37. *See Summary of State Manufactured Home Notice and Right of First Refusal Laws*, NAT'L CONSUMER L. CTR. (Jan. 2021), https://www.nclc.org/images/pdf/manufactured_housing/Summary-of-MH-state-purchase-oppty-laws.pdf [<https://perma.cc/T99X-EBHH>]. Some states have recently updated policies, like Montana, which now offers 100% tax abatement for owners who voluntarily choose to sell to manufactured home owners.

38. *Id.* In states that require the community owner to give notice of a prospective sale only when there is already a residents' association in existence, the statute specifies actual notice, not constructive notice.

Symbolizing the highest level of protection, states such as Florida, Rhode Island, New Hampshire, Oregon, Massachusetts, and Colorado require owners to offer an opportunity to purchase to residents either through a right of first purchase or ROFR policy.³⁹ Colorado recently amended their OTP law to guarantee tenants an opportunity to bid on their parks, but struggles to adequately enforce its policy because many owners have skirted around its notice requirements, failing to alert its tenants when it intends to put the park up for sale.⁴⁰

The vulnerability of manufactured home owners renting their land is not dissimilar to renters of traditional housing if their landlord sells the building and decides to convert the affordable rentals to market-rate condos.⁴¹ But manufactured home owners are even more likely to experience homelessness and forced abandonment of property when other parks are unable to accept new residents. The number of manufactured home parks is dwindling. Zoning that permits manufactured housing communities is limited, and while parks continue to close, additional parks that permit manufactured homes are not easily created.⁴² Local governments

39. *Id.*

40. See Sam Tabachnik, *A New Law Was Supposed to Help Colorado Mobile Home Owners Buy Their Parks. Few Have Been Successful*, DENVER POST (Oct. 10, 2021, 6:00 AM), <https://www.denverpost.com/2021/10/10/colorado-mobile-home-parks-resident-owned-communities/> [https://perma.cc/Z2S7-2FXK]; see also Nancy Lofholm, Jason Blevins & Kevin Simpson, *Flurry of Sales, Lot-Rent Increases Hit Colorado Mobile Home Parks as New Laws Reform the Industry*, COLO. SUN (Sept. 11, 2022, 4:14 AM), <https://coloradosun.com/2022/09/11/colorado-mobile-home-parks-rent-increases-sales/> [https://perma.cc/3ELZ-9AYU]. The Dispute Resolution and Enforcement Program established in 2020 has no specific penalty to assess if a landlord fails to properly notify homeowners and other designated parties of their intent to sell. This enforcement mechanism may be contrasted with Massachusetts' statute, which requires the seller or lessor to file an affidavit of compliance with the attorney general, the director of housing and community development, the local board of health, and the registry of deeds, within seven days of the sale or lease if the community is not sold to residents. Under regulations adopted by the attorney general, it is an unfair and deceptive act, in violation of the state consumer protection statute, MASS. GEN. LAWS ch. 93A, § 2 (2022), for an owner or operator to not comply with laws governing manufactured housing communities. See *Summary of State Manufactured Home Notice and Right of First Refusal Laws*, *supra* note 37.

41. Tenants are also given the right of first purchase/right of first refusal in other types of legislation as well, including when buildings are converted to cooperative or condominium ownership. See N.Y. GEN. BUS. LAW § 352-eeee(2)(d) (2022); CAL. GOV'T CODE § 66427.1 (2022); see also Anti-Eviction Act, N.J. STAT. ANN. § 2A:18-61.8 (West 2022) (requiring owners to provide notice to tenants of the intention to convert the building to condominium ownership and of tenants' exclusive right to purchase within ninety days). Connecticut's statute, CONN. GEN. STAT. § 47-88b(b) (2022) provides that the landlord or developer shall give at least 180 days' notice to each of the tenants. These and other similar protections are compiled in Deborah F. Buckman, Annotation, *State Statute or Local Law Affording Tenants or Community Opportunity to Purchase Property Before Sale or Conversion to Other Purpose*, 65 A.L.R.7th Art. 2 (2021), and outlined in the following section.

42. Andrew Keel, *Five Reasons Why Mobile Home Parks in the United States are Disappearing*, FORBES (Dec. 22, 2021, 7:45 AM), <https://www.forbes.com/sites/>

are reluctant to give new communities permits because of the stigma associated with mobile home communities. Proposals for the expansion of affordable manufactured home parks are often met with NIMBY (Not In My Backyard) attitudes from residential neighbors and zoning boards who associate these communities with vagrancy and sanitation problems.

The limited supply of alternative forms of affordable housing only worsens a manufactured home owner's options when they face a dramatic rent increase. As a result, residents are trapped and can be squeezed for every dollar. Frank Rolfe, owner of hundreds of manufactured housing parks around the country, said that a manufactured home park is like "a Waffle House where [the customers are] chained to the[ir] booths."⁴³

The trend of private equity firms acquiring manufactured home communities is likely to grow without government regulations like OTP policies in place. The private equity and real estate firms that have bought into manufactured home communities in recent years manage more than \$1.77 trillion in assets.⁴⁴ Driven by profit motives, they have little incentive to invest capital into communities.⁴⁵ Corporate investment firms who have had success in manufactured home communities began training programs to help other investors do the same. Training materials for "Mobile Home University" stated, "[t]he fact that tenants can't afford the \$5,000 it takes to move a mobile home . . . makes it easy to raise rent without losing any occupancy."⁴⁶ Private equity investment in manufactured home communities is likely to increase now that a number of larger firms have made initial investments that have proven profitable.⁴⁷

Policies that give manufactured home owners an opportunity to purchase their parks before they are sold to private developers are the best way to slow the cycle of displacement for manufactured home communities. Because of the vulnerability of manufactured home owners, and this

forbesbusinesscouncil/2021/12/22/five-reasons-why-mobile-home-parks-in-the-united-states-are-disappearing/?sh=3ab5c0194b64 [https://perma.cc/L88Y-LARF].

43. This economic trap is not a side effect but a building block of the business model. RV Horizons co-owner, Frank Rolfe, notoriously said that a manufactured home park is like "a Waffle House where everyone is chained to the booths." Pilar Sorensen, A "Hostage" Strategy for Housing Investment?, PRIV. EQUITY STAKEHOLDER PROJECT 2 (Mar. 2020), <https://pestakeholder.org/wp-content/uploads/2020/03/A-Hostage-Strategy-for-Housing-Investment-TPG-RVHorizons-031620.pdf> [https://perma.cc/NUJ8-JNFN] (quoting *Mobile Homes: Last Week Tonight with John Oliver*, YOUTUBE (Apr. 8, 2019), <https://www.youtube.com/watch?v=JCC8fPQOaxU> [https://perma.cc/L9YQ-TWVW]).

44. Baker, Voigt & Jun, *supra* note 3, at 2.

45. *Id.*

46. *Id.* at 8 (quoting Elizabeth Findell, *Housing Advocates Protest 'Boot Camp' to Maximize Trailer Park Profits*, AUSTIN AMERICAN-STATESMAN, (Sept. 25, 2018, 9:23 AM) <https://www.statesman.com/story/news/2017/12/02/housing-advocates-protest-boot-camp-to-maximize-trailer-park-profits/10143826007/> [https://perma.cc/B2WS-DMEC]).

47. *Id.* at 10.

affordable housing model's viability in the face of a depleting source of government-subsidized rentals, this Article argues that OTP policies must be swiftly adopted nationwide without running the risk of a takings challenge.

A. *Right of First Refusal Policies as Applied to Conventional Rentals*

OTP policies are widespread in a variety of conventional and alternative housing contexts. These policies' effectiveness at preserving affordable housing is proven through studies of one of the oldest and most established forms of OTP policies—Washington, D.C.'s Tenant Opportunity to Purchase Act (TOPA), passed in 1980. Given the longtime acceptance and success of TOPA in Washington, D.C., it is worth examining why these policies remain unavailable in most states within the manufactured housing and conventional rental context.

1. *Tenant Opportunity to Purchase Acts: Washington, D.C., Berkeley, CA, and Beyond*

Washington, D.C.'s TOPA gives tenants of residential buildings and multi-family homes the opportunity to purchase the property in which they rent before the owner may sell or repurpose it.⁴⁸ Under TOPA, tenants have a right of notice of a sale and the opportunity to purchase at a price representing a bona fide offer.⁴⁹ The statutory requirements are triggered when an owner has agreed to sell the property to a third party, at which point the owner must provide the tenants with an offer of sale and give them the first right of refusal.⁵⁰ Thus, TOPA is not a forced transfer because it only applies when the owner puts the property up for sale or voluntarily issues a notice to vacate for purposes of demolition or discontinuance of housing use.⁵¹

48. Tenant Opportunity to Purchase Act of 1980, D.C. CODE § 42-3404.02 (2022); see also Nena Perry-Brown, *TOPA Bill Exempting Single-Family Homes Inches Forward*, URBANTURF (Feb. 26, 2018), <https://dc.urbanturf.com/articles/blog/topa-bill-exempting-single-family-homes-inches-forward/13607> [<https://perma.cc/Z4P8-9WTD>] (stating Washington, D.C.'s TOPA legislation originally applied to single family homes as well, but that part of the law was struck in 2018).

49. See D.C. CODE § 42-3404.02; see also *TOPA Process Charts*, OFFICE TENANT ADVOC., <https://ota.dc.gov/page/tenant-opportunity-purchase-act-topa> [<https://perma.cc/NV3Y-PQER>] (last visited June 20, 2023) (explaining the statute's requirements depending upon the number of housing units).

50. D.C. CODE § 42-3404.03.

51. See *id.* The stated purposes of TOPA, found in Chapter 34 of Title 42, are “to discourage the displacement of tenants through conversion or sale of rental property and to strengthen the bargaining position of tenants . . . without unduly interfering with the rights of property owners to the due process of law.” *Id.* Thus, the statute explicitly states that this opportunity to purchase act does not duly interfere with the property rights of owners, despite mandating the process through which the property may be disposed.

A 2013 report from the D.C. Fiscal Policy Institute found that the D.C. TOPA law helped preserve nearly 1,400 units of affordable housing in the District between 2003 and 2013 at just a fraction of a cost of building new affordable units.⁵² TOPA acquisitions made with financial assistance from D.C.'s Housing Production Trust Fund have led to the creation of 4,400 limited-equity co-op units across ninety-nine buildings.⁵³ Limited-equity co-ops successfully limit the resale rate of housing indefinitely, allowing for modest gains by the owner while ensuring affordability for generations to come.

Berkeley, California's proposed Tenant Opportunity to Purchase ordinance is similar to the D.C. law in requiring owners of rental properties to offer tenants the first opportunity to purchase and the right of first refusal before it may be sold on the market to a third-party purchaser.⁵⁴ According to the latest version of the bill, Berkeley's TOPA ordinance requires owners of residential rental property to give notice to existing tenants of their intent to sell prior to sale or transfer of their property.⁵⁵ It then allots a specified amount of time to allow tenants to express interest and submit an offer to purchase. The ordinance also confers a right of first refusal to tenants and "qualified nonprofits" to match third-party of-

52. See Jenny Reed, *DC's First Right Purchase Program Helps to Preserve Affordable Housing and Is One of DC's Key Anti-Displacement Tools*, D.C. FISCAL POL'Y INST. 1, 7 (Sept. 24, 2013), https://www.dcfpi.org/wp-content/uploads/2013/09/9-24-13-First_Right_Purchase_Paper-Final.pdf [<https://perma.cc/XE5F-43TB>]; see also Faith Meixell, Note, *Housing for the People: A Tenant Opportunity to Purchase Act for New York City*, 48 FORDHAM URB. L.J. 255, 282–83 (2020) (stating that housing costs "in TOPA cooperatives are dramatically lower than for other residents in their surrounding area"). Meixell also cites to another OTP policy in Montgomery County, Maryland that has resulted in strategically-acquired buildings and created a positive long-term benefit. *Id.* at 284.

53. See DEP'T OF HOUS. & CMTY. DEV., DISTRICT OF COLUMBIA LIMITED EQUITY COOPERATIVE TASK FORCE FOR 2018–2019 FINAL REPORT 5 (2019), https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/page_content/attachments/Final%20LEC%20Recommendations_10.21.19.pdf [<https://perma.cc/7M8N-4G92>] (corresponding content of footnotes 52 and 53 originally published in Julie Gilgoff, *Giving Tenants the First Opportunity to Purchase Their Homes*, SHELTERFORCE (July 24, 2020), <https://shelterforce.org/2020/07/24/giving-tenants-the-first-opportunity-to-purchase-their-homes> [<https://perma.cc/PH4C-KRSH>]).

54. See *Proclamation Calling a Special Meeting of the Berkeley City Council*, BERKELEY CITY COUNCIL 5 (Jan. 27, 2022), <https://berkeleyca.gov/sites/default/files/city-council-meetings/2022-01-27%20Worksession%20Agenda%20Packet%20-%20Council.pdf> [<https://perma.cc/J8ZR-TL9T>].

55. See Tenant Opportunity to Purchase Act, BERKELEY, CAL., MUN. CODE ch. 13.89, § 13.89.70 (2019).

fers.⁵⁶ Ultimately, the property owner may reject any offers from qualified organizations and accept third-party offers to sell or transfer the property according to the established TOPA timelines.⁵⁷

The timelines created in the Berkeley bill were designed based on input from Washington, D.C., which allows for sufficiently long escrow periods to provide tenants the opportunity to organize, engage in technical assistance, and obtain the necessary financing to close a transaction. To incentivize owners to participate in a TOPA transaction, a provision in the proposal dictates that those who sell to tenants or a qualified organization will receive a refund in the amount of the City's portion of the Real Property Transfer Tax (seventy-five percent).⁵⁸

The TOPA bill makes clear that its purpose is to promote the health, safety, and general welfare of the residents of the City of Berkeley and the economic stability and viability of neighborhoods.⁵⁹ Linking the right of first purchase to a state's (and local government's) valid exercise of police powers to promote the health and safety of Berkeley residents is meant to take the policy out of takings jurisprudence, thus removing legal obstacles. Berkeley's TOPA bill has still not been finalized or approved by the mayor, although he has expressed his support for the law.⁶⁰

Massachusetts was considering state enabling legislation that would give all Massachusetts cities the ability to opt in to TOPA, however, the former governor vetoed a proposal in 2021.⁶¹ The cities of Boston and Somerville, Massachusetts, have been trying to get versions of TOPA passed through local home-rule petitions, with limited success.⁶² A state-

56. See *Proclamation Calling a Special Meeting of the Berkeley City Council*, *supra* note 54, at 5; see also BERKELEY, CAL., MUN. CODE ch. 13.89, § 13.89.70. In many jurisdictions, qualified third-party organizations must be vetted by the city. The local government will maintain a list of qualified affordable housing organizations. In order to qualify, organizations must show commitment to permanent affordability and democratic residential control. See Gilgoff, *supra* note 53.

57. See BERKELEY, CAL., MUN. CODE ch. 13.89, § 13.89.160.

58. See *Proclamation Calling a Special Meeting of the Berkeley City Council*, *supra* note 54, at 5. The seventy-five percent refund does not include the proportional amount attributed to a local ordinance.

59. *Id.* at 129.

60. See Emilie Raguso, *Watch: Berkeley Mayor Announces 'First in the State' Housing Policy*, BERKELEYSIDE (Feb. 20, 2020, 1:12 PM), <https://www.berkeleyside.org/2020/02/20/watch-berkeley-mayor-announces-first-in-the-state-housing-policy> [<https://perma.cc/V57G-ESX5>].

61. See An Act to Guarantee a Tenant's First Right of Refusal, S. 786, 191st Gen. Ct. (Mass. 2019); see also *Governor Signs Economic Development Bill with Critical Zoning Reforms and Affordable Housing Resources*, CITIZENS' HOUS. & PLAN. ASS'N (Jan. 15, 2021), <https://www.chapa.org/housing-news/governor-signs-economic-development-bill-with-critical-zoning-reforms-affordable> [<https://perma.cc/7M9M-RECT>].

62. S. 786; see also *Governor Signs Economic Development Bill with Critical Zoning Reforms and Affordable Housing Resources*, *supra* note 61; David Tisel, *The Campaign for the Tenant Right to Purchase in Greater Boston*, MIT Libraries (May 22, 2018) (MCP Thesis, Massachusetts Institute of Technology, Department of Urban Studies and Planning) (on file with author).

wide TOPA bill and enabling act have been newly proposed before the Massachusetts legislature in 2023, and is currently undergoing evaluation by the Housing Committee.⁶³ TOPA ordinances are being proposed elsewhere throughout the country including in New York State, Minneapolis, MN, and San Jose, CA.⁶⁴

All versions of TOPA in the traditional residential home setting allow tenants to assign their right of purchase to a third party who could help with financing and oversight in the acquisition and renovation process. Third-party entities may be able to help tenants acquire funding for the purchase of their property, having familiarity with available tax exemptions and credits. They likewise may be able to leverage preexisting relationships with local banks and credit unions to secure mortgage loans.⁶⁵

D.C.'s TOPA law does not have a permanent affordability requirement, meaning that tenants who collectively purchase a property through TOPA using private funds could resell that property for market-rate prices without resale caps. Thus, they have the opportunity to build unrestricted equity. However, if tenants utilize public subsidies or subsidized loans offered by the Department of Housing and Community Development to purchase the property, affordability restrictions (resale caps and rent limits) are triggered. Although D.C. policymakers intended to allow for tenants to build equity if using private funds, the option to resell for an unlimited amount does not accomplish other policymakers' goals of preserving the units of affordable housing in perpetuity.⁶⁶

In Berkeley, previous versions of the proposed policy required permanent affordability restrictions (via recorded deed resale restrictions) on all TOPA purchases. A revised proposal removes this permanent affordability requirement for tenant purchases financed without public subsidies, similar to the D.C. law. While TOPA's permanent affordability requirements remain unchanged for qualified third-party purchasers, for tenant-purchased properties, permanent affordability requirements will now be dictated by the terms of applicable subsidies or limited equity ownership models.⁶⁷ This revision was implemented in response to feedback from community groups that permanent affordability mandates constrain the opportunity of communities to build equity. This revision promotes wealth-building for tenants and reduces the administrative burden to enforce resale restrictions.

63. See S. 880, 193rd Gen. Ct. (Mass. 2023).

64. See Tenant Opportunity to Purchase Act, S. 3157, 2021–2022 Reg. Sess. (N.Y. 2021). The bill would allow renters to buy the building and manage it as a limited equity cooperative. See also Gilgoff, *supra* note 53.

65. Gilgoff, *supra* note 53.

66. *Id.*

67. See *Proclamation Calling a Special Meeting of the Berkeley City Council*, *supra* note 54, at 186.

As a work-around to the permanent affordability restrictions, Berkeley Mayor Jesse Arreguin expressed his support to add a penalty for speculation through TOPA (i.e., where a property acquired through a TOPA sale is quickly sold for profit rather than used for long-term owner occupancy).⁶⁸

The aforementioned policies restricting equity building only apply to TOPA policies for conventional homes. In the context of manufactured home communities, permanent resale restrictions are generally not incorporated into OTP policies. Reselling one's manufactured home may be the owner's only opportunity to build equity. Further, by maintaining the purpose of the park for manufactured homes controlled by fellow manufactured home owners, affordability will presumably be preserved since it would be in their own self-interest to set reasonable terms that they and their community are able to abide by.

2. *Community Opportunity to Purchase Acts*

Besides D.C.'s law, Berkeley's TOPA Model was also inspired by San Francisco's Community Opportunity to Purchase Act (COPA).⁶⁹ San Francisco's COPA contains a right of first offer and accompanying incentives to sellers who accept the initial offer, as well as a vetting process for qualified affordable housing organizations who can purchase. In this way, San Francisco attorney and broker, Richard Hurlburt, says that COPA has escaped legal challenges, as offers made for purchase of eligible property have been accepted by the owner at the right of first offer stage for a voluntarily negotiated market rate.⁷⁰ Negotiations never extended to the right of first refusal stage.⁷¹ Hurlburt, who helped draft the COPA policy, says that the San Francisco City Attorney's Office was careful to avoid provisions that would be subject to takings challenges.⁷² Hurlburt stated, "the right of first offer [can't be a regulatory taking since the price] is voluntarily negotiated or set by the market."⁷³ Before owners can offer the building for sale to a private party, they are required to give qualified nonprofit groups five days' notice to express interest to give a right of first offer.⁷⁴

San Francisco's COPA bill gives qualified nonprofit organizations and community groups the right of first purchase, and/or the right of first refusal, to acquire certain properties offered for sale, including buildings

68. *Id.* at 10.

69. S.F., CAL., ADMIN. CODE ch. 41B (2022).

70. Telephone Interview with Richard Hurlburt, San Francisco Broker (Mar. 1, 2022) (notes on file with author).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Community Opportunity to Purchase Act (COPA) Program Rules*, MAYOR'S OFFICE HOUS. & CMTY. DEV. 1, 4 (Oct. 21, 2021), <https://sfmohcd.org/sites/default/files/Documents/MOH/COPA/COPA%20-%20Final%20%20Program%20Rules-060622.pdf> [<https://perma.cc/2QF4-ZH9V>].

with three or more units or vacant land that could be developed into three or more residential units.⁷⁵ COPA policies are now being proposed elsewhere, including New York City.⁷⁶

3. *Right to Match Bid in Foreclosure Auctions*

Lastly, California recently passed Senate Bill 1079 (S.B. 1079), which gives tenants, Community Land Trusts, and other nonprofit housing developers an opportunity to match (in the case of tenants) or exceed by just \$1 (in the case of Community Land Trusts and other qualified third-party organizations) the winning bid in a foreclosure auction—thereby reclaiming distressed properties from the hands of private investors.⁷⁷

S.B. 1079 aims to prevent another foreclosure crisis in California by prohibiting foreclosed properties from being sold to real estate corporations in bulk.⁷⁸ Instead, each foreclosed property must be auctioned individually, and tenants of properties with one to four units, as well as Community Land Trusts and other eligible bidders, are given the right to meet or exceed the winning bid at auction within forty-five days.⁷⁹ If an eligible bidder is able to produce these funds, the auctioneer must sell to the eligible bidder rather than the investor. This law went into effect in 2021 and will sunset in five years (2026). It can be seen as part of an effort to redistribute properties away from large corporate landowners in the aftermath of the pandemic.⁸⁰

Community Land Trusts and other qualified third-party organizations need adequate funding, however, to purchase distressed properties at market rate. The California Community Land Trust Network (CACLТ Network) therefore put forth a proposal to fund S.B. 1079, called the Foreclosure Intervention Housing Preservation Program (FIHPP), which

75. S.F., CAL., ADMIN. CODE ch. 41B (2022). COPA bills can be distinguished from TOPA bills in that the latter policy gives tenants the first right of purchase, with the option to assign that right to a third party, whereas COPA bills give qualified nonprofits and other affordable housing developers the first right of purchase directly.

76. N.Y. CITY COUNCIL Int. No. 1977, 2020 Sess. (N.Y. 2020).

77. S.B. 1079, 2019–2020 Leg., Reg. Sess. (Cal. 2020). Corresponding text with footnotes 77 through 92 was originally published by the author in Julie Gilgoff, *Land Redistribution in the Aftermath of the Covid-19 Pandemic*, 67 WAYNE L. REV. 211 (2022).

78. Press Release, Sen. Nancy Skinner, *Governor Signs SB 1079, Homes for Homeowners, Not Corporations* (Sept. 28, 2020), <https://sd09.senate.ca.gov/news/20200928-governor-signs-sb-1079-homes-homeowners-not-corporations> [https://perma.cc/T2J7-5FP6].

79. Categories of eligible bidders who are given right of first refusal include an eligible tenant buyer and a nonprofit based in California whose primary activity is the development and preservation of affordable rental housing. See S.B. 1079.

80. This bill was approved by Governor Newsom on September 28, 2020 and filed with the Secretary of State on that same day. S.B. 1079 went into effect January 1, 2021.

was ratified by Governor Newsom on July 19, 2021.⁸¹ California Assembly Bill 140 allots \$500 million in loans and grants to nonprofits purchasing and rehabilitating buildings at foreclosure auction, in the foreclosure process, or at risk of foreclosure.⁸² According to Leo Goldberg, Co-Director of the CACLT Network, “FIHPP is an unprecedented investment in long-term housing affordability that will help reverse the cycle of speculative investment and displacement that is playing out across the state . . . particularly in low-income communities of color.”⁸³

Since the passage of S.B. 1079 in January 2021, there have already been efforts by property owners to skirt around the law’s mandates by passing out waivers at public auctions that would exempt owners from selling to eligible bidders if the buyer planned to use the property for their primary residence for twelve months following the auction.⁸⁴ In one instance, when a bidder admitted that he did not qualify for this exemption, the auctioneer told them to “just sign the waiver anyway.”⁸⁵

Some foreclosures are also being initiated without alerting tenants of their rights, in violation of the law. Jocelyn Foreman, an employee of Berkeley’s Public Schools, was renting a house which foreclosed on March 4, 2021, and was sold at a trustee sale.⁸⁶ Ms. Foreman was not alerted of her right to make a bid on the house where she was living, as was required by S.B. 1079. Housing activists intervened and initiated a fundraising campaign for Jocelyn to purchase her home so that she might be able to stay.⁸⁷ The prevailing bid of \$600,000 was placed by the real estate firm, Wedgewood, and Ms. Foreman had forty-five days to produce funds to match it in order to regain possession of her home, according to the provisions of S.B. 1079.⁸⁸

81. *Foreclosure Intervention Housing Preservation Program (FIHPP) Fact Sheet*, CAL. CMY. LAND TR. NETWORK, <https://www.cacltnetwork.org/fihpp/> [<https://perma.cc/P76B-2P8T>] (lasted visited June 2, 2023).

82. *Id.*; see also A.B. 140, 2021 Leg., Reg. Sess. (Cal. 2021).

83. E-mail Correspondence with Leo Goldberg, Co-Dir. Cal. Cmnty. Land Tr. Network (Aug. 21, 2021, 2:50 PM) (on file with author).

84. Memorandum from Mia Bonta to the Senate Judiciary Committee 10 (May 19, 2022), https://sjud.senate.ca.gov/sites/sjud.senate.ca.gov/files/ab_1837_mia_bonta_sjud_analysis.pdf [<https://perma.cc/6HKK-R9GQ>].

85. S.B. 1079 Working Group Meeting Notes (Mar. 2, 2021) (on file with author).

86. E-mail Newsletter from Sustainable Economies L. Ctr. (Mar. 24, 2021, 12:45 PM) (on file with author).

87. See *Planting Seeds with Jocelyn Foreman*, TOGETHER RISING, <https://secure.givelively.org/donate/berkeley-public-schools-fund/planting-seeds-with-jocelyn-foreman> [<https://perma.cc/YTJ8-2J8S>] (last visited July 8, 2023).

88. See Erin Baldassari & Molly Solomon, *Grandma Challenges Real Estate Giant in Early Test of New California Law*, KQED (Apr. 6, 2021), <https://www.kqed.org/news/11868037/grandma-challenges-real-estate-giant-in-early-test-of-new-california-law> [<https://perma.cc/87QH-4LSJ>].

Luckily, Ms. Foreman was able to partner with The Community Land Trust, Northern California Land Trust (NCLT), which purchased the property, then offered Ms. Foreman an occupancy agreement with an option to purchase.⁸⁹ Under this arrangement, Ms. Foreman will eventually secure a traditional mortgage to buy the home, but the trust will maintain ownership of the land to preserve as permanently affordable.⁹⁰ Jocelyn was able to match Wedgewood's bid through private crowdsourcing, Community Land Trust funding, and through a loan by the National Housing Trust, which has the capacity to make up the difference between what a tenant can reasonably afford and what the unit could rent for at local market prices.⁹¹ According to Sarah Scruggs, Co-Director of Policy at NCLT, National Housing Trust does not ordinarily move that quickly but made an exception since "they believed in this process and wanted to make the first S.B. 1079 purchase happen."⁹²

All OTP policies try to balance the interests of tenants with landowners and are carefully constructed not to impose a regulatory taking by ensuring that tenants are not conferred an economic advantage at sale.⁹³

There have been several court challenges related to OTP policies where tenants challenged owners' failure to follow the correct notice requirements or owners' failure to accept a bona fide offer by the tenants in violation of the statute.⁹⁴ However, there have been no takings challenges to the constitutionality of OTP policies in the conventional home setting, unlike the manufactured home context, discussed below.

89. Email Correspondence with Sarah Scruggs, Stewardship & Educ. Coordinator/Co-Dir. of Pol'y at N. Cal. Land Tr. (Aug. 20, 2021, 12:21 PM) (on file with author).

90. Baldassari & Solomon, *supra* note 88.

91. *See Planting Seeds with Jocelyn Foreman*, BERKELEY PUB. SCH. FUND, <https://secure.givelively.org/donate/berkeley-public-schools-fund/planting-seeds-with-jocelyn-foreman> [<https://perma.cc/S6GU-BFAM>] (last visited June 3, 2023); *see also* Email Correspondence with Sarah Scruggs, *supra* note 89.

92. Email Correspondence with Sarah Scruggs, *supra* note 89.

93. *Richman Towers Tenants' Ass'n v. Richman Towers LLC*, 17 A.3d 590, 619 (D.C. 2011) (clarifying that the legislature did not intend that TOPA could bestow an economic benefit on tenants). Applying the categories of regulatory takings to right of first refusal/purchase policies, it does not constitute a permanent physical occupation of property since there is no encroachment on the property owner's physical space. The policy likewise does not deprive the owner of all economically beneficial use since the owners are getting market-rate return for their investment.

94. Rick Eisen, former attorney for the Metropolitan Washington Planning and Housing Association (MWPHA), a metropolitan D.C. nonprofit housing and planning organization, and one of the principal drafters of D.C. TOPA, compiled a list of all TOPA-related challenges, none of which challenged the constitutionality of the law itself. *See Memorandum from Rick Eisen on D.C. Cases Challenging Possible Regulatory Takings* (2019) (on file with author). Some of the cases and subjects on his list included the obligations of the landlord to bargain in good faith and give adequate notice to tenants under TOPA. *See, e.g., Green v. Gibson*, 613 A.2d 361, 364 (D.C. 1992) (holding that any owner's obligation to bargain in good faith extends to the right of first refusal, and that the failure to bargain in good

B. *Do Opportunity to Purchase Policies in the Manufactured Housing Context Further a Legitimate State Interest?*

The creation of affordable housing for low- and moderate-income families is widely considered a legitimate state interest.⁹⁵ That manufactured housing is still considered personal property or “chattel” rather than real property may be part of the explanation why benefits conferred to conventional homeowners are not available to manufactured home owners.⁹⁶ Given the increased acknowledgement that mobile home communities offer a viable form of naturally occurring affordable housing, and because manufactured homes are now fixed to the ground rather than being moveable like vehicles, favorable mortgages available for other forms of conventional housing should likewise be accessible to all manufactured home owners.⁹⁷

The most significant act of the U.S. government in promoting homeownership is the extensive benefits that the government confers on homeowners who finance their homes through a mortgage, through the deduction of mortgage interest and property taxes. The tax expenditures to the middle class and wealthy total hundreds of billions of dollars in lost tax revenue through mortgage interest and property tax deductions.⁹⁸ Owner-occupied housing receives other tax advantages as well. Home owners can exclude most capital gains from the sale of their main residence from taxable income.⁹⁹

Although the government subsidizes middle- and upper-class housing through creating these tax breaks, not as many low-income Americans benefit, claiming the standard deduction rather than itemizing their taxes.¹⁰⁰ The government typically invests in low-income housing through

faith may provide sufficient grounds to negate a third-party contract); *Redmond v. Birkel*, 797 F. Supp. 36, 40 (D.D.C. 1992) (tenants are entitled to summary judgment because tenants were not notified that their buildings were being offered for sale; if allowed to purchase the apartments, the tenants would have to purchase the entire complex).

95. See generally *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992); *Santa Monica Beach, Ltd. v. Superior Ct.*, 968 P.2d 993, 1004–05 (Cal. 1999).

96. See *Can a Manufactured Home Be Real Property?*, TRIAD FIN. SERVS. (Mar. 30, 2021), <https://www.triadfs.com/news/can-a-manufactured-home-be-real-property> [<https://perma.cc/GWE2-L2QW>].

97. See *President Biden Announces New Actions to Ease the Burden of Housing Costs*, WHITE HOUSE BRIEFING ROOM (May 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs/> [<https://perma.cc/6YCN-8K4X>].

98. See Solomon, *supra* note 28, at 119 (citing *Federal Housing Assistance for Low-Income Households*, CONG. BUDGET OFFICE (Sept. 2015), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/50782-lowincomehousing-onecolumn.pdf> [<https://perma.cc/R5WB-P8BF>]).

99. See Larry Ozanne, *Taxation of Owner-Occupied and Rental Housing 2* (Cong. Budget Office, Working Paper No. 2012-14, 2012).

100. Homeowners who itemize can deduct the interest on up to \$1 million of debt used to buy, build, or substantially improve their primary residence and one other home (defined as “acquisition debt”). Many low-income Americans may not

subsidizing affordable rentals.¹⁰¹ The rental subsidy is limited to the lucky applicants who have endured long waiting lists to secure the opportunity to obtain a Section 8 voucher, a benefit that is not available to most Americans in need because of the limited supply.¹⁰²

In a few states, federal programs directly assist low-income homeowners with the purchase of their first home. In Washington, D.C., for example, low-income applicants are provided a nonrefundable federal income tax credit of up to \$5,000 towards the purchase of their first home.¹⁰³ However, these programs are not sufficient to level the playing field and provide a meaningful opportunity for homeownership, partly because the asking price for conventional homes is too expensive and supplemental funding is limited.

The Internal Revenue Service (IRS) should uniformly change the classification of manufactured homes from personal property to real property, enabling manufactured home owners to obtain favorable loans with longer repayment periods and lower interest rates.¹⁰⁴ In most states, manufactured housing is considered private property or chattel, rather than real property. A chattel mortgage is a loan on a moveable piece of property, like a car, boat, or trailer.¹⁰⁵ This type of loan tends to carry higher interest rates and fewer consumer protections than mortgage loans on real estate. Many manufactured home buyers do not get a deed; they get a

itemize deductions on their taxes if the standard deduction is greater than listing itemized deductions on their tax forms and may benefit from these exemptions—even as a homeowner. *See id.* at 5.

101. William G. Gale, Jonathan Gruber & Seth Stephens-Davidowitz, *Encouraging Homeownership Through the Tax Code*, TAX NOTES 1171, 1175 (June 18, 2007), <https://www.brookings.edu/wp-content/uploads/2016/07/20070618.pdf> [<https://perma.cc/8X2D-P2UM>].

102. *See* Solomon, *supra* note 28, at 119–20; *see also* Diana Ionescu, *The Housing Crisis in America's Mobile Home Parks*, PLANETIZEN (June 7, 2022, 8:00 AM), <https://www.planetizen.com/news/2022/06/117399-housing-crisis-americas-mobile-home-parks> [<https://perma.cc/GRG3-6T2Y>].

103. *First-Time Homebuyer Individual Income Tax Credit*, D.C. OFFICE TAX & REVENUE, <https://otr.cfo.dc.gov/page/other-credits-and-deductions#:~:text=this%20federal%20tax%20credit%20is,purchase%20price%20of%20the%20home> [<https://perma.cc/3WYH-NG3P>] (last visited June 3, 2023).

104. *See* Solomon, *supra* note 28, at 127 (describing the drastically different terms of a typical home mortgage as compared to a chattel mortgage).

105. In one case study, Jan Hollingsworth found that one buyer, who had an optimal site for his new manufactured home, went through the borrowing process only to end up with a \$9,500 loan at thirty-six percent interest, with an additional \$1,500 closing fee. The loan was still a bargain compared to the costs of his previous rental. *See id.* at 126–27 (citing Jan Hollingsworth, *Dodd-Frank and Manufactured Home Financing: The Place Where Good Intentions and Unintended Consequences Collide*, MH LIVING NEWS (2015), <http://manufacturedhomelivingnews.com/dodd-frank-and-manufactured-home-financing-the-place-where-good-intentions-and-unintended-consequences-collide/> [<https://perma.cc/3TPJ-3V2N>]).

certificate of title, as is issued for a car, for which they pay yearly fees.¹⁰⁶ If a manufactured home owner does not own the park underneath their home and needs to pay monthly rent to the park owner, many are classified as renters and are unable to qualify for the tax breaks afforded to homeowners.¹⁰⁷ Therefore, owners of manufactured homes do not reap any of the tax benefits of traditional homeownership unless they could own the parks underneath their homes and qualify for home mortgages.

Roughly 20 million Americans live in manufactured homes.¹⁰⁸ These are the structures in which people live and raise families, but for the purpose of the tax code and access to capital, manufactured housing is not treated as a legitimate housing model. Technically, real property is property that cannot be moved, and the U.S.'s current policy concerning manufactured homes is based on the old perception of "mobile homes" as moveable, with greater similarity to a vehicle than a home. This is no longer the case. It is contrary to our national interest in encouraging homeownership and wealth-building to continue treating manufactured housing as personal property, ineligible for the benefits of homeownership.

In addition to modifying the tax code and uniformly changing the designation of manufactured homes as real property rather than personal property, OTP policies should be widely adopted to enable manufactured home owners to reap the benefits of homeownership by owning the land underneath their homes. A combination of these policy platforms would ensure that manufactured home owners are treated as legitimate homeowners.¹⁰⁹

106. 2022 *Manufactured Housing Facts*, MANUFACTURED HOUS. INST. (Aug. 2022), <https://www.manufacturedhousing.org/wp-content/uploads/2022/04/2022-MHI-Quick-Facts-updated-05-2022-2.pdf> [<https://perma.cc/89QT-EQ95>].

107. See Solomon, *supra* note 28, at 129 ("[I]f you buy [a] manufactured home, place it on rental land, and live there with your family, you are unlikely to be eligible for the mortgage deduction because you are unlikely to have a mortgage, as opposed to a consumer loan. Even though your home stops being mobile once it is placed down, your home is forever classified as a mobile home, and you are classified as a renter in a mobile home park.")

108. 2022 *Manufactured Housing Facts*, *supra* note 106.

109. This Article devotes limited attention to tax law, glossing over efforts to eliminate or significantly reform the mortgage interest deduction (MID). In 2005, the President's Advisory Panel on Federal Tax Reform suggested major changes to the MID, proposing that the deduction be replaced with a fifteen percent credit. This would make the benefit of homeownership available to all tax filers, including low-income communities that typically claim the standard deduction rather than itemizing their taxes. See Gale, Gruber & Stephens-Davidowitz, *supra* note 101, at 1175. Still, other tax experts suggest that the MID does not achieve the desired results of incentivizing homeownership and mostly benefits wealthy Americans while robbing the tax base of billions in revenue. *Id.* See also Jessica Schieder, *The Mortgage Interest Deduction Is a House of Cards*, JUSTTAXESBLOG (Aug. 12, 2019), <https://itep.org/the-mortgage-interest-deduction-is-a-house-of-cards/> [<https://perma.cc/8H7Y-EWK6>]. The controversy of the MID does not minimize this Article's and Solomon's argument that manufactured homes should be considered real property rather than personal property. Regardless of whether manufactured

II. THE “CHILLING EFFECT” OF TAKINGS CHALLENGES: WHY RIGHT OF FIRST REFUSAL POLICIES ARE NOT MORE WIDELY ADOPTED

ROFR policies are generally not considered government takings of private property for public use, meaning they do not require just compensation under the Fifth Amendment.¹¹⁰ In the Eighth Circuit decision *State v. Block*,¹¹¹ the court determined that the state statute granting the government right of first refusal was not a taking despite some diminution in value.¹¹² A federal district court (*Kaiser Development Co. v. City & County of Honolulu*)¹¹³ and state appellate court (*City of Ashland v. Kittle*)¹¹⁴ have both ruled that ROFR policies in conventional home settings are not compensable in regulatory taking challenges. Nevertheless, many property owners take issue with pending ROFR bills in their jurisdiction, arguing that government regulations dictating who they may sell their property to infringes on their right to dispose of their property.¹¹⁵ Other owners argue that the regulations have a chilling effect on private parties' willingness to make a bid, knowing that tenants have the final opportunity to match and thus displace their offers.

Certain states have developed mechanisms to account for these minor infringements while still preserving the benefit of the policy. A common practice in Massachusetts aims to compensate private third parties for their time and legal fees invested in preparing an offer if their bids are displaced by tenants'. Real Estate Attorney Phil Lombardo, who assists Massachusetts mobile home tenants with the purchase of their parks, describes the practice of offering a “breakup fee” to the third parties in order to compensate them if, in the end, the best and final offer is matched by tenants.¹¹⁶ Lombardo states that the fees are often disproportionate to the actual out-of-pocket expenses incurred by a third party in preparing their bid, averaging \$100,000 to \$150,000 for a property that may cost \$10

home owners would benefit from the MID, the changed designation for manufactured homes as real property would make manufactured home owners eligible for more favorable loan terms from mortgages rather than chattel loans.

110. This Part will focus exclusively on ROFR policies as compared to OTP policies generally, which include Right of First Purchase policies. Right of First Purchase policies have never been framed as a constitutional taking because the price is voluntarily negotiated between the landowner and tenant, and the park owner has the option to reject the bid if they prefer to sell to private third parties.

111. 660 F.2d 1240 (8th Cir. 1981).

112. *Id.* at 1256.

113. 649 F. Supp. 926 (D. Haw. 1986).

114. 347 S.W.2d 522 (Ky. 1961).

115. *Join the Growing Opposition to TOPA/OPA, STOP TOPA*, <https://www.stoptopa.org/> [<https://perma.cc/K7WN-UMVU>] (last visited July 7, 2023).

116. Telephone Interview with Philip C. Lombardo, Jr., Esq., Founding Partner at Phil Lombardo, Jr. LLC (Oct. 7, 2022) (notes on file with author).

million.¹¹⁷ Breakup fees compensate third parties for whatever minimal infringement is caused by the policy provisions, thus counteracting the possible chilling effect on the market.

Supreme Court precedent has held that as long as owners are allowed to continue the current uses of the property, no taking should be found if those uses provide economic benefits.¹¹⁸ Mobile home park owners have the right to continue the economically beneficial use of renting their mobile home park to tenants, even under OTP policies.¹¹⁹ But because tenants have the right to match the bid of a party who may otherwise change the use from a manufactured housing community, the policy may possibly be challenged as a limitation of the owner's right to repossess the property according to the expanded *Cedar Point* standard as articulated by *Heights Apartments*.

Although the two cases analyzed below were each decided decades ago (1983 and 2000), the 2021 *Cedar Point* decision puts these and most other state land use regulations in a vulnerable position for a takings challenge. In this light, it is useful to determine the correct takings doctrine that should have been applied by the Washington State Supreme Court and California Federal Intermediate Court that previously ruled ROFR policies in the manufactured housing context to be a taking.

In *Manufactured Housing Communities of Washington v. State*,¹²⁰ the Washington Supreme Court concluded that a ROFR policy did amount to a government taking of private property according to the standard set out in its state constitution.¹²¹ Its holding was abrogated by *Chong Yim v. City of Seattle*,¹²² nineteen years later, in part because the court acknowledged that it is inappropriate to use a state takings test that is stricter than the standard set out in the U.S. Constitution's Fifth Amendment.¹²³ Despite

117. *Id.*

118. See Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, 650 (2015) (first citing *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926); then citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

119. Many statutes guaranteeing tenant associations an opportunity to purchase do not apply if the owner intends to change the use of the park, thus preserving their unencumbered right to do so. See, e.g., DEL. CODE ANN. tit. 25, §§ 7026–7036 (2022); N.J. REV. STAT. ANN. §§ 46:8C-11–13, 46:8C-15–16, 46:8C-21 (West 2022). Other states like Florida and Massachusetts, for example, preserve the right of notice and opportunity to match a bid if an owner is putting his park up for sale, thus potentially preventing the owner from changing the use. See FLA. STAT. §§ 723.061, 723.071, 723.075, 723.076 (2022) and MASS. GEN. LAWS ch. 140, § 32R (2022).

120. 13 P.3d 183 (Wash. 2000).

121. *Id.* at 195–97.

122. 451 P.3d 675 (Wash. 2019).

123. See *id.* at 683 (holding that the correct regulatory takings test is not one that attempts to decide the case as a matter of independent state law, acknowledging that the federal takings definition was inconsistent with the standard set out in the state constitution and in Washington state precedent); see also John A. Humbach, *A Unifying Theory For The Just-Compensation Cases: Takings, Regulation and*

the invalidation of *Manufactured Housing's* holding, the decision contains decisive language that the right of first refusal was determined an infringement of the landowner's property rights, which had a chilling effect on the future legislature. Washington state has failed to reinstate a ROFR policy for manufactured home owners, even after the *Chong Yim* decision. Its policy only "encourages" landlords to negotiate with residents, which does not provide sufficient protection against displacement.

Likewise, an intermediate appellate court in California reached the same conclusion in *Gregory v. City of San Juan Capistrano*,¹²⁴ finding a ROFR policy for manufactured home owners to be a taking requiring just compensation.¹²⁵ Although *Gregory* was disapproved of by *Fisher v. City of Berkeley*¹²⁶ with regard to its treatment of a price control ordinance, the relevant ruling that California's manufactured home ROFR policy constitutes a taking of private property has not been overturned and has not been adopted by the progressive California legislature. All the while, OTP policies in the traditional home or apartment context have never been challenged in California (for example, in the state's condominium conversion policies, COPA, or S.B. 1079), showing that the public interest of preserving affordable housing outside the manufactured home context is considered more legitimate by the court and legislature.

Neither California nor Washington state currently have strong protections for manufactured home owners when a park is put up for sale. Both states have notice requirements in their policies, meant to alert manufactured home owners ahead of time of a sale, but neither have included a right of first purchase, right of first refusal, or a requirement to negotiate with tenants in good faith—even after the *Chong Yim* decision opened the door for the policy's reinstatement in Washington.¹²⁷

Public Use, 34 RUTGERS L. REV. 243, 247 (1982) (discussing the dangers of state courts' differing definition of property protected by the Takings Clause compared to the federal government).

124. 191 Cal. Rptr. 47 (Ct. App. 1983).

125. *Id.* at 57–59.

126. 475 U.S. 260 (1985).

127. The Washington statute in *Manufactured Housing* was repealed and replaced with a statute encouraging landlords to negotiate with tenants. In late 2021, a proposed bill to make such good faith negotiations a requirement failed after the executive deadline passed. In the case of the California statute, the first version of the ordinance, No. 412, imposed a nine percent limit to rent increases, regardless of owner costs or inflation. *See Gregory*, 191 Cal. Rptr. at 50 n.1. It also required a majority of park residents to agree on any rules relating to "personal actions, age limits, [or] the health, safety and welfare of other residents" and contained no provision that a landlord may receive a fair return on investment. *Id.* (alteration in original). After passing Ordinance No. 412 in 1980, the ordinance was amended twice before being repealed alongside several other ordinances and replaced by Ordinance No. 439. *Id.* This ordinance was amended again into Ordinance No. 456, which is the ordinance under scrutiny in the *Gregory* case. *Id.* The current California statute governing mobile home notice does not include a right to first refusal; however, the statute does require a landlord to provide notice of

A. *Washington State's Treatment of Right of First Refusal Policies*

In *Manufactured Housing*, an association of mobile home park owners commenced suit against the state for an infringement of their property rights.¹²⁸ They argued that the Mobile Home Parks Resident Ownership Act (the Act), which included a right of first refusal, created an unconstitutional taking of private property in violation of the Washington State Constitution as well as the Fifth Amendment of the U.S. Constitution.¹²⁹

Washington State Constitution Article I, Section 16 explicitly bars the taking of private property for private use, whereas the U.S. Constitution provides a similar prohibition only by inference, with the wording “nor shall private property be taken for public use, without just compensation.”¹³⁰ The Washington State Constitution also gives the judiciary, rather than the legislative branch, wide authority to determine what is private and public use, with its language stating: “[w]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.”¹³¹

The judicial standard of review for legislative police power is generally one of deference, but the Washington State Constitution created a higher level of scrutiny.¹³² The *Manufactured Housing* court noted the intent of the Washington State Constitution’s eminent domain provision, articulating that, “the use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state.”¹³³ There are no explicit definitions of what constitutes public use in the U.S. Constitution. That is meant for the legislature to decide based on their police power. The judiciary need only decide whether the regulation “goes too far,” which was the standard articulated in *Pennsylvania Coal Co. v. Mahon*.¹³⁴

selling to the residents between thirty and 365 days prior to entering an agreement with any party. See CAL. CIV. CODE § 798.80 (West 2022).

128. See *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183, 185 (Wash. 2000).

129. *Id.*

130. WASH. CONST. art. I, § 16 (amend. 9); U.S. CONST. amend. V.

131. *Manufactured Hous. Cmty. of Wash.*, 13 P.3d at 188 (quoting WASH. CONST. art. I, § 16 (amend. 9)).

132. See Humbach, *supra* note 123, at 244 n.7 (stating that “[t]he presumption of constitutionality [of police power] makes a successful attack on [land] use regulations a generally unlikely prospect” (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594, 596 (1962))).

133. *Manufactured Hous. Cmty. of Wash.*, 13 P.3d at 196 (quoting Justice Dunbar, a convention delegate and member of the Judicial Department responsible for the final proposal of article I, section 16, as articulated in *Healy Lumber Co. v. Morris*, 74 P. 681, 685 (Wash. 1903)).

134. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (where Justice Holmes set out that “while property may be regulated to a certain extent, if regula-

According to this standard, the majority opinion of *Manufactured Housing* maintained that the Mobile Home Parks Resident Ownership Act constituted a taking by infringing on the owners' property rights. The court stated that "[p]roperty in a thing consists not merely in its ownership and possession but in *the unrestricted right of use, enjoyment and disposal*. Anything which destroys any of these elements of property, to that extent destroys property itself."¹³⁵ Further, "[a] right of first refusal to purchase is a valuable prerogative, limiting the owner's right to freely dispose of his property by compelling him to offer it first to the party who has the first right to buy."¹³⁶

The majority decision, as well as the method of analysis utilized by the *Manufactured Housing* court, led to two strongly-worded dissenting opinions. In Judge Johnson's dissent, he declared that "right of first refusal [policies are] not [considered] a fundamental attribute of property ownership . . . [or] a property right at all," which would invalidate the court's holding that the Mobile Home Parks Resident Ownership Act's ROFR provision was a taking.¹³⁷ There is a long-standing debate whether any "strand" of property rights should be completely immune from deprivation, limitation, revision, or even regulation (with or without compensation).¹³⁸ Although the rights named by the *Manufactured Housing* court are certainly among the most *essential* property rights: *use, enjoyment, and disposal*, the state will always have a role to play in regulation of these rights. Few would contest the state's ability to implement zoning laws, a resident's implied warranty of habitability, or the regulation of subprime mortgages.¹³⁹ One should view the state not as a threat to, but rather as the guardian of, one's property rights.¹⁴⁰ Property requires regulation.

tion goes too far it will be recognized as a taking"). Thus, the mining statute evaluated in *Mahon*, The Kohler Act, was deemed a taking because of its infringement on the defendant's contractual and property rights to mine beneath the surface, without just compensation.

135. See *Manufactured Hous. Cmty. of Wash.*, 13 P.3d at 191 (quoting *Ackerman v. Port of Seattle*, 348 P.2d 664 (Wash. 1960)).

136. *Id.* at 192 (quoting *Northwest Television Club, Inc. v. Gross Seattle, Inc.*, 612 P.2d 422 (Wash. 1980)).

137. See *id.* at 202 (Johnson, J., dissenting) (citing *Robroy Land Co. v. Prather*, 622 P.2d 367 (Wash. 1980)); see also *Bennett Veneer Factors, Inc. v. Brewer*, 441 P.2d 128 (Wash. 1968); *Old Nat'l Bank v. Arneson*, 776 P.2d 145 (Wash. 1989); *Feider v. Feider*, 699 P.2d 801 (Wash. 1985). Judge Johnson's statement that ROFR policies are not considered a property right was backed up by several Washington Supreme Court and court of appeals cases. It is impossible for a court to hold that just compensation is owed for a taking of private property when no property right ever existed.

138. Singer, *supra* note 118, at 604.

139. *Id.* at 611.

140. JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 36 (Yale Univ. Press ed., 2000).

The *Manufactured Housing* court cited the U.S. Supreme Court decision *United States v. General Motors Corp.*,¹⁴¹ with regard to the essential property rights that are not to be touched by regulation: possession, use, and disposition.¹⁴² In listing these rights, including the right of disposition, the *Manufactured Housing* court failed to acknowledge that a manufactured park owner still has a right to dispose of their land for fair market gain at a time of their choosing, even according to the challenged regulation. There is no forced transfer, and when the owner chooses to put their property up for sale, they have already relinquished their rights as the outgoing property owner. The U.S. Supreme Court has ruled that as long as the owner retains rights to the other “strands” in the bundle of property rights, according to the *Allard* standard, a minimal infringement on a single strand is not considered a taking.¹⁴³

The *Manufactured Housing* court proclaimed that a right to grant first refusal was a part of “the bundle of sticks” and was therefore a taking.¹⁴⁴ The Washington court here attempts to uphold individual property rights (the right to dispose or alienate) as immune to state influence, directly in contradiction to the *Allard* standard and commonly accepted principles about the necessity of property regulation.

The court gave credence to the notion that ROFR policies discourage private parties from making a bid, thereby lowering the property’s worth.¹⁴⁵ The court echoed *Ferrero Construction Co. v. Dennis Rourke Corp.*’s¹⁴⁶ rationale that prospective purchasers may decide not to bid on a property because their offer could be matched and displaced by tenants—a speculation that helped justify the invalidation of the ordinance.¹⁴⁷ Other state legislatures, like Connecticut’s, ensure that a landowner will receive a market-rate return regardless of the last bid received by outlining the private appraisal process and mandating that tenants must match the appraised value.¹⁴⁸ The Washington state court overextended its author-

141. 323 U.S. 373 (1945).

142. See *Manufactured Hous. Cmty. of Wash.*, 13 P.3d at 191.

143. *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979).

144. *Manufactured Hous. Cmty. of Wash.*, 13 P.3d at 192.

145. *Id.* But see *id.* at 204 (Johnson, J., dissenting) (rebutting the claim and maintaining that “the creation of a right of first refusal may lead to a more favorable economic result for petitioners: ‘[t]he interference with alienation present in a requirement that a designated person be afforded a reasonable opportunity to meet any offer received from a third person by an owner desirous of selling is so slight . . . [and] freedom of alienation [is] not infringed to a degree which requires invalidation. Under these circumstances, the owner has two potential buyers at the same price and is assured of a reasonably prompt culmination of the sale.’” (quoting *Robroy Land Co. v. Prather*, 622 P.2d 367, 369–70 (Wash. 1980))).

146. 536 A.2d 1137 (Md. 1988).

147. *Manufactured Hous. Cmty. of Wash.*, 13 P.3d at 192 (citing *Ferrero Construction Co.*, 536 A.2d at 1139–40).

148. CONN. GEN. STAT. § 21-70(f)(4) (2022).

ity to strike down a regulation that was not the functional equivalent of eminent domain, instead of deferring to the legislature to preserve a market-rate return, as was the practice in other states.¹⁴⁹

The *Manufactured Housing* court held that ROFR policies and other exercises of the state's police power are subject to a categorical "facial" taking challenge because the "regulation destroys one or more of the fundamental attributes of ownership (the right to possess, exclude other and to dispose of property)."¹⁵⁰ The significance of labeling ROFR policies as categorical takings is that the regulation would not have to undergo the fact-specific, "ad hoc" *Penn Central* test.¹⁵¹ The *Penn Central* test is, however, the correct takings test for ROFR policies, as analyzed below.

Recent takings jurisprudence has expanded what courts consider a per se taking. In *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁵² the Supreme Court ruled that a New York City regulation that authorized a cable company to string a thin cable and place two boxes onto private rental apartment buildings was a physical taking.¹⁵³ Despite this minimal burden placed on the property owner, the Court held that a per se, physical occupation had occurred because the government permanently occupied the physical space of a private property owner. It declared that it was not the size of the physical occupation, but rather the permanence of the occupation that merited this categorical, or per se taking. After the *Loretto* decision, any regulation that authorized a permanent, physical occupation or invasion should be considered a taking without analyzing the public interest served by the regulation and the severity of economic impact on the owner.¹⁵⁴ The Court declared that a permanent invasion is "qualitatively more severe than a regulation of the use of the property."¹⁵⁵

Cedar Point did away with the distinction of permanent versus temporary physical occupations by ruling that even a regulation that authorized a temporary physical invasion—allowing union organizers to enter the private property of a corporate-owned farm for up to three hours per day, 120 days per year—was a per se physical taking. Recently, *Heights Apart-*

149. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) for support that a court should only find a taking if a regulation is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."

150. See *Manufactured Hous. Cmty. of Wash.*, 13 P.3d at 187.

151. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

152. 458 U.S. 419 (1982).

153. *Id.* at 441.

154. In *Loretto*, the regulation actually added value to the building by placing the cable wires on the exterior of the building. For a discussion of how courts determine just compensation for partial takings, see Fennell, *supra* note 9, at 59–60 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428 (N.Y. 1983)) (upholding, on remand from the Supreme Court, the statutory scheme for setting compensation for the encroachment of the cable box and wires at a one-time payment of one dollar).

155. *Loretto*, 458 U.S. at 436.

ments and other cases attempted to utilize the rationale of *Cedar Point* to expand the per se takings doctrine to include policies like COVID-19 moratoria.¹⁵⁶

The other type of per se taking can be summarized in the *Lucas v. South Carolina Coastal Council*¹⁵⁷ standard, when a regulation deprives land of all economically beneficial use of the property.¹⁵⁸ In *Lucas*, the state of South Carolina passed a ban on construction on beachfront property which was held to deprive the property owner of all “economically viable use” of his land, and therefore effected a taking under the Fifth Amendment that required just compensation.¹⁵⁹

If a policy fits into these per se categories, the *Penn Central* regulatory takings test has no place. But in the context of policies like ROFR policies, which should not constitute a physical invasion of the property, nor deprive the owner of all economically viable use, the *Penn Central* test is appropriate.

Instead of using this *Penn Central* test, the *Manufactured Housing* court listed the per se categorical tests under federal law *and* state law, beginning with *Lucas* and *Loretto*, then continuing with other per se categories created by the Washington state judiciary. These state per se categories include when a regulation destroys one or more of the fundamental attributes of ownership (the right to possess, exclude, and to dispose of property) and where regulations were employed to enhance the value of publicly held property.¹⁶⁰ Although the *Chong Yim* decision later acknowledged that it is improper to apply a stricter state standard than that set out by the Fifth Amendment of the U.S. Constitution, the *Manufactured Housing* court purposely blurred the lines between state and federal per se categories to give legitimacy to its holding.

Because of the fact-specific and subjective nature of the *Penn Central* regulatory takings test, it is not unheard of for the judiciary to try to “recast the regulatory takings doctrine in clear constitutional rules,” expanding per se categories for a simplified analysis.¹⁶¹ Justice Scalia aspired to do the same in response to his discomfort with the ad hoc nature of the *Penn Central* test. Justice Scalia wrote the *Lucas* decision and successfully expanded the “per se [takings] rule condemning any regulation that elimi-

156. *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022); *see also Williams v. Alameda Cnty.*, 22-cv-01274, 2022 WL 17169833, at *11–12 (N.D. Cal. Nov. 22, 2022) (declining to apply the *Cedar Point* standard to Alameda County’s COVID-19 Eviction moratorium and citing a long line of similar precedent which did not follow *Heights Apartments*’ precedent).

157. 505 U.S. 1003 (1992).

158. *Id.* at 1016.

159. *Id.*

160. *See Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183, 187 (Wash. 2000).

161. J. Peter Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia*, 41 VT. L. REV. 733, 733 (2017).

nates all the economic value of a parcel of land.”¹⁶² Justice Scalia later “argued that any restriction on land use that did not mitigate a harm caused by the property owner must be held to be a taking per se.”¹⁶³ He also advocated for a rule finding a taking per se whenever the Justices determined that “a new statute or judicial innovation in the common law eliminated an established right of property.”¹⁶⁴ Other Supreme Court Justices did not concur that a per se taking is found in such broad and subjective terms, and prevented the even wider expanse of per se takings.¹⁶⁵

Although the *Manufactured Housing* court did not apply the *Penn Central* test as it should have, it did reference *Mahon*, which asks whether the use of state police power violated the Fifth Amendment’s Takings Clause in going “too far.”¹⁶⁶ The Supreme Court has clarified in the *Murr v. Wisconsin*¹⁶⁷ decision that the *Penn Central* regulatory takings test is precisely the way to decide whether a regulation has gone too far.

The *Manufactured Housing* court held that the legislature’s exercise of its police power had “gone too far” in its creation of the ROFR policy:

Police power is inherent in the state by virtue of its granted sovereignty. “It exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution.”¹⁶⁸

According to the majority opinion, the ROFR policy went too far towards an abuse of government power because it both violated the state constitution, and also because it did not reasonably correct some evil or promote some interest of the state. Judge Talmadge adamantly disagreed, asserting that the Act corrected the evil of displacing vulnerable communities from their mobile homes.¹⁶⁹

Whether a per se or regulatory takings test is being applied, the public interest that justifies the regulation should be considered.¹⁷⁰ The potential of ROFR policies to slow the displacement of residents and

162. *Id.* at 738.

163. *Id.* at 739 (citing *Pennell v. City of San Jose*, 485 U.S. 1, 18–24 (1988) (Scalia, J., concurring in part and dissenting in part)).

164. *Id.*

165. *Id.* (explaining that Justice Kennedy prevented Justice Scalia’s expansive approach from becoming federal law by concurring only in judgement in *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env’t Prot.*, 560 U.S. 702 (2010)).

166. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

167. 582 U.S. 383 (2017).

168. *Manufactured Hous. Cmty of Wash. v. State*, 13 P.3d 183, 186 (Wash. 2000) (citation omitted) (quoting *Shea v. Olson*, 53 P.2d 615, 619 (Wash. 1936)).

169. *Id.* at 205–07 (Talmadge, J., dissenting).

170. *See Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 490 (1987) (where the challenged Subsidence Act was upheld as valid in large part because it was intended to benefit the general public); *see also Singer, supra* note 118, at 632.

preserve the affordability of manufactured home communities has been documented.¹⁷¹ To state that the policies do not promote an interest of the state shows the subjectivity and bias that may come through in takings jurisprudence in deciding which policies to uphold and which necessitate just compensation. For this reason, a narrower interpretation of the Takings Clause should be preserved.

B. *California's Treatment of Manufactured Home Communities' Right of First Refusal Policies*

In *Gregory*, the California Court of Appeals upheld a takings challenge of California's ROFR policy, ruling that:

The ability to sell and transfer property is a fundamental aspect of property ownership. . . . [C]ourts have long recognized the fundamental importance of an owner's right, absent an illegal purpose, to sell property to whomever the owner chooses. "The constitutional guaranty securing to every person the right of 'acquiring, possessing, and protecting property,' . . . includes the right to dispose of such property in such innocent manner as he pleases."¹⁷²

The *Gregory* court failed to apply the *Penn Central* factors that would have proven that the minimal infringement on the right to dispose is not a taking. First, California's ROFR policy did not have a significant economic impact on landowners, who still received a market-rate return in exchange for their land at the time they decided to put their property up for sale. Second, the claimant's "distinct investment-backed expectations" have not been disturbed since the land was purchased to maintain as a manufactured home community and the landowner may continue collecting rent from tenants. Lastly, the character of the policy does not cause a physical invasion of the property or a forced transfer.

The sort of infringement on the right to dispose that ROFR policies impose is akin to the policy analyzed in the Supreme Court case *Andrus v. Allard*.¹⁷³ In *Allard*, the Court determined that the regulations that restricted the disposition of personal property did not compel the surrender of the property and did not constitute a physical invasion or restraint upon them. The restriction on alienation imposed in *Allard* was only one of several means of disposing of artifacts, which did not constitute a taking.

171. See Meixell, *supra* note 52 (relating to the benefits of Washington, D.C.'s TOPA policy). Although TOPA applies specifically to conventional rental properties, the benefits of promoting conversion of rentals to limited equity cooperative models has been proven and accepted by the Washington, D.C. legislature, which has preserved the law since 1980.

172. *Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47, 58 (Ct. App. 1983) (third alteration in original) (quoting *Ex Parte Quarg*, 84 P. 766, 766 (Cal. 1906)).

173. 444 U.S. 51, 65–66 (1979).

The *Allard* Court held “the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”¹⁷⁴

The *Allard* ruling on personal property was correctly applied to the real property context in cases such as the Eighth Circuit Court decision *State of Minnesota by Alexander v. Block*.¹⁷⁵ There, the court ruled that the Boundary Waters Canoe Area Wilderness Act—containing the U.S. Government’s right of first refusal on property riparian to designated lakes—only “slightly” affected an owner’s ability to alienate property, but had “little effect on even that ‘strand’ in the bundle of property rights.”¹⁷⁶ The court could not conclude that the statute would adversely affect the ability of the landowners to sell their property, since they will receive full value for it. The Eighth Circuit did not find the ROFR policy to take property in violation of the Fifth Amendment.¹⁷⁷

Allard and *Minnesota by Alexander* correctly considered whether a minor infringement on rights of alienability constituted a taking, when other rights including the right to use, enjoy, and transfer were untouched. This integrated view and analysis of property rights can be juxtaposed with the *Gregory* and *Manufactured Housing* courts, which justified a break in takings jurisprudence by upholding a single, individual property right to dispose in a certain manner to be essential, and therefore impenetrable by regulation.

The *Gregory* court reached the determination that the California ROFR policy in its Manufactured Housing Act was too onerous and thus went “too far” as to constitute a taking, according to the *Mahon* standard. The court employed a balancing of the governmental interest sought to be advanced by the regulation against the gravity of its interference with or impact on property rights. The *Gregory* court concluded that, “[a]pplication of this balancing test to the instant case results in the unavoidable conclusion that an unconstitutional taking is affected by this part of the ordinance,” which “effects an outright abrogation of well-recognized property rights.”¹⁷⁸ “The ability to sell and transfer property is a fundamental aspect of property ownership. . . . This part of the ordinance

174. *Id.*

175. 660 F.2d 1240 (8th Cir. 1981).

176. *Id.* at 1256; *see also* *Horne v. Dep’t of Agric.*, 576 U.S. 350, 361–62 (2015) (holding that the Takings Clause applies with equal force to personal property as to real property).

177. *State of Minnesota by Alexander*, 660 F.2d at 1256.

178. *Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47, 58 (Ct. App. 1983).

simply appropriates an owner's right to sell his property to persons of his choice. [The] City has thus 'extinguish[ed] a fundamental attribute of ownership' ¹⁷⁹

The *Gregory* court failed to recognize that the ROFR policy does not abrogate the right to dispose, though it does deprive the owner of selling "property to persons of his choice."¹⁸⁰ As *Allard* holds, as long as the owner holds onto the other options to dispose of his property for economic gain, this is not a full extinguishment of even one of his property rights. Upholding any one of the owner's property rights as "untouchable" is not an appropriate takings test, as was further articulated by *Keystone Bituminous Coal Ass'n v. DeBenedictis*¹⁸¹ in 1987.¹⁸²

What tips the scales of the *Gregory* court in applying the balancing test is its determination that the ROFR policy actually decreases the value of manufactured home parks, therefore infringing on the property owner more than the policy benefits the public. The *Gregory* court categorizes the ROFR policy as a "preemptive right" that has value and therefore deprives the owner of that right to sell it.¹⁸³ Its opinion stated, "[i]t is well established that a preemptive right is a valuable property right which may be bought, sold, and enforced in a court of law."¹⁸⁴ The court maintained that enforcement of the California statute deprived the park owner of selling a right of first refusal to other parties since the government granted that right to park residents through the ordinance in question.

A diminution in value rarely constitutes a taking according to Supreme Court precedent, including *Village of Euclid v. Amber Realty Co.*,¹⁸⁵ where the regulation resulting in a seventy-five percent loss in value was upheld; and *Hadacheck v. Sebastian*,¹⁸⁶ where there was nearly a ninety percent loss in value of the land because of the regulation in question, and still no taking.¹⁸⁷ A more modern interpretation could be found in *Laurel Park Community, LLC v. City of Tumwater*,¹⁸⁸ where an economic loss of less than fifteen percent with respect to one of three properties in a manufactured park owner's portfolio, and no effect on the other two properties,

179. *Id.* (third alteration in original) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980), *abrogated by* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005)).

180. *Id.* *But see* *Babbitt v. Youpee*, 519 U.S. 234, 234 (1997) (where abrogation of the rights of descent and devise was deemed a taking when a regulation attempted to control an individual's ability to pass land to heirs by descent or devise).

181. 480 U.S. 470 (1987).

182. *Id.* at 506.

183. *Gregory*, 191 Cal. Rptr. at 59.

184. *Id.* at 58.

185. 272 U.S. 365 (1926).

186. 239 U.S. 394 (1915).

187. *Vill. of Euclid*, 272 U.S. at 384; *Hadacheck*, 239 U.S. at 405.

188. 698 F.3d 1180 (9th Cir. 2012).

did not lead to a taking determination.¹⁸⁹ A diminution in value due to an owner not being able to sell preemptive rights on the land would amount to a much lower monetary loss, and could not justify a takings holding according to precedent. In considering the regulation's economic effect on the landlord and the extent to which the regulation interferes with reasonable investment-backed expectations, the *Gregory* court used a similar analysis to the *Penn Central* test without applying the factors explicitly.

The *Gregory* court ultimately held the ordinance impaired two property rights at issue: 1) an owner's right to sell property to whomever the owner chooses; and 2) an owner's right to sell the preemptive right. Thus, it expanded the definition of property rights to include a preemptive right as part of the right to transfer and dispose of property. Although the decision was disapproved of by *Fisher*, the *Fisher* court only overruled *Gregory* in relation to its treatment of the rent control ordinance in question.¹⁹⁰ *Gregory*'s negative treatment of California's ROFR policy as it relates to manufactured home owners remains unchanged. There is no ROFR policy for manufactured home owners in California, which otherwise confers this right to tenants of traditional housing in a number of other statutes.¹⁹¹

C. *Right of First Refusal Policy Challenged in Massachusetts Produces a Different Result: Policy Found Not to be a Taking*

A decision by the Massachusetts Supreme Court, holding their right of first refusal law as a legitimate use of the Commonwealth's police power, represents the more common view that ROFR policies are not takings requiring just compensation.¹⁹²

In *Greenfield Country Estates Tenants Ass'n. v. Deep*,¹⁹³ a group of manufactured home park residents brought suit against their previous park owner for selling to a third party ahead of them, depriving them of their right to purchase according to the policy.¹⁹⁴ Residents brought suit for specific performance—to be able to purchase the park even though it had already been sold to a private third party, Mr. Deep. In turn, Deep alleged that the statute should not be enforced because it was an unconstitutional

189. *Id.* at 1189.

190. See generally *Fisher v. City of Berkeley*, 475 U.S. 260, 260 (1986) (where the rent control ordinance that had been held unconstitutional by *Gregory* was overruled by the Supreme Court, as the ordinance was not in violation of the Sherman Act).

191. *Id.* See also Section I.A, above, for a discussion of ROFR policies in the conventional housing context that have not been challenged as a taking.

192. *Greenfield Country Est. Tenants Ass'n. v. Deep*, 666 N.E.2d 988 (Mass. 1996).

193. *Id.*

194. MASS. GEN. LAWS ch. 140, §§ 32A–32R (2022).

taking in violation of the Fifth Amendment. Deep did not contend that the state had physically “taken” his land, but alleged that the statute burdened “the free alienation of [his] land.”¹⁹⁵

The Massachusetts court in *Greenfield* applied the regulatory takings test laid out in *Agins v. City of Tiburon*¹⁹⁶ and a single factor of the Penn Central test that “[a] regulation amounts to a ‘taking’ if it fails substantially to advance a legitimate State interest or deprives a landowner of economically viable use of the land.”¹⁹⁷ This test resembles a mix of *Agins’* consideration of whether the regulation “substantially advance[s] legitimate state interests” as well as *Penn Central* and *Lucas’s* economic deprivation test, as analyzed below.¹⁹⁸

In applying these considerations to Massachusetts General Laws chapter 140, sections 32A–32R, the ordinance in question, the court first determined that the ordinance *does* advance a legitimate state interest. The court spoke to the difficulty of the elderly and persons of low-to-moderate income to find viable, affordable housing—facts that are documented in the preamble of the statute in question. The court summarized the goal of the statute:

[T]o avoid discontinuances of manufactured housing communities and to ensure that tenants of such communities are not left at the peril of their landlords due to a practical inability to relocate [their home]. “Unless mobile home owners receive further protection in relocating their homes upon mobile home park discontinuances than the law now affords, this increasing shortage of mobile home park sites and increasing cost of relocation will generate serious threats to the public health, safety, and general welfare of the citizens of the commonwealth, particularly the elderly and persons of low and moderate income.”¹⁹⁹

The court documented how ROFR policies enable residents of manufactured housing communities to purchase the land on which their homes exist and thus avoid eviction from their communities, creating housing stability and continuation of affordable housing options. In observing the *Greenfield* court’s conclusion that “[i]t is difficult to imagine a more appropriate and close-fitting method to further the legitimate interest of the

195. *Greenfield Country Est. Tenants Ass’n.*, 666 N.E.2d at 991.

196. 447 U.S. 255 (1980), *abrogated by* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

197. *Greenfield Country Est. Tenants Ass’n.*, 666 N.E.2d at 992 (citing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987); *Agins*, 447 U.S. at 260 (1980)); *see also* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

198. *Agins*, 447 U.S. at 260; *Lucas*, 505 U.S. at 1019.

199. *Greenfield Country Est. Tenants Ass’n.*, 666 N.E.2d at 992 (quoting MASS. GEN. LAWS ch. 317, § 1 (1986) (current version MASS. GEN. LAWS ch. 140, § 32-L (2022))).

Commonwealth,” one sees the subjectivity of how the courts in California and Washington analyzed regulations according to their socio-political views.²⁰⁰

The arguments made by the *Greenfield* court resemble the dissent of Judge Talmadge in the *Manufactured Housing* opinion. Judge Talmadge was appalled by the Washington Supreme Court striking down legislation designed to assist the vulnerable.²⁰¹ He argued that “[t]he effects on mobile home owners . . . faced with moving because mobile home park owners . . . want to convert a mobile home park to another use can be devastating[,]” especially considering that “[m]anufactured housing is a significant source of affordable housing for American families.”²⁰²

Judge Talmadge discussed the animus against manufactured housing communities, which may have motivated the majority decision in Washington state. He stated that “[a]lmost all local and state regulations . . . discriminate against manufactured housing[,]” and that these discriminatory policies result in a missed opportunity for jurisdictions to provide essential affordable housing.²⁰³ He further commented:

Some towns exclude mobile homes altogether; others limit how long the homes can stay in town. Most frequently, municipalities confine mobile homes to privately-owned mobile home parks and restrict the number of parks permitted in the town. Consequently, there is a major shortage of space for mobile homes. Thus the owner who needs to rent a lot for his mobile home has no choice but to enter the “park owner’s market” in which the demand for space far exceeds the supply of available lots.²⁰⁴

The Massachusetts court did not demonstrate bias against manufactured home owners and found that preservation of this affordable housing model was a legitimate government interest, continuing its analysis to the second part of its regulatory takings test.

After establishing that the Massachusetts statute advanced a legitimate state interest, the *Greenfield* court analyzed whether the statute deprived the park owner of all economically viable use of the land. The opinion reads: “[e]ven a regulation enacted pursuant to a State’s legitimate exercise of its police power may constitute a taking if it deprives the owner of

200. *Id.*

201. *See* *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183, 206 (Wash. 2000) (Talmadge, J., dissenting).

202. *Id.* (Talmadge, J., dissenting) (quoting Molly A. Sellman, *Equal Treatment of Housing: A Proposed Model State Code for Manufactured Housing*, 20 URB. LAW. 73, 74 n.3 (1988)).

203. *Id.* (Talmadge, J., dissenting) (quoting Sellman, *supra* note 202, at 74 n.3).

204. *Id.* at 207 (Talmadge, J., dissenting) (quoting Thomas G. Moukawsher, *Mobile Home Parks and Connecticut’s Regulatory Scheme: A Takings Analysis*, 17 CONN. L. REV. 811, 814–15 (1985)).

all economically viable use of the land.”²⁰⁵ The *Greenfield* court concluded that the statutory right of first refusal minimally limits an owner’s freedom to transfer property in that the owner must offer the property to the tenants on substantially the same terms and conditions as contained in a bona fide offer of purchase. Owners are not required to sell to the tenants on terms less favorable than they can receive from a third party. Further, “the statute imposes no restriction on transfers of property by gift, devise, or operation of law.”²⁰⁶ The statutory right of first refusal cannot be said to materially affect the marketability of the property so as to deprive it of economic value.

The court denied the claim of the third-party purchaser, Deep, that the ROFR policy reduces the pool of buyers:

We do not speculate as to the validity of Deep’s unsubstantiated assertions that the restriction results in a diminution in property value or reduces the pool of prospective purchasers. We note only that mere conditioning the sale of the property to a right of first refusal does not amount to a taking. The owner may continue to approve tenants, to collect rents, to promulgate rules of the park with the approval of the Attorney General, and to make improvements to the land. Section 32R does not deprive an owner of economically viable use of the property.²⁰⁷

In contrast to California’s *Gregory* decision, the Massachusetts court refused to consider the new park owner’s claim that the ROFR policy reduces the pool of prospective purchasers—thus reducing its value. That “preemptive right” was deemed to have value in and of itself as an essential property right in California’s *Gregory* decision.²⁰⁸ What guides the court to consider some of the plaintiff’s arguments or dismiss them as “speculative” may be guided by the socio-political motivations of the court as much as any other factor. Since the Massachusetts court was not trying to reinforce the status quo of the “ownership model” as discussed below, it implemented the integrated view expressed in *Allard*.

D. *Inconsistent Regulatory Takings*

Contrasting the three courts’ analyses of constitutional takings—Washington’s four-prong per se test that includes whether property rights are being infringed, California’s balancing test, and Massachusetts’s examination of legitimate government interests or complete economic deprivation—one might wonder: What is the appropriate regulatory takings test?

205. *Greenfield Country Est. Tenants Ass’n.*, 666 N.E.2d at 992 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

206. *Id.* (citing MASS. GEN. LAWS ch. 140, § 32R(d) (2022)).

207. *Id.* (citation omitted) (footnote omitted).

208. *See Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47, 58 (Ct. App. 1983).

The *Penn Central* Court itself admitted that it “quite simply, has been unable to develop any ‘set formula’ for determining” whether a regulation effects a taking, but engaged in “essentially ad hoc, factual inquiries.”²⁰⁹ One scholar commented that, “the only uniform agreement about the meaning of the Takings Clause is that there has been no agreement.”²¹⁰ Professor Richard Epstein referred to the three prong *Penn Central* regulatory takings test and its progeny as “confused, and often contradictory” and as an illustration of “intellectual disarray.”²¹¹ On the contrary, Professor Joseph Singer asserted that the regulatory takings doctrine as shaped by the Supreme Court is actually “more predictable, coherent, and normatively defensible than its critics think it to be.”²¹² Singer asserted that the results of *Penn Central* applications reveal a comprehensible pattern. Perhaps it is not the subjectivity of the test that leads conservatives to advocate for per se takings, but a greater likelihood that a taking will be found if a fact-specific analysis is not undertaken. This Article asserts that the three-prong *Penn Central* test is the correct standard to apply for regulations such as ROFR policies.

States generally have broad discretion under their police power to regulate the health and safety of their residents. Regulation of housing conditions and the landlord-tenant relationship generally fall under this category.²¹³ Such forms of regulation are analyzed by “engaging in essentially ad hoc, factual inquiries.”²¹⁴ In the words of Justice Holmes, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”²¹⁵ The court is “meant to determine how far is too far, or, put another way, when a governmental action amounts to the functional equivalent of eminent domain.”²¹⁶

There are different perspectives about whether any of the *Penn Central* factors have greater importance. *Lingle v. Chevron U.S.A., Inc.*²¹⁷ established that the primary factors in the *Penn Central* balancing test are the first two: the magnitude of the regulation’s economic effect on the landowner and the extent to which the regulation interferes with reasonable investment-backed expectations, disavowing the view that *Agins*’ advancement of legitimate state interests is of central importance.²¹⁸ The third

209. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

210. Baar, *supra* note 1, at 217.

211. Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 4 (1987).

212. Singer, *supra* note 118, at 606.

213. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982).

214. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

215. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

216. Fennell, *supra* note 9, at 38.

217. 544 U.S. 528 (2005).

218. *Id.* at 538–39 (“Primary among [the *Penn Central*] factors are ‘[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expecta-

Penn Central factor—the character of the government action—considers whether the policy causes a physical invasion to the property or whether it bears greater resemblance to a public program designed to protect the public from harm by adjusting the benefits and burdens of the economy, promoting the common good.²¹⁹ Despite *Lingle*'s characterization of the first two factors as primary and its emphasis on the repeal of the *Agins* standard, some property scholars argue that the character of the regulation remains an important factor.²²⁰

E. *Correct Takings Test as Applied to Right of First Refusal Policies*

ROFR policies do not satisfy the criteria of either of the two categories of per se takings tests, *Lucas* or *Cedar Point*, as analyzed below.

1. *Deprivation of All Economically Beneficial Uses of Private Property*

ROFR policies do not deprive the owner of all economically beneficial use of the land, so they do not amount to “categorical takings” according to the *Lucas* standard. Although some economic deprivation is tolerated without being deemed a taking, a regulation that results in complete economic deprivation is automatically a taking according to *Lucas*. ROFR policies are not a complete economic deprivation because the owner is free to continue using the park as a manufactured home park, profiting through the collection of rent and the appreciation of the value of the land. When choosing to sell the land, even to tenants, the market rate of the park will most likely be more than the purchase price, allowing the owner to build equity. Giving the residents a right of first refusal does not deny the park owner's economic gain from the park, since the residents will have to pay the same market rate for the park as the owner could get from a private

tions.” (second alteration in original) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978))).

219. *Penn Central*, 438 U.S. at 124.

220. See Singer, *supra* note 118, at 607 (interpreting recent takings decisions governed by the type of impact at issue); see also Timothy M. Mulvaney, *Property-As-Society*, 2018 WIS. L. REV. 911, 947–48 (2018) (analyzing the purpose of regulations in protecting society as having a key role in takings analysis). This Article asserts that the Supreme Court may expand the interpretation of the *Penn Central* factor that analyzes “investment-backed expectations” to include changes in use. *Id.* at 914 (quoting *Penn Central*, 438 U.S. at 123–24, 130–31). It is plausible that a property owner purchased a mobile home park intending to change the use at some point if the maintenance of the land as a mobile home park became too burdensome. Just as *Heights Apartments* has already interpreted the *Cedar Point* standard to protect owners who want to discontinue renting their property to tenants in order to repossess it, so might the court apply this principle to a property owner who bought land thinking that one day they might change the use from a mobile home park to develop private condominiums. Thus, the expanded *Cedar Point* standard might have an effect on the hierarchy of importance given to the *Penn Central* factors.

third party. The negligible decrease in value due to certain buyers refraining from making a bid is not at the level that the court would consider a categorical taking according to the *Lucas* standard.²²¹

2. *Physical Invasion of Private Property*

Likewise, it is improbable that ROFR policies would constitute a physical invasion or occupation. ROFR policies are not a forced transfer, and there is no government actor physically invading private land because of these policies. However, it is possible that some courts may interpret *Cedar Point*'s sanctification of the right to exclude to encompass restrictions on a property owner's ability to repossess his property, as articulated in *Heights Apartments*.²²² ROFR policies do not typically infringe on a property owner's right to exclude strangers from entering their property (the scenario in *Loretto* and *Cedar Point*), but some policies impose restrictions on owners when attempting to change the use of the park, allowing tenants to offer a bid to maintain the park as mobile home communities, and in a way, preserving tenants' rights to indefinitely occupy the property.²²³

In analyzing whether Minnesota state's eviction moratorium constituted a government taking of private property for public use in *Heights Apartments*, the court proclaimed that "[t]he Takings Clause protects property owners from both physical and regulatory takings—the 'direct appropriation of property' by governmental actors and *imposition of restriction[s] on the use of property that went "too far."*"²²⁴ To support its holding that Minnesota's Eviction Moratorium was a taking, the *Heights Apartments* court posed a view of the bundle of property rights that negates an integrated view of property rights: "[b]y imposing restrictions on property rights, 'the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.'"²²⁵ By preventing the property owner's right to reclaim his

221. See *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1189–91 (9th Cir. 2012) (discussing examples of what sort of economic impact on park owners the court determines to be a taking). There, an economic loss of less than fifteen percent with respect to one of three properties in a manufactured park owner's portfolio, and no effect on the other two properties, did not satisfy the *Penn Central* factor, let alone the *Lucas* standard.

222. Although *Heights Apartments* dealt with a property owner's right to evict tenants for nonpayment of rent, the petitioner also alleged a taking due to the moratorium's restriction on nonrenewal of leases, similar to ROFR's "indefinite lease[s]" with mobile home owners. *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022). If mobile home park owners wanted to repossess their property at the end of tenants' leases to live there themselves, or to keep it empty while the land value appreciates, they would be unable to do so if the land was bound by OTP policies.

223. See MASS. GEN. LAWS ch. 140, § 32L(7a) (2022).

224. *Heights Apartments*, 30 F.4th at 732 (second alteration in original) (emphasis added) (quoting *Horne v. Dep't of Agric.*, 576 U.S. 350, 360 (2015)).

225. *Id.* at 735 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

property when tenants had failed to pay rent, the Eighth Circuit determined that the state had taken land by the government, preventing the owner from occupying his own property.

A similar rationale was used to declare a taking on a policy meant to protect manufactured housing residents from the changed use of a mobile home park in the 1994 District Court case *Aspen-Tarpon Springs Ltd. v. Stuart*.²²⁶ There, the owners of a Florida mobile home park filed suit and successfully challenged certain sections of the Florida Mobile Home Act as a taking.²²⁷ The Act in question provided that a mobile home park owner who wished to change the land use must either pay for the tenants to move to another comparable park within fifty miles, or compensate the mobile home owners for the full value of their homes at a statutorily determined value. The mobile home park owners persuaded the court that compliance with this provision was too onerous, in effect, requiring them to hold their property out for rent in perpetuity. The court determined that the statute transferred a possessory interest in their land to the tenants, and that it constituted a taking of property without compensation in violation of both the federal and state constitutions.²²⁸

Even if ROFR policies maintain the use of land as a manufactured home park into perpetuity, they should not be considered a taking. They are more akin to a use restriction, like zoning, analyzed under the fact-specific *Penn Central* standard than a physical invasion where the *Cedar Point* standard applies.

3. *The Correct Analysis of Right of First Refusal Policies Under Penn Central*

The *Penn Central* regulatory takings test is the more appropriate takings test for ROFR policies, and its three factors should be applied: (a) the economic impact of the regulation on the claimant, (b) the extent to which the regulation has interfered with distinct investment-backed expectations, and (c) the character of the governmental action.

a. The Economic Impact of the Regulation on the Claimant

With regard to the economic impact of the regulation, one must first analyze whether a ROFR policy will result in an economic loss. As cited above, an economic loss of less than fifteen percent with respect to one of three properties in a manufactured park owner's portfolio, and no effect on the other two properties, did not satisfy this factor according to *Laurel Park*.²²⁹ The court explained that a small decrease in value for only one

226. 635 So. 2d 61 (Fla. Dist. Ct. App. 1994).

227. *Id.* at 67. For a discussion of the statute in its relevant parts, see FLA. STAT. § 723.033 (2022) and FLA. STAT. § 723.061 (2022).

228. *Id.* at 66–68; see also Ronald L. Weaver & Mark D. Solov, *Emerging Property Rights Protection*, FLA. BAR J., 103, 103 (1994).

229. See *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1180 (9th Cir. 2012).

affected property falls within the range of permissible land use regulations that falls short of a constitutional taking. Supreme Court cases uniformly reject the proposition that diminution in property value, standing alone, can establish a taking.²³⁰

ROFR policies have minimal economic impact on owners. In the case of right to purchase policies—where tenants get to make the first bid—certain states have an independent assessor determine the market value, and the owner has no obligation to accept the bid if he believes he can get more. In the example of ROFR policies, the economic deprivation is not significant enough to satisfy this factor. The potential chilling effect on certain parties making a bid will not result in the owner receiving less than market value. Even if the policy results in a minimal economic effect, this alone cannot constitute a taking. This factor is not met for the above reasons.

b. The Extent to Which the Regulation Has Interfered with Distinct Investment-Backed Expectations

The second prong of the *Penn Central* analysis is whether the ordinance interfered with distinct, investment-backed expectations. To answer this question, courts have considered whether, when the owners bought the properties, they had the expectation that they could sell it for profit when they desired or when market conditions made it attractive. As the Supreme Court wrote in *Penn Central*:

Submission that [the plaintiffs] may establish a “taking” simply by showing that they have been denied the ability to exploit a property interest that they . . . had believed was available for development [does not constitute a taking]. Were this the rule, this Court would have erred [in many of its previous takings cases].²³¹

In the case of manufactured home ROFR policies, the owners purchase the property as manufactured home parks and still retain the ability to continue operating the property as manufactured home parks. If manufactured home park owners viewed their purchase as a good investment because of the return from charging rent and the appreciation of the value of the land, then continued use in this capacity is not depriving the owner of their constitutional rights by preserving the purpose of the park. However, if the park owner asserts that they could get a significantly higher rate of return for land if it were repurposed for private development, and that they invested in the property with these expectations, the court would need to consider the second *Penn Central* prong of the test.

230. See *Manufactured Home Park Ordinance Not Regulatory Taking*, 30 No. 12 MCQUILLIN MUN. LAW REP. NL 1, 3 (Dec. 2012) (discussing a takings analysis of mobile home statutes).

231. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978).

In a Ninth Circuit decision, *Guggenheim v. City of Goleta*,²³² the court held that “[d]istinct investment-backed expectations’ implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes.”²³³ A manufactured home owner may have expectations of converting the land to another purpose and getting paid an astronomical value, but “[s]peculative possibilities of windfalls do not amount to ‘distinct investment-backed expectations,’ unless they are shown to be probable enough materially to affect the price.”²³⁴ Manufactured home park owners who are legally bound to give park residents the right of first refusal might prefer to sell the property to a private developer to change the purpose of the park, but a ROFR policy does not deprive the park owner of its current profitable use, and the sale of the park should still generate a similar profit whether it is sold to a private developer or to tenants.

c. The Character of the Governmental Action

The third prong of the *Penn Central* factors—the character of the governmental action—analyzes whether the regulation more closely resembles “a physical invasion or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good.’”²³⁵ According to the Armstrong Principle, the court would further analyze if the individual park owner bears a burden to preserve affordable housing to their detriment, which should be more fairly borne by society as a whole.²³⁶

The character of a ROFR policy more closely resembles a mechanism for preserving the affordability of housing and preventing the displacement of residents rather than a physical invasion of property. OTP policies adjust the benefits and burdens of the economy, namely the lack of access to affordable housing. OTP policies may prevent an increase in homelessness in an already over-burdened public housing system that also lacks enough government-subsidized rentals. The character of the policy is less like laws that condone physical invasion or occupation of private property and more like a policy that confers public benefits.²³⁷

232. 638 F.3d 1111 (9th Cir. 2010).

233. *Id.* at 1120.

234. MCQUILLIN MUN. LAW REP. NL, *supra* note 230, at 3 (quoting *Guggenheim*, 638 F.3d at 1120–21).

235. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124).

236. Under the Armstrong Principle, courts must find a taking if property owners are forced to bear public burdens “which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

237. See Memorandum from the E. Bay Cmty. Law Ctr.’s Cmty. Econ. Just. Unit (Nov. 9, 2018) (on file with author).

There are several cases that determine that “local neighborhood preservation, continuity, and stability,” and “discourag[ment] [of] rapid turnover in ownership of homes . . . in order to inhibit displacement of lower income families by the forces of gentrification” are legitimate government interests.²³⁸ These policies are of similar “character” to ROFR policies under the *Lingle* standard because they also preserve affordable housing.

The property owner may argue, however, that under the Armstrong Principle, they are forced to bear a disproportionate burden that should be borne by the public as a whole. If the individual mobile park owner bought land and chose to establish a manufactured home park at that time, they should later be free to change the use or evict tenants at the end of their leases without offering a right of first refusal. If the court agreed that this group of land owners were being unfairly burdened, the public good of promoting affordable housing would not necessarily justify their disparate treatment. However, the negligible financial diminution in value of the land would be considered by the court in weighing the actual burden placed on the landowner.

The Supreme Court also held that the third prong of the *Penn Central* factors considers a reciprocity of advantage—in other words, whether a landowner receives benefits from the policy even as it simultaneously limits their rights.²³⁹ “[T]he more immediately and directly a regulation returns reciprocal benefits to the burdened landowner, the less likely” the court will determine a policy to be a taking.²⁴⁰ Average reciprocity considerations have also been interpreted as requiring a benefit to the public equal to the burden on the landowner.²⁴¹ The variety of interpretations the court takes when considering the character of the regulation further shows the lack of uniformity in the ad hoc test. However, what is certain is that the third factor can be weighed against the first two as part of a balancing test, with the public interest to be advanced by the policy weighed against the harm to the property owner.

With respect to OTP policies, ROFR policies should not be deemed a taking because the public interest served outweighs the minimal harm to owners. However, if right of first refusals were tried by a conservative court, it may consider any infringement of what they may call a fundamental property right (the right to dispose) as outweighing the public benefit, therefore justifying compensation paid to the landowner.

238. See *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992); see also *Santa Monica Beach, Ltd. v. Superior Ct.*, 968 P.2d 993, 1005 (Cal. 1999).

239. See *Fennell*, *supra* note 9, at 7.

240. See *id.* at 8 n.29.

241. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (where an average reciprocity of advantage between the owner of the restricted property and the rest of the community was weighed by the Court).

Although compensation need not be significant if the infringement is small,²⁴² as the *Manufactured Housing* and *Gregory* decisions showed, a court-determined taking also has a chilling effect on similar policies being passed or reinstated. Because of potential legal challenges, advocates of affordable manufactured home communities are taking a defensive posture and choosing not to propose ROFR policies, opting for less effective alternatives instead. OTP policies should be widely passed at this time when the affordability of manufactured home communities is threatened without fear of a takings determination.

III. AN INTEGRATED VIEW OF PROPERTY RESULTS IN THE CORRECT TAKINGS ANALYSIS

The *Gregory* and *Manufactured Housing* courts declared “the right to dispose” as fundamental, or essential, among property rights, thus justifying the invalidation of ROFR policies in California and Washington.²⁴³ Both state courts connected the right to dispose to other possessory rights listed in *General Motors*—namely “the right to possess, use and dispose of it.”²⁴⁴ The *Manufactured Housing* court likened the right to dispose to other fundamental property rights: the right to possess and to exclude others.²⁴⁵

The disaggregation of property rights in the attempt to single out those more fundamental than others is called *essentialism*.²⁴⁶ The implication of disaggregating individual property rights, identifying a definable

242. Even if ROFR policies are considered a taking, that finding does not necessarily invalidate a policy—it simply requires “just compensation.” U.S. CONST., amend. V. In 1987, the Supreme Court’s Justice Rehnquist held that if a regulation is ultimately determined a taking, compensation is due for the period from the imposition of the legislation until its judicial invalidation. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674 (1988). The value that the government would owe the landowner as just compensation is not necessarily significant. Even if courts find that granting residents the right of first refusal amounts to a taking, the net loss to the park owner may be zero, or very little if the owner can prove that certain parties did not make a bid on the property due to fear of their bid being displaced by tenants. See Berger, *supra* note 13, at 38 (writing that the determinations of monetary compensation are not always significant in takings jurisprudence). “Just compensation’ means the impact of the government action on the fair market value of the property . . .” *Id.* For example, in *Loretto*, “the Court held that a small, permanent cable box on the property owner’s roof was a taking, but because the box . . . had no impact on the value of the building, ‘just compensation’ was ultimately just one dollar.” *Id.* (footnote omitted).

243. *Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47, 58 (Ct. App. 1983); *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183, 191 (Wash. 2000).

244. See *Gregory*, 191 Cal. Rptr. at 58 (emphasis omitted) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945)).

245. See *Manufactured Hous. Cmty. of Wash.*, 13 P.3d at 191.

246. Katrina Wyman explains that since the late 1990s, new essentialists, like Thomas Merrill and Henry Smith, have tried to define property as having a definable core or essence. Wyman calls this movement “new essentialism,” acknowledg-

core, and placing them of a hierarchy of importance is that the fundamental property rights should tolerate less government intrusion, leading to a finding of regulatory takings when a policy infringes on that right.²⁴⁷ Critics of essentialism maintain that protecting the most fundamental property rights in this way “will block urgently needed regulation and redistribution.”²⁴⁸ Others, both on the right and left of the political spectrum, embrace disaggregation in relation to the just compensation clause, arguing that the state will simply pay for what it takes.²⁴⁹

Still, another alternative exists. Despite the widespread acceptance of essentialism, this view is flawed when used as a justification for expanding takings jurisprudence—justifying a regulation as a taking for the alleged infringement of a “core property right.”²⁵⁰ Non-essentialist property theorists maintain that there is no need to create a hierarchy of property rights because they are all interrelated. These theorists have argued that the bundle of rights metaphor stands for the precept that property is a holistic system made up of interactive components, not individual pieces that can be disaggregated. Adam Mossoff calls this idea the “integrated theory,” building off theories of “nominalism,” discussed below.²⁵¹

A. *The Bundle of Property Rights*

The bundle of property rights is a common metaphor describing a person’s interest in property. It contains sticks or “strands” that correspond to different rights. It is a legal construct that has evolved to describe the rights and responsibilities involved in ownership.²⁵² The theory enables the creation of a hierarchy of property rights according to the importance of these interests, or in the alternative, a list of rights which collectively comprise a range of property interests.

Although some point to the shortcoming of this metaphor, many maintain that it is still a useful concept. Property scholars such as Jane Baron and Gregory Alexander argue that the bundle of rights conceptual-

ing that these attempts to define property in that way are not new. Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183, 184 n.6 (2017).

247. See Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 981–82 (1989).

248. Wyman, *supra* note 246, at 185.

249. Richard Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 ECON. J. WATCH 223 (2011).

250. See Radin, *supra* note 242, at 1674–78 (discussing “conceptual severance” with regard to the idea that each incident or group of incidents of ownership in the bundle of rights constitutes a protectable property interest).

251. Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 372, 376 (2003).

252. See Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247 (2007) (originally delivered as a lecture to undergraduate law students and faculty at the Facoltà di Giurisprudenza, Università degli Studi di Udine, Udine, Italy in March, 2007).

ization remains useful both descriptively and normatively.²⁵³ Alexander maintains that “[n]o expression better captures the modern legal understanding of ownership than the metaphor of property as a ‘bundle of rights.’”²⁵⁴ Baron highlights the benefits of the bundle metaphor, portraying property composed of pieces that are combined together, but which can be disentangled.²⁵⁵ Many essentialists, however, argue that the bundle metaphor allows governments to regulate property as they see fit without triggering constitutional protections under the justification that the regulation only affects a single strand of property right and not the property as a whole.²⁵⁶

The origin of the bundle metaphor can be traced to a treatise written by John Lewis in 1888.²⁵⁷ Critics of the metaphor attribute its rise to prominence to the New Deal era when legal realists created justifications for state regulations limiting property owners’ rights for the benefit of the public. References to the bundle theory can also be found in William Blackstone’s writing, as well as in A.M. Honoré’s essay, “Ownership,” written in the 1960s, which disaggregated property into eleven “incidents.”²⁵⁸ Whether any of Honoré’s enumerated incidents were essential continues to be debated.²⁵⁹ Many maintain that the more modern-day bundle could consist of pretty much any combination of the eleven incidents enumerated by Honoré.²⁶⁰

The eleven incidents consist of:

1. The right to possess . . .
2. The right to use—the right “to personal enjoyment and use of the thing as distinct from” the right to manage and the right to the income.
3. The right to manage—the right “to decide how and by whom a thing shall be

253. Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 60 (2013); see also GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970* 319 (1997) (“No expression better captures the modern legal understanding of ownership than the metaphor of property as a ‘bundle of rights.’”); J. E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712 (1996) (“The currently prevailing understanding of property in what might be called mainstream Anglo-American legal philosophy is that property is best understood as a ‘bundle of rights.’”).

254. ALEXANDER, *supra* note 253, at 319.

255. See Baron, *supra* note 253, at 58–59.

256. See Wyman, *supra* note 246, at 184–85.

257. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 737 (1998); see also ALEXANDER, *supra* note 253, at 455 n.40 (citing JOHN LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* 43 (Chicago, Callaghan & Co. 1888)) (reporting that the first use of the metaphor was in a treatise on eminent domain published in 1888).

258. See Johnson, *supra* note 252, at 253–54 (citing A.M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURIS.*, First Series 107–47 (A.G. Guest ed., 1961)); see also Epstein, *supra* note 249, at 224 (citing to nine incidents rather than eleven).

259. See Baron, *supra* note 253, at 64–65.

260. See *id.* at 67.

used.” 4. The right to the income—the right “to the benefits derived from foregoing personal use of a thing and allowing others to use it.” 5. The right to capital—“the power to alienate the thing,” meaning to sell or give it away, “and to consume, waste, modify, or destroy it.” 6. The right to security—“immunity from expropriation,” that is, the land cannot be taken from the right-holder. 7. The power of transmissibility—“the power to devise or bequeath the thing,” meaning to give it to somebody after your death. 8. The absence of term—“the indeterminate length of one’s ownership rights,” that is, that ownership is not for a term of years, but forever. 9. The prohibition of harmful use—a person’s duty to refrain “from using the thing in certain ways harmful to others.” 10. Liability to execution—liability for having “the thing taken away for repayment of a debt.” 11. Residuary character—“the existence of rules governing the reversion of lapsed ownership rights”; for example, who is entitled to the property if the taxes are not paid, or if some other obligation of ownership is not exercised.²⁶¹

Although progressives are often associated with the rise of the bundle of property rights, some conservatives have embraced the metaphor as well. Richard Epstein asserts there is no reason to think that the disaggregation of property rights signifies the disintegration of property rights.²⁶² If disaggregation is facilitated by private parties rather than the state in a bottom-up rather than a top-down view of property, dividing the incidents as a part of trade agreements may increase worth of the property rather than devalue it.²⁶³

B. *Single Variable Essentialism*

Most essentialists consider the right to exclude as the most essential of all the property rights. *Kaiser Aetna v. United States*²⁶⁴ named the right to exclude a “universally held . . . fundamental element of the property right”²⁶⁵ and the *Loretto* Court described it as “one of the most treasured . . . [rights of] property.”²⁶⁶

261. This annotated list, with valuable explanations, is taken from Johnson, *supra* note 252, at 253.

262. Epstein, *supra* note 249, at 233.

263. *Id.*

264. 444 U.S. 164 (1979).

265. *Id.* at 179–80.

266. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). For a comparable holding, see also *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

A recent example of the Supreme Court's endorsement of the right to exclude as the most fundamental is found in *Cedar Point*, which held a restriction on the right to exclude as a taking, "whether it is permanent or temporary"²⁶⁷ and "no matter how small" the impact.²⁶⁸

Thomas Merrill calls the right to exclude "more than just 'one of the most essential' constituents of property—it is the *sine qua non*," explaining: "[g]ive someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property."²⁶⁹ Title to property gives the owner the right to use, possess, and enjoy the property, but if others are allowed unfettered access to share in the use and enjoyment of the property, the ownership right has no value.

Bethany Berger asserts that upholding the right to exclude as a distinctive right within property law seems a fairly modern development and one that necessitates involvement by the state to safeguard against discrimination and civil rights violations.²⁷⁰ For example, landlords are prohibited from excluding tenants through self-help evictions without due process of law.²⁷¹ Society's interest in limiting the right to exclude is also seen in the creation of a warranty of habitability, prohibiting eviction for non-payment of rent from residential homes where landlords fail to make essential repairs.²⁷² Racial exclusion policies in the post-civil war era were used to prohibit the entry of African Americans from private and public accommodations, and fair housing laws are necessary to safeguard against those exclusionary laws.²⁷³ Despite the potential for abuse, many agree with Merrill that "the right to exclude others is a necessary . . . condition of identifying the existence of [private] property," without which, strangers would be free to enter private property, rendering it valueless.²⁷⁴

C. *Multiple Variable Essentialism*

The second version of essentialism holds that property is defined by multiple attributes or incidents. In the *Gregory*, *Manufactured Housing*, and *General Motors* decisions, the courts link the right to dispose with the other fundamental rights, exhibiting what Merrill calls "multiple variable essentialism."²⁷⁵ This theory asserts that there are property rights more impor-

267. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021).

268. *Id.* at 2078 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002)).

269. Merrill, *supra* note 257, at 730.

270. See Berger, *supra* note 13, at 28.

271. *Id.* at 24.

272. *Id.* (citing Revised Unif. Residential Landlord Tenant Act § 4.105 (2015)).

273. *Id.* at 27–28.

274. Merrill, *supra* note 257, at 731.

275. *Id.* at 734.

tant than others, but there does not have to be just one. Most often, multiple variable essentialists consider the three possessory rights, plus the right to exclude, the most important sticks in the bundle of property rights.²⁷⁶

Multiple variable essentialism finds support in the Supreme Court's decisions. On several occasions, including in *General Motors*, the Court has stated that "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'"²⁷⁷ As Karl Manheim points out, placing "possessory takings" as the clearest and most intrusive form of eminent domain makes sense because it is physically appropriating an owner's property.²⁷⁸

D. *Non-Essentialist Theories: The Integrated Model*

The non-essentialist alternative is what Adam Mossoff calls an integrated model. Subscribers of this belief hold that it is counterintuitive to place the individual sticks of the bundle in a hierarchy with one strand higher than the next. Mossoff explains the "sticks" in the bundle can be compared to a bag of fruit.²⁷⁹ The person holding the bag still has a bunch of fruit regardless of the number of items inside. That person can describe what is being held accurately as a shopping bag full of fruit, regardless of whether there are one or eleven types of fruit inside.

Since property is more than a collection of sticks, a theory of property must address how the features of property relate to one another. Many aspects of property are only fully describable at the level of the property system as a whole, and some of property's desirable (and undesirable) effects emerge holistically. They are integral and should not be separated, as the bundle of property sticks implies.²⁸⁰ Strands can be tweaked, but they are not detachable. Property is a holistic system made up of interactive components.²⁸¹

If the integrated theory were utilized in takings jurisprudence, it would be inappropriate to justify an expansion of takings jurisprudence by upholding an individual property right or even a group of property rights as fundamental. There would be an acknowledgement that changing social and economic conditions necessitates the state to use its police powers

276. *See id.* at 736.

277. *See id.* at 736–37 (alteration in original) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)); *see also* *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984).

278. *See* Manheim, *supra* note 247, at 980–81.

279. *See* Mossoff, *supra* note 251, at 374.

280. Henry E. Smith, *Property As the Law of Things*, 125 HARV. L. REV. 1691, 1698–99 (2012) (note that Smith does not endorse the Bundle of Sticks metaphor and disavows that it is a theory at all).

281. *Id.* at 1700.

in various manifestations, consistent with the *Allard* precedent that a minor infringement of one property right does not establish a taking if the owner enjoys the other rights intact.²⁸²

1. *Contrasting the Integrated Theory with the Ownership Model*

When a court decides takings challenges by upholding certain sticks of the bundle as fundamental, it reveals its adoption of what Joseph Singer calls the “ownership model.”²⁸³ In adopting this posture, it misunderstands property’s dependence on state regulation, taking the stance that regulation and individual property rights are inapposite.

This Article furthers the theory that regulation is inherent in property ownership, as evidenced by zoning laws and landlord tenant laws which are present in any thriving society. Jane Baron explains the problems with courts adopting the ownership model: owners assume that property is associated with doing more or less whatever they want with what they own, and “[t]he burden is always on others (meaning nonowners or the state) to explain why the owner’s rights should be limited.”²⁸⁴ Baron asserts that while other property theories have competed with the ownership model in academic circles, the ownership model remains culturally and politically dominant.²⁸⁵

2. *A Holistic View of Property Rights Leads to the Correct Takings Analysis*

ROFR policies, just like any other state regulations, should be decided with a holistic view of property rights when facing a takings challenge. Following *Allard*, which was reiterated by the Supreme Court in *Keystone Bituminous*, the Court should not consider an infringement on one “strand” of the property right bundle a taking. As the *Allard* and *Keystone Bituminous* Courts stated, “the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.”²⁸⁶

With the activist Supreme Court bench looking to expand takings jurisprudence, perhaps it is enough to agree on what is *not* the right takings approach. The use of single variable or multiple variable essentialism to

282. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (“[W]here an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.” (quoting *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979))).

283. See SINGER, *supra* note 140, at 3.

284. Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 216 (2002) (alteration in original) (quoting SINGER, *supra* note 140, at 3, 68).

285. *Id.* at 216–17 (citing SINGER, *supra* note 140, at 10–13, 207) (noting that the bundle-of-rights approach “does not get rid of ownership as a concept; it merely asks us to talk about ownership of particular entitlements rather than ownership of the entire bundle”).

286. *Allard*, 444 U.S. at 65–66; *Keystone Bituminous Coal Ass’n*, 480 U.S. at 497 (quoting *Allard*, 444 U.S. at 65–66).

strike down land use regulations is inappropriate and misguided, resulting in the reinforcement of the status quo ownership model. In viewing the *Manufactured Housing* and *Gregory* decisions' use of the same fragmented tactic to strike down ROFR policies, one can see the fallacy of this same tactic as it is currently misdirected towards legitimate exercises of state police power.

CONCLUSION

In a nation where affordable rentals are vanishing by the day, manufactured home communities provide a unique opportunity for low-income individuals and families to enjoy homeownership.²⁸⁷ Despite the unparalleled economic benefits of this housing model, manufactured home owners are uniquely vulnerable to the sale of their rented parks. Contrary to the assumption that "mobile homes" can simply move elsewhere when faced with eviction, it is either impossible or extremely costly to uproot and transfer most manufactured housing once hooked to the ground. Further, there is a dwindling supply of manufactured home communities without others zoned to replace them.²⁸⁸ Now more than ever, as park owners are selling to private equity firms, it is essential to legislate OTP policies on a widespread basis.²⁸⁹

OTP policies have been largely successful in helping to preserve affordable housing, as seen in Washington, D.C.'s TOPA law, resulting in the preservation of thousands of affordable housing units.²⁹⁰ The same is true for ROFR policies in the manufactured home context. By allowing manufactured housing tenants the opportunity to purchase their parks before they are sold to a third party, OTP policies help to maintain manufactured home ownership as a legitimate and stable housing model. By contrast, without such policies in place, affordable manufactured home communities are in danger of extinguishment, similar to the fate of Lowry Grove, Minnesota.²⁹¹

Despite being challenged under takings jurisprudence in California and Washington state, OTP policies are generally not considered a taking of private property for public use in contexts outside of mobile home communities. The *Manufactured Housing* majority decision resulted in a scathing dissent by Judge Johnson and Judge Talmadge and was later abrogated in the subsequent *Chong Yim* decision.²⁹² These decisions, similar to *Cedar Point* and *Heights Apartments*, utilize an essentialist understanding of prop-

287. See Baker, Voigt & Jun, *supra* note 3, at 1.

288. See Sophie Kasakove, *Investors are Buying Mobile Home Parks. Residents Are Paying a Price*, N.Y. TIMES (Mar. 27, 2022), <https://www.nytimes.com/2022/03/27/us/mobile-home-park-ownership-costs.html> [<https://perma.cc/A5LD-55D2>].

289. See Baker, Voigt & Jun, *supra* note 3, at 1.

290. See Reed, *supra* note 52, at 7.

291. See Covington & Otárola, *supra* note 31.

292. See *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183 (Wash. 2000); *Chong Yim v. City of Seattle*, 451 P.3d 675, 683 (Wash. 2019).

erty interests. The essentialist outlook of property is incorrect and should be replaced by the integrated view, treating each property right as interconnected as articulated by the *Allard* and *Keystone Bituminous* decisions. The holistic approach acknowledges the role of regulation in ensuring property rights rather than framing the state outside and inapposite to ownership rights.

It is undisputed that the *Cedar Point* decision will result in an expanded takings doctrine. There needs to be a greater understanding of the danger of adapting essentialism as a rationale used by the Court in takings jurisprudence. Essentialism used as justification for striking down any regulation as a taking that does not promote the status quo of property owners must be discontinued to prevent the chilling effect of regulations like OTP policies. The essentialist rationale was used in the past to strike down ROFR policies in two lower court decisions, despite widespread acknowledgement that these policies are a minor infringement of an owner's right to dispose, insignificant when compared to the bundle of property rights that remain intact.

Now, more than ever, when manufactured housing communities experience rent spikes and displacement exacerbated by changes in ownership, OTP policies must be implemented nationwide rather than staying on the defensive. We must keep a watchful eye over OTP policies to ensure that they are never again struck down by the Court, and that the *Penn Central* factors, rather than an expanded categorical takings doctrine, are correctly applied.

