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## A Dangerous Disappearing Act: Preserving Affordable Housing in the Face of Maturing Mortgages

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# A DANGEROUS DISAPPEARING ACT: PRESERVING AFFORDABLE HOUSING IN THE FACE OF MATURING MORTGAGES

KAITLIN J. BROWN\*

**Abstract:** By the year 2020, almost all of the affordable housing units created by Sections 221(d)(3) and 226 of the Housing Act of 1937 could disappear. These units were created in the late 1960s in an effort to draw more private equity to the affordable housing market. The federal government entered into contracts with developers, exchanging mortgage subsidies and insurance for affordability clauses in the developers' mortgages that required a certain percentage of their developments be kept for affordable housing for the life of the mortgage. These mortgages were set for a term of forty years. The country is now faced with an unprecedented housing crisis as these mortgages reach their maturity mark. Unfortunately, the federal government lacks the funding and political will to pass the necessary legislation to protect the current stock of affordable housing. Furthermore, only a handful of states have taken the lead in efforts to preserve affordability through new laws that impose notice requirements on owners of developments reaching maturity, and afford rights of first offer and first refusal to local housing authorities so that they may purchase these properties to retain affordability. This Note argues that more states should adopt such laws to ensure that the tens of thousands of families who are bound to lose their subsidized housing are provided reasonable protections.

## INTRODUCTION

Tina Amenta lived with her husband in a Colorado town in a rental unit subsidized by the Fort Collins Housing Authority ("FCHA").<sup>1</sup> She, along with dozens of other families, was forced to pack up and move when the FCHA decided to sell eighty-eight of its 154 public housing units.<sup>2</sup> The FCHA sold the units because, as a local housing agency, it did not receive enough government funds to refurbish and maintain each unit.<sup>3</sup> Fort Collins families were "heart-

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<sup>1</sup> See Pat Ferrier, *88 Fort Collins Families Displaced by Public Housing Shift*, COLORADOAN, Aug. 3, 2013, available at <http://www.coloradoan.com/article/20130803/NEWS01/308030029/88-Fort-Collins-families-displaced-by-public-housing-shift>.

<sup>2</sup> *Id.*

<sup>3</sup> *See id.*

broken” to leave their homes.<sup>4</sup> The FCHA provided vouchers to the displaced residents to supplement rent at a new development.<sup>5</sup> Nonetheless, many of the displaced tenants could not find new affordable housing because affordable rental units in Fort Collins, as in many places around the United States, are extremely scarce.<sup>6</sup>

Because Ms. Amenta can only afford two hundred dollars for monthly rent, she cannot afford to rent a market-rate apartment; that is, she must either find another affordable unit or risk homelessness.<sup>7</sup>

\* \* \*

In early 2011, low-income tenants of the Los Angeles neighborhood of Arlington Heights received letters from their landlord notifying them of significant rent increases, in some cases doubling their monthly payment.<sup>8</sup> The rent increase forced some tenants, including many long-term residents, to move.<sup>9</sup> Similarly, in 2011, residents of the Burbank Apartments development in Boston’s Fenway neighborhood were informed that more than 170 affordable housing units, representing ten percent of the neighborhood’s affordable housing, were being converted to market-rate units.<sup>10</sup> The development’s owner, First Realty Management, decided to opt out of its Section 8 contract and convert the affordable units to market rate.<sup>11</sup> The current tenants were promised

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *Id.*; JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION’S HOUSING 2013, at 29–30 (2013), [hereinafter STATE OF THE NATION’S HOUSING], available at <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2013.pdf> (noting the current shortage of affordable housing throughout the United States). The FCHA has a waiting list of 1900 families. Ferrier, *supra* note 1.

<sup>7</sup> *See* People to End Homelessness, Inc. v. Develco Singles Apartments Assocs., 339 F.3d 1, 3 (1st Cir. 2003) (discussing that tenants with subsidized housing pay less than the market rate); Ferrier, *supra* note 1. Ms. Amenta rents an apartment at a level that is subsidized by the FCHA. Ferrier, *supra* note 1. The FCHA pays the owner the difference between the rent Ms. Amenta can afford and the “market rate” the owner could otherwise earn. *See id.* Local housing authorities, such as FCHA, participate in a number of federal programs to be able to offer affordable rental units to low-income families. *See generally* Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413 (2004) (discussing the history of affordable housing programs).

<sup>8</sup> *See* Adam Cowing, *The Latest Threat: How Mortgage Maturity Jeopardizes Affordable Housing*, 21 J. AFFORDABLE HOUS. & CMTY. DEV. L. 233, 233 (2012).

<sup>9</sup> *See id.* at 233–34.

<sup>10</sup> *See* Sara Brown, *At Hearing, Fenway Residents Fight Loss of Affordable Housing at Burbank Apartments*, BOSTON.COM (Mar. 15, 2011, 11:57 AM), [http://www.boston.com/yourtown/news/fenway-kenmore/2011/03/fenway\\_residents\\_fight\\_loss\\_of.html](http://www.boston.com/yourtown/news/fenway-kenmore/2011/03/fenway_residents_fight_loss_of.html).

<sup>11</sup> *Id.* The “Section 8” program was created by the federal Department of Housing and Urban Development (HUD) in 1974 and is governed largely by the Housing Act of 1937. *People to End Homelessness*, 339 F.3d at 3; *see* 42 U.S.C. § 1437f (2012) (authorizing HUD to enter into Section 8 contracts with public housing agencies to subsidize rent for low-income tenants). The purpose of Sec-

vouchers from First Realty Management to subsidize their current or future apartments.<sup>12</sup> Once the current tenants move out of their units, however, the units will no longer be available as subsidized housing.<sup>13</sup>

When the owners of developments such as Burbank Apartments and Arlington Heights purchased their respective properties, they did so with the assistance of a number of government programs.<sup>14</sup> In the 1960s and 1970s, the U.S. Congress established federal housing programs to incentivize private investment in the affordable housing market.<sup>15</sup> Through these federal programs, owners were able to borrow money from the bank to buy the development at an interest rate far below the market rate at the time.<sup>16</sup> The U.S. government subsidized the low interest rate by promising to pay the bank the resulting difference in interest rates.<sup>17</sup> These very low interest rates made it affordable for developers to build new units.<sup>18</sup> As a condition of these mortgage deals, the owners had to contractually agree to maintain a certain number of units as affordable housing.<sup>19</sup> In other words, the owners promised to charge below-market rent for some of the units, which they would rent to low-income tenants.<sup>20</sup> These promises were memorialized in the mortgages the owners

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tion 8 is to “aid[] low-income families in obtaining a decent place to live and [to promote] economically mixed housing . . . .” See § 1437f(a); *People to End Homelessness*, 338 F.3d at 3. Under Section 8, HUD and the private developers enter into Housing Assistance Payment Contracts (“HAPs”), which set the maximum monthly rent that the owner may charge for each unit. *People to End Homelessness*, 338 F.3d at 3. In Section 8 developments, the subsidized tenants pay the property owner a portion of their income, usually no more than thirty percent. *Id.* The government pays the difference between the tenant’s payments and the market rate. *Id.*

<sup>12</sup> See Brown, *supra* note 10.

<sup>13</sup> See *id.*

<sup>14</sup> See Cowing, *supra* note 8, at 234–35; Brown, *supra* note 10; Emily Achtenberg, *Maturing Mortgages: The Next Frontier of the Expiring Use Crisis* 5 (Ctr. for Soc. Pol’y, Univ. of Mass. Bos., Working Paper No. 2009-8, 2009) (discussing the early government programs that enabled developers to purchase properties so long as the properties contained affordable housing).

<sup>15</sup> See Cowing, *supra* note 8, at 234–35. In 1961, the Senate held hearings concerning the National Housing Act where senators voiced their concern about the nation’s developing homelessness problems as well as the “sluggishness” in the homebuilding industry. See COMM. ON BANKING & CURRENCY, HOUSING ACT OF 1961, S. REP. NO. 87-281, at 3 (1961), as reprinted in 1961 U.S.C.C.A.N. 1186, 1192. Some of the stated purposes of the amendments to the National Housing Act included to “enable private enterprise to participate to the maximum extent in meeting the housing needs of moderate-income families,” and “to encourage rehabilitation and improvement of existing properties by establishing a long-term, low-interest rate improvement and rehabilitation program within the medium of FHA loan insurance . . . .” *Id.* at 1–2, 4.

<sup>16</sup> See Williams, *supra* note 7, at 429–30.

<sup>17</sup> See Michael Quirk, Note, *Preserving Project-Based Housing in Massachusetts: Why the Voucher Discrimination Law Falls Short*, 30 REV. OF BANKING & FIN. L. 651, 657–58 (2010–2011).

<sup>18</sup> See *id.* at 657.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* HUD defines “low income” as determined by taking a certain percentage of the median family income (“MFI”) per geographic area defined by the Office of Management and Budget’s metropolitan area definitions. See 42 U.S.C. § 1437a(b)(2) (2012); U.S. DEP’T OF HOUS. & URBAN DEV.,

signed.<sup>21</sup> These mortgages—and the promises to maintain affordable units—were set to expire, or mature, after forty years.<sup>22</sup>

Hundreds of thousands of mortgages for these federal programs—along with the use restrictions within the mortgages—have expired or will expire before 2020.<sup>23</sup> Once the restrictions expire, owners may rent the units at market rates.<sup>24</sup> Most of the current tenants are low-income families and individuals who will not be able to afford the higher rent when the units are converted.<sup>25</sup> These families and individuals will likely have to move out and look for new, affordable housing, a task that may prove to be extremely difficult because of the already existing deficit of available affordable units.<sup>26</sup>

In 2011, there were 12.1 million “extremely low-income” renters in the United States—2.5 million more than in 2007.<sup>27</sup> Meanwhile, in the same year, there were only 6.8 million housing units affordable for extremely low-income renters—135,000 units fewer than in 2007.<sup>28</sup> The scarcity of these affordable housing units has only been amplified by the maturing mortgage crisis; due in part to this crisis, between 2001 and 2011, the permanent stock of affordable housing in the United States decreased by 12.8 percent.<sup>29</sup>

NOTICE PDR-2014-03 1–3 (2013) [hereinafter HUD NOTICE PDR-2014-03]. The income limits used for the Section 236 program in 2014 were the same as the Section 8 low-income limits, which are statutorily defined. *See* § 1437a(b)(2). These income limits are normally set at eighty percent of an area’s MFI for a family of four, and are adjusted for family size and unusually high or low housing costs. *Id.*

<sup>21</sup> *See* Quirk, *supra* note 17, at 657 n.35 (citing *Cienega Gardens v. United States*, 194 F.3d 1231, 1234–35 (Fed. Cir. 1998)) (describing the execution of deeds of trust and mortgage notes under the subsidized mortgage programs).

<sup>22</sup> *See id.*

<sup>23</sup> *See* Cowing, *supra* note 8, at 238 (stating that the mortgage maturity crisis is predicted to affect 190,000 units between 2012 and 2020).

<sup>24</sup> *See id.*

<sup>25</sup> *See id.* at 242 (noting that the effect of mortgage maturity includes the loss of affordable rent and possible relocation, particularly for those families who live in unassisted units); *see also* 42 U.S.C. § 1437a(b)(2) (2012) (mandating that tenants in subsidized units fit the definition of low- or extremely low-income).

<sup>26</sup> *See* STATE OF THE NATION’S HOUSING, *supra* note 6, at 5; Cowing, *supra* note 8, at 241 (noting that in Los Angeles, residents of units with these federally subsidized mortgages will be forced to move out of their homes); Williams, *supra* note 7, at 442–43 (noting the current large nationwide waitlist for individuals seeking subsidized housing). The stock of affordable housing available to households with less than thirty percent of the area median income is shrinking. STATE OF THE NATION’S HOUSING, *supra* note 6, at 5. According to HUD estimates, only one in four of those eligible for rental assistance obtain this help. *Id.*

<sup>27</sup> STATE OF THE NATION’S HOUSING, *supra* note 6, at 5 (defining “extremely-low income” households as any household with only thirty percent of the area’s median income).

<sup>28</sup> *Id.* at 29–30. A family’s “affordable rent” is defined by statute and is based on the area’s median family income. *See* HUD NOTICE PDR-2014-03, *supra* note 20, at 2.

<sup>29</sup> *See* STATE OF THE NATION’S HOUSING, *supra* note 6, at 29 (providing the percentage of low-income housing lost nationwide between 2001 and 2011); Edward J. Sullivan & Karin Power, *Coming Affordable Housing Challenges for Municipalities After the Great Recession*, 21 J. AFFORDABLE HOUS.

These statistics are replicated on the state level.<sup>30</sup> In Massachusetts, the mortgages in approximately 130 subsidized properties—totaling nearly 17,000 units—will mature by 2019, while in California, Los Angeles County alone will see fifty-seven properties—comprising more than 5,000 units—mature by 2015.<sup>31</sup> Many of the properties with maturing subsidized mortgages are located in cities like Boston and Los Angeles, and are in neighborhoods that have gentrified since these developments were built in the 1960s.<sup>32</sup> Owners in gentrified neighborhoods have a significant incentive to convert these apartments to market rates and charge as much as possible in monthly rent.<sup>33</sup> In short, current owners are able to earn higher profits on the open market than through government subsidies.<sup>34</sup> Because this sudden depletion of the affordable housing stock is set to occur at a time when the number of households needing these affordable units is actually increasing, the United States is facing a looming housing crisis.<sup>35</sup>

This Note examines the crisis of the loss of hundreds of thousands of units due to the expiration of government-subsidized mortgages and Section 8 contracts. Part I discusses the history of affordable housing in the United States, including the impetus for housing programs for low-income tenants and the program's evolution over the last fifty years. Part II presents the impending crisis caused by the imminent expiration of hundreds of thousands of these mortgages. In particular, Part II discusses the weaknesses of past legislative attempts by federal and state governments to address this crisis, and describes why litigious efforts to maintain affordable housing have fallen short. Finally, Part III proposes that states should adopt preservation statutes similar to the statute adopted in Massachusetts in order to address the crisis in the short term. State statutes that require notice prior to conversion of affordable housing, and mandate that owners give state housing authorities rights of first offer and first

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& CMTY. DEV. L. 297, 307 (2013) (noting that for owners of subsidized units who are located in competitive markets, “the temptation to convert [their subsidized units] at the conclusion of their HUD contracts to market-rate rents may be too financially appealing to resist”).

<sup>30</sup> See Cowing, *supra* note 8, at 240; Achtenberg, *supra* note 14, at 3.

<sup>31</sup> See Cowing, *supra* note 8, at 240; Achtenberg, *supra* note 14, at 3.

<sup>32</sup> See Rachel D. Godsil, *The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing*, 78 BROOK. L. REV. 319, 333–34 (2013) (describing gentrification trends in New York City, San Francisco, Boston, and Chicago).

<sup>33</sup> See *id.* at 334 (noting that gentrification's displacement of both residents and businesses is a result of increased demand for housing and commercial space, which results in higher rental and purchase prices); Sullivan & Power, *supra* note 29, at 307 (noting the natural incentive to convert apartments to market rate in neighborhoods where demand for housing is high because market rents are high).

<sup>34</sup> See Sullivan & Power, *supra* note 29, at 307.

<sup>35</sup> See *id.* (noting that approximately twenty-one percent of HUD-subsidized mortgages will mature by 2013 and properties located in competitive markets with low vacancy rates and high average market rents will likely lose their affordability when the owners convert their units).

refusal, provide state governments, non-profits, and tenant organizations the time and legal recourse to preserve existing affordable housing.

## I. THE TORTURED HISTORY OF AFFORDABLE HOUSING IN THE UNITED STATES

The lack of affordable housing in the United States has been an intractable policy issue since the mid-twentieth century.<sup>36</sup> On the heels of the Great Depression, the United States experienced a dramatic increase in homelessness.<sup>37</sup> In the 1930s and 1940s, Congress attempted to address the crisis primarily by providing affordable housing through government-run projects.<sup>38</sup> Government housing was established with the goal of providing decent and affordable housing to any citizen.<sup>39</sup> Due to the high costs of building and maintaining these projects, however, the government struggled to meet the nation's housing needs.<sup>40</sup> As a result, many members of Congress, who questioned the cost and efficiency of public housing, quickly challenged the implementation of government-run housing projects.<sup>41</sup>

Beginning in the 1960s, the federal government began experimenting with programs to involve the private sector in the provision of affordable housing.<sup>42</sup> Rather than continuing to wholly fund and operate its own affordable housing projects, the federal government under the Kennedy and Johnson administrations began providing incentives for private developers to build and

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<sup>36</sup> See Michael Freedman, Note, *In Search of Congressional Intent: Does LIHPRHA Restrict State and Local Governments from Preserving Affordable Housing?*, 13 J.L. & POL'Y 741, 749–60 (2005) (discussing the history of preservation programs and their shortcomings); Achtenberg, *supra* note 14, at 5–6 (discussing fifty years of housing policy).

<sup>37</sup> See Williams, *supra* note 7, at 427.

<sup>38</sup> See *id.* at 427–29; see also United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (1937) (codified as amended at 42 U.S.C. § 1437 (2012)) (establishing the United States Housing Authority and loans to low-rent housing).

<sup>39</sup> See 42 U.S.C. § 1437(a) (2006).

<sup>40</sup> See Alexander Von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, 11 HOUSING POL'Y DEBATE 299, 303, 310 (2000).

<sup>41</sup> See *id.* at 303. Following the passage of the Housing Act of 1937, the program encountered sustained political challenges. *Id.* Between 1938 and 1942, anti-New Deal politicians were elected to Congress and eventually succeeded in cutting off funding for this early public housing program. *Id.* In 1949, Congress passed a new Housing Act, which restored many of the federal housing programs, including a new commitment to building 810,000 new low-rent public housing units over the following six years. *Id.* at 310; see also United States Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413, 428 (1949) (codified as amended at 12 U.S.C. § 1716 (2012)). Immediately after its passage, however, the Housing Act of 1949 was mired in political opposition due to objections to federally funded housing in general as well as objections to racial integration. *Id.* While the goal of the 1949 Act was to construct 810,000 units within six years, it took the federal government twenty years to complete this goal. *Id.*

<sup>42</sup> See Von Hoffman, *supra* note 40, at 319.

maintain affordable housing under the programs commonly known as Section 221(d)(3) and Section 236.<sup>43</sup> In 1965, former President Johnson created the Department of Housing and Urban Development (HUD), which took on the responsibility of providing housing opportunities for low-income individuals.<sup>44</sup> Then, in the 1970s, the Nixon administration pushed new legislation through Congress, ultimately signed by President Ford, which established the Section 8 program within HUD.<sup>45</sup> Taken together, these new programs were initially successful in harnessing the power of the private sector.<sup>46</sup> Each of these programs, though, had inherent expiration dates.<sup>47</sup> These expiration dates form the foundation of the current looming housing crisis.<sup>48</sup>

### A. Subsidized Mortgages and the Section 8 Program

As the federal government sought to exit the direct housing market, it looked for ways to spur the private market to provide more affordable housing.<sup>49</sup> The U.S. Senate developed the first government incentive program—referred to as Section 221(d)(3)—under the 1961 Housing Act, to “enable private enterprise to participate to the maximum extent in meeting the housing

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<sup>43</sup> See Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 236, 82 Stat. 476 (1968) (establishing a federally funded mortgage subsidy to private developers, known as Section 236); Housing Act of 1961, Pub. L. No. 87-70, § 101, § 221(d)(3), 75 Stat. 149, 149–50 (1961) (establishing the below-market interest rate program, known as Section 221(d)(3)); Von Hoffman, *supra* note 40, at 318–19.

<sup>44</sup> See Williams, *supra* note 7, at 429. In 1965, Congress created HUD with the Department of Housing and Urban Development Act, and also transferred the Federal Housing Administration (FHA) to HUD. See Housing & Development Act of 1965, Pub. L. No. 89-174, 79 Stat. 667, 667 (1965); 24 C.F.R. § 200.1 (1968).

<sup>45</sup> Von Hoffman, *supra* note 40, at 320; see Housing & Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified as amended at 42 U.S.C. § 1437f (2012)); Quirk *supra* note 17, at 659.

<sup>46</sup> See Williams, *supra* note 7, at 429–30 (noting that Section 236’s privately run housing programs in part helped to create more housing by the 1970s than had been created over forty years by the federally run public housing programs, and noting that Section 8 was likely the most successful affordable housing program for low-income people). *But see* Von Hoffman, *supra* note 40, at 319 (stating that because Section 221(d)(3) was not initially successful, Congress passed Section 236 to supplement its efforts).

<sup>47</sup> See *Cienega Gardens v. United States (Cienega X)*, 503 F.3d 1266, 1270 (Fed. Cir. 2007) (discussing that the mortgages created under Sections 221(d)(3) and 236 were meant to last forty years, but that they also had prepayment clauses that allowed owners to pay off their mortgages after twenty years); *People to End Homelessness, Inc. v. Develco Singles Apartments Assocs.*, 339 F.3d 1, 3 (1st Cir. 2003) (noting that owners are not required to renew their Section 8 contracts upon the contract’s expiration).

<sup>48</sup> See Achtenberg, *supra* note 14, at 5.

<sup>49</sup> See Williams, *supra* note 7, at 429.



needs of moderate-income families.”<sup>50</sup> Under Section 221(d)(3), the Federal Housing Administration (FHA), the precursor to HUD, implemented the Below-Market Interest Rate (“BMIR”) program, which insured mortgages at below-market rates for property owners who provided affordable rental housing.<sup>51</sup> Under the BMIR program, project owners entered into mortgage contracts with private lenders at the market rate, and these mortgage contracts were later purchased by the Federal National Mortgage Association (“FNMA”).<sup>52</sup> The FNMA was then able to charge the owners below-market interest rates and subsidize the difference using government funds.<sup>53</sup> Still, the BMIR did not attract the response from the private market that the government expected, leaving the program dependent on federal funding.<sup>54</sup>

To address the lack of private sector participation, Congress amended the Housing Act and created a new program under the Housing and Urban Development Act of 1968, known as Section 236.<sup>55</sup> Under the Section 236 program, the federal government subsidized interest rates on private market-rate mortgages, allowing private developers to obtain mortgages at very low interest rates.<sup>56</sup> These programs were available until 1973, when President Nixon suspended the programs indefinitely.<sup>57</sup>

The mortgages signed under Sections 221(d)(3) and 236 were usually for a term of forty years and contained use restrictions to ensure that the property continued to provide affordable housing as long as it benefited from the government mortgage subsidy or mortgage insurance.<sup>58</sup> This meant that, for a term of forty years, these mortgage holders would receive government benefits such as favorable interest rates and tax rates, and in return would provide a guaran-

<sup>50</sup> See Housing Act of 1961, Pub. L. No. 87-70, § 101, § 221(d)(3), 75 Stat. 149, 149–50 (1961) (enabling Section 221(d)(3) in Section 101) (1961); COMM. ON BANKING & CURRENCY, HOUSING ACT OF 1961, S. REP. NO. 87-281, at 4 (1961), as reprinted in 1961 U.S.C.C.A.N. 1186, 1192.

<sup>51</sup> See Housing Act of 1961 § 101; Cowing, *supra* note 8, at 235 (noting the BMIR program was implemented pursuant to Section 221(d)(3)).

<sup>52</sup> See Housing Act of 1961 § 101; *Cienega X*, 503 F.3d at 1270 (explaining the historical legislation).

<sup>53</sup> See *Cienega X*, 503 F.3d at 1270.

<sup>54</sup> See Von Hoffman, *supra* note 40, at 319; Lawrence Geller, *Expiring Use Restrictions: Their Impact and Enforceability*, 24 NEW ENG. L. REV. 155, 158 (1989).

<sup>55</sup> See Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 236, 82 Stat. 476 (1968); Von Hoffman, *supra* note 40, at 319.

<sup>56</sup> See Achtenberg, *supra* note 14, at 5; Geller, *supra* note 54, at 157–58; Quirk, *supra* note 17, at 658.

<sup>57</sup> See Von Hoffman, *supra* note 40, at 320 (noting that, in response to corruption and economic inefficiencies, President Nixon issued a moratorium on all federal housing program in 1973).

<sup>58</sup> See *Cienega X*, 503 F.3d at 1270–71. Under both Sections 221(d)(3) and 236, owners entered into regulatory contracts with HUD, which required that important management decisions, including rent increases, be approved by HUD. *Id.* at 1271. The agreements also limited the profit that owners could make on their initial equity investment to six percent. *Id.*

teed source of affordable housing.<sup>59</sup> As a further incentive, the government added a provision to the restricted use mortgages that allowed developers to pay off their mortgages after twenty years (an action known as “prepaying” the mortgage).<sup>60</sup> This enabled developers to choose to leave the government contract for the open market if it was more lucrative to the developers.<sup>61</sup> At the time this provision was written, Congress did not consider what would happen if, all at once, many of these mortgagors decided to exit the affordable housing market at the twenty-year mark.<sup>62</sup> Rather, members of Congress focused on the goal of incentivizing private developers to take over the provision of affordable housing from the government.<sup>63</sup>

The Sections 221(d)(3) and 236 programs were popular amongst developers in the 1960s and 1970s.<sup>64</sup> By the end of the 1970s, twelve years after its implementation, the public-private government housing programs had produced more housing units than the federally run public housing programs had produced in over forty years.<sup>65</sup> By the mid-1970s, however, the subsidized mortgage programs were facing serious issues, particularly the Section 236 program, which was hampered by foreclosures, inefficiency, and high costs.<sup>66</sup> Consequently, in 1973, President Nixon issued a moratorium on all federal housing programs.<sup>67</sup>

In 1974, Congress created the Section 8 rental housing assistance program under the Housing and Community Development Act to supplement the affordable housing legislation of the 1960s.<sup>68</sup> Section 8 became permanent in 1987.<sup>69</sup>

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<sup>59</sup> See *id.*

<sup>60</sup> See *Cienega Gardens v. United States (Cienega IV)*, 194 F.3d 1231, 1235 (Fed. Cir. 1998).

<sup>61</sup> See *id.*

<sup>62</sup> See Geller, *supra* note 54, at 161. See generally *Housing and Urban Development Legislation and Urban Insurance: Hearing on H.R. 15624, H.R. 15625, and Related Bills Before the Subcomm. on Hous. of the H. Comm. On Banking & Currency*, 90th Cong. 83–84 (1968) [hereinafter *HUD Hearing*] (detailing interest in attracting private capital and growing the housing stock, but lacking discussion on dangers of prepayment).

<sup>63</sup> See *HUD Hearing*, *supra* note 62, at 83–84 (noting the goal of “attracting large amounts of private equity money into the provision of low and moderate income housing”); Geller, *supra* note 54, at 161; see also 111 CONG. REC. 6811–12 (daily ed. Apr. 6, 1965) (statement by Senator Javits introducing the Moderate Income Housing Act of 1965 to address one of the “greatest deficiencies” in the federal housing program: the lack of new housing construction by private enterprise).

<sup>64</sup> See Williams, *supra* note 7, at 430.

<sup>65</sup> See *id.* Section 236 in conjunction with Section 235—a similar program that also provided subsidized interest rates—produced more low-income housing units than other public housing initiatives. *Id.*

<sup>66</sup> See Von Hoffman, *supra* note 40, at 320.

<sup>67</sup> See *id.*

<sup>68</sup> Housing & Community Development Act of 1974, Pub. L. No. 93-383, § 201, 88 Stat. 633 (1974) (codified as amended at 42 U.S.C. § 1437f (2012)); see Quirk, *supra* note 17, at 659.

<sup>69</sup> See Housing & Community Development Act of 1987, Pub. L. No. 100-242, § 141, 101 Stat. 1815 (1987) (codified as amended at 42 U.S.C. 1437 (2006)); Williams, *supra* note 7, at 441.

The Section 8 program has two primary components: project-based assistance and tenant-based assistance.<sup>70</sup> Under Section 8, rental vouchers are given to either individual tenants or assigned to particular developments.<sup>71</sup> Tenants apply for a Section 8 voucher through their local public housing authority, which administers the federal program.<sup>72</sup> Tenants who hold a tenant-based voucher are able to access Section 8 subsidized rents for any housing unit that meets HUD's regulatory standards for quality and rent reasonableness.<sup>73</sup>

Project-based vouchers are tied to a particular development.<sup>74</sup> Tenants who decide to move away from a development with project-based vouchers lose the guarantee of subsidized rent.<sup>75</sup> Pursuant to the project-based Section 8 program, the federal government enters into Housing Assistance Payment ("HAP") contracts with private development owners.<sup>76</sup> These HAP contracts allow project owners to charge a lower rate to qualified tenants and bill the government for the difference between the subsidized rate and fair market rate.<sup>77</sup> The contracts, executed between the government and private owners in the 1970s, were typically for terms between five and twenty years, with an option provided to the private owners to renew.<sup>78</sup> The Section 8 program continues to be a major ve-

<sup>70</sup> See 42 U.S.C. § 1437f(f)(6)–(7) (2012) (defining project-based and tenant-based assistance); § 1437f(o) (codifying the Section 8 voucher program).

<sup>71</sup> See § 1437f(o)(1) (providing that HUD may enter into Section 8 contracts with individual tenants through the local housing authority); § 1437f(o)(13) (providing that HUD may enter into contracts with individual housing developments through the local housing authority); Quirk, *supra* note 17, at 660. With vouchers, tenants only pay a portion of their total monthly rent (and the government pays the remainder), and a tenant's total monthly rent typically does not exceed thirty percent of that tenant's monthly income. Quirk, *supra* note 17, at 660. Units must qualify for Section 8 assistance under the statute by meeting certain quality standards and charging a reasonable rent. See 24 C.F.R. § 982.1 (2014).

<sup>72</sup> See 24 C.F.R. § 982.1 (2014)

<sup>73</sup> Quirk, *supra* note 17, at 660; see 24 C.F.R. § 982.1 (2014).

<sup>74</sup> Quirk, *supra* note 17, at 660. Under the current Housing Choice Voucher Program, the project-based component allows public housing agencies to base a portion of their housing choice vouchers in specific housing developments. See Amy Glassman, *Project-Based Voucher Reforms Will Facilitate Development of Affordable Units but Should Be Taken Further*, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 71, 78 n.2 (2008). Older project-based Section 8 programs included funding for substantial rehabilitation, new construction, and moderate rehabilitation of low-income funding. *Id.* These older programs have been repealed. See *id.*

<sup>75</sup> See Quirk, *supra* note 17, at 660.

<sup>76</sup> *Id.*

<sup>77</sup> See *id.*

<sup>78</sup> See *People to End Homelessness*, 339 F.3d at 3 (noting that HAP contracts were entered into in the 1970s); Cowing, *supra* note 8, at 236 (noting that the original Section 8 contracts "lasted between five to twenty years, with options to renew"). After 1981, HUD did not authorize any new HAP contracts. See Williams, *supra* note 7, at 440. This means that the only source of affordable housing under this program derives from those developments that entered into a HAP contract prior to 1981. See *id.* Property owners had complete discretion over whether or not to renew a HAP contract at the end of the term. See Cowing, *supra* note 8, at 236.

hicle for affordable housing.<sup>79</sup> Both the HAP contracts and the government-subsidized mortgages under Sections 221(d)(3) and 236, however, pose the risk of a massive and sudden conversion to market-rate units when their respective contracts expire.<sup>80</sup> This is precisely the problem that the federal government faced in the 1980s.<sup>81</sup>

### B. The Prepayment Crisis of the 1980s

Along with changes to the tax code, options given to developers to prepay subsidized mortgages and to decline to renew HAP contracts created an affordable housing crisis in the 1980s.<sup>82</sup> The government's assumption that the affordable housing programs would replenish themselves and that participating owners would remain in the program proved shortsighted.<sup>83</sup> The housing market fundamentally began to change in the 1980s.<sup>84</sup> Wealthy individuals began moving from the suburbs back to the cities in a movement known as gentrification.<sup>85</sup> This migration occurred at an increasing rate, causing housing costs to skyrocket as previously undesirable, low-value neighborhoods turned into high-rent, high-return opportunities for property owners.<sup>86</sup> In addition, changes

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<sup>79</sup> See Williams, *supra* note 7, at 441. Between 1974 and 2000, the number of households participating in the Section 8 program grew from 30,000 to 1.4 million. *Id.*

<sup>80</sup> See Achtenberg, *supra* note 14, at 5; Sullivan & Power, *supra* note 29, at 307 (noting that twenty-one percent of HUD's subsidized mortgages were scheduled to mature by 2013).

<sup>81</sup> See Sullivan & Power, *supra* note 29, at 307. While project-based Section 8 developments carry a risk similar to the 221(d)(3) and 236 mortgage programs, tenant-based assistance does not suffer from the same type of inherent expiration date. See Achtenberg, *supra* note 14, at 5. Nevertheless, the Section 8 tenant-based assistance program is oversubscribed and not accessible to many new low-income tenants. See Williams, *supra* note 7, at 442. The national average waiting time for a Section 8 tenant voucher was twenty-eight months, and the wait time in large cities is typically much longer. *Id.* at 442–43. For example, in New York City, families typically wait for eight years. *Id.* at 443. Likewise, in Los Angeles, the wait for a Section 8 voucher can be up to ten years. *Id.*

<sup>82</sup> See Cowing, *supra* note 8, at 236–37; Geller, *supra* note 54, at 162.

<sup>83</sup> See *Loss of Subsidized Multifamily Housing Units: Hearing Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Fin. & Urban Affairs*, 99th Cong. 17 (1986) [hereinafter *House Hearing on Loss of Subsidized Units*] (statement of Rep. Barney Frank) (noting the “foolish[ness]” of previous administrations when they allowed for inclusion of twenty-year prepayment clauses); Geller, *supra* note 54, at 160–61.

<sup>84</sup> See Geller, *supra* note 54, at 162.

<sup>85</sup> See *id.* at 161–62. Gentrification describes the process where comparatively wealthy people purchase cheap real estate in low-income neighborhoods. See *House Hearing on Loss of Subsidized Units*, *supra* note 83, at 3 (describing the process of gentrification in context of why Sections 221(d)(3) and 236 units are at risk). This demand drives property values up, making the neighborhood less accessible to low-income people. See Godsil, *supra* note 32, at 319. This process continues until the entire neighborhood has been converted to high rents. See *id.* at 319–20.

<sup>86</sup> See Geller, *supra* note 54, at 161–62. HUD did not foresee this change in the 1960s. *Id.* at 161. The prevailing wisdom at the time was that poor areas would always remain poor. *Id.* The government was focused primarily on developing the suburbs because it saw those areas as the future affluent neighborhoods, leaving the cities to the poorer communities. See Godsil, *supra* note 32, at 329 (de-

made to the tax code in 1986 made affordable housing a less desirable investment for developers.<sup>87</sup>

The result of changes in the housing market and tax code was that owners participating in affordable housing programs sought to leave the program, while very few new participants emerged.<sup>88</sup> Property owners whose mortgages included prepayment clauses planned to prepay in numbers that posed a serious threat to the housing situation of hundreds of thousands of people across the country.<sup>89</sup> Congress realized that a large number of property owners prepaying their subsidized and insured mortgages would create a major crisis because tens of thousands of affordable units would suddenly become unaffordable for their tenants, and those tenants would have few options for alternative housing.<sup>90</sup>

Faced with a substantial loss of affordable housing units, Congress took steps to prevent owners from exercising their prepayment clauses by passing emergency legislation aimed at preserving existing affordable housing.<sup>91</sup> First, Congress passed the Emergency Low Income Housing Preservation Act of 1987 (“ELIHPA”), which prohibited owners of properties eligible for prepayment from converting their affordable units to market-rate rentals unless they first complied with cumbersome requirements.<sup>92</sup> This law effectively prevented

scribing that the homeownership push of the 1970s favored white, middle class families and neglected minority urban neighborhoods).

<sup>87</sup> Geller, *supra* note 54, at 162. Prior to the tax code change, developers could use affordable housing developments as a kind of tax shelter. *Id.* The 1986 updates tied the total tax deduction that developers could receive from depreciation on a building to the amount of rental income earned from that building. *Id.* This change made investing in affordable housing much less desirable. *See id.*

<sup>88</sup> *See id.* at 161–62.

<sup>89</sup> *See id.* at 162–63.

<sup>90</sup> *See House Hearing on Loss of Subsidized Units, supra* note 83, at 2–3; Geller, *supra* note 54, at 161–62.

<sup>91</sup> *See* Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPA), 12 U.S.C. §§ 4101–4125 (2012) (codified as Title VI within the Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990)); Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), Pub. L. No. 100-242, §§ 201–263, 101 Stat. 1877 (1988) (codified as Title II within the Housing & Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1815 (1988)); Freedman, *supra* note 36, at 745; Geller, *supra* note 54, at 163.

<sup>92</sup> *See* ELIHPA § 1715l note; Freedman, *supra* note 36, at 753. ELIHPA authorized HUD to offer additional incentives to mortgagors to discourage prepayment while placing strict conditions of prepayment on those who chose to forego the incentives. Geller, *supra* note 54, at 163–64. Specifically, Congress required owners to file a “plan of action” demonstrating to HUD that prepayment would not unduly burden low-income tenants. *Id.* Within the plans of action, ELIHPA required owners to promise that their tenants’ cost of living would not rise and that there was comparable housing available in the area. *Id.* at 164. Congress’s stated purpose for ELIHPA was:

- (1) to preserve and retain to the maximum extent practicable as housing affordable to low income families or persons those privately owned dwelling units that were produced for such purpose with Federal assistance; (2) to minimize the involuntary displacement of tenants currently residing in such housing; and (3) to continue the partner-

owners from exercising the prepayment clause because the conditions were so onerous.<sup>93</sup> Congress then replaced ELIHPA with the Low Income Housing Preservation and Resident Homeownership Act of 1990 (“LIHPRHA”).<sup>94</sup> Unlike ELIHPA, LIHPRHA made it possible for owners to prepay their mortgages, but continued to impose prepayment restrictions and provide incentives if the owner remained in the program.<sup>95</sup> The incentives included increased rent ceilings, increased allowable rates of return on investments, and equity loan funds for capital improvements.<sup>96</sup> In addition, many non-profit purchasers were able to receive direct capital grants if they purchased the properties.<sup>97</sup> In exchange for the benefits the Act gave to private owners, owners did not prepay their mortgages, so affordability restrictions in those mortgages remained in place.<sup>98</sup>

LIHPRHA was not a lasting solution to the problem of disappearing affordable housing.<sup>99</sup> Most critically, the constitutionality of LIHPRHA was challenged in court, successfully in some cases.<sup>100</sup> Owners contested the gov-

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ship between all levels of government and the private sector in the production and operation of housing that is affordable to low income Americans.

ELIHPA § 202(b).

<sup>93</sup> See *Forest Park II v. Hadley*, 336 F.3d 724, 728 (8th Cir. 2003). Prior to ELIHPA, many owners were permitted to prepay their mortgages after twenty years without HUD approval. See *Cienega X*, 503 F.3d at 1270.

<sup>94</sup> *Forest Park II*, 336 F.3d at 728; see 12 U.S.C. §§ 4101–4125.

<sup>95</sup> See § 4108; see also *Cienega X*, 503 F.3d at 1272–73 (describing the restrictions and incentives under LIHPRHA). Under LIHPRHA, Congress required owners to offer their property for sale to preservation buyers—owners who agreed to preserve the unit’s rent restrictions—and barred the owners from prepaying while the properties were for sale. See § 4110; *Cienega X*, 503 F.3d at 1272. LIHPRHA required owners to sell the property to preservation buyers at “fair market value of the housing based on the highest and best use of the property.” § 4103. If, after fifteen months, the owners were unable to sell the property, the owners were permitted to prepay their mortgages. See § 4110; *Cienega X*, 503 F.3d at 1272.

<sup>96</sup> See *Cienega X*, 503 F.3d at 1273.

<sup>97</sup> See Achtenberg, *supra* note 14, at 6 & n.1.

<sup>98</sup> See *id.* at 6.

<sup>99</sup> See Quirk, *supra* note 17, at 664 (noting that, while Congress has never explicitly repealed LIHPRHA, Congress has defunded LIHPRHA and in 1996 HUD stopped reviewing LIHPRHA prepayment applications).

<sup>100</sup> See *Cienega Gardens v. United States (Cienega VIII)*, 331 F.3d 1319, 1353 (Fed. Cir. 2003) (holding that ELIHPA and LIHPRHA abrogated owners’ property interests and therefore the provision that restricted owners from prepaying their mortgages was an unconstitutional regulatory taking under the Fifth Amendment); *Forest Park II*, 336 F.3d at 734 (holding state laws that create additional requirements for prepaying federal mortgages are preempted by LIHPRHA and are void); see also *CCA Assocs. v. United States*, 667 F.3d 1239, 1244, 1248, 1250 (Fed. Cir. 2011) (recognizing that, while the particular owner did not have a valid contract or takings claim against HUD, LIHPRHA may still be an unconstitutional regulatory taking if the owner satisfies the requirements laid out in *Cienega X*). The results of challenges based on breach of contract theory were mixed. Compare *CCA*, 667 F.3d at 1253 (dismissing the contract claim for lack of privity under the reasoning put forth in the *Cienega* line of cases), and *Cienega IV*, 194 F.3d at 1246 (holding that owner did not have a contract claim against HUD due to a lack of privity), with *Aspenwood Inv. Co. v. Martinez*, 335 F.3d 1256,

ernment's refusal to allow prepayments under theories of breach of contract as well as under the Fifth Amendment takings clause.<sup>101</sup> In *Cienega Garden v. United States*, for example, the owners were successful, with the U.S. Court of Appeals for the Federal Circuit holding that the prepayment prohibition under LIHPRHA constituted an uncompensated regulatory taking.<sup>102</sup>

In 1996, the federal government restored owners' prepayment rights with the Housing Opportunity Program Extension Act ("HOPE Act").<sup>103</sup> To address the problem of tenants displaced when properties converted to market rent, Congress relied on the Enhanced Voucher program.<sup>104</sup> Enhanced vouchers are given automatically to tenants who rent from owners who decided to prepay their mortgages and convert their units to market-rate rent.<sup>105</sup> The program provided

1260–61 (10th Cir. 2004) (disagreeing with *Cienega IV* and holding HUD did breach its contract with development owner when HUD prevented the owner from prepaying its mortgage), and *People to End Homelessness*, 339 F.3d at 5 (holding HUD could not require owners to renew Section 8 HAP contracts).

<sup>101</sup> See, e.g., *CCA*, 667 F.3d at 1253 (breach of contract theory); *Cienega X*, 503 F.3d at 1270 (takings clause theory); see also U.S. CONST. amend. V. Under the Fifth Amendment, the government may not take private property for public use without just compensation. See U.S. CONST. amend. V. In *Penn Central Transportation Co. v. New York City*, the U.S. Supreme Court set out a three-factor test to determine whether there has been an unconstitutional regulatory taking such that the government owes the private party just compensation. See 438 U.S. 104, 124 (1978). Following *Penn Central*, courts must consider (1) "the character of the government action," (2) "the economic impact" of the government action, and (3) "whether the regulated parties had reasonable investment-backed expectations that they would not be subjected to such regulation." *Cienega X*, 503 F.3d at 1279 (citing *Penn Cent.*, 438 U.S. at 124). Development owners brought suits against HUD under a takings clause theory, alleging that the government, by preventing them from prepaying their mortgages, had effectively taken their property, resulting in economic harm to the owners. See *id.* at 1290; *Cienega VIII*, 331 F.3d at 1328.

<sup>102</sup> *Cienega X*, 503 F.3d at 1290. *Cienega X* was dismissed by agreement of the parties before the Supreme Court decided whether to grant certiorari. *Cienega v. United States*, 554 U.S. 938, 938 (2008) (discussing that *Cienega X* was dismissed pursuant to Supreme Court Rule 46); see also SUP. CT. R. 46 (permitting parties to voluntarily dismiss a petition for certiorari when the parties agree to do so).

<sup>103</sup> Housing Opportunity Program Extension ("HOPE") Act of 1996, Pub. L. No. 104-120, §§ 1–13, 110 Stat. 834 (1996) (codified in scattered sections of 12 U.S.C. and 42 U.S.C.); *Cienega X*, 503 F.3d at 1274. The political climate had changed significantly by the mid-1990s and congressional concerns about housing turned more on its expense than on an expiring mortgage crisis. See David B. Bryson, *How the Clinton Administration and the 104th Congress Impaired Poor People's Rights to Housing*, 30 CLEARINGHOUSE REV. 1154, 1154–56 (1997). HOPE provided that owners who prepaid could not raise rents for an additional two months after prepayment. See HOPE Act § 2(b); *Cienega X*, 503 F.3d at 1274. One month after Congress enacted HOPE, Congress passed an appropriations bill which expressly permitted owners to prepay their HUD-created mortgages. *Cienega X*, 503 F.3d at 1274 (citing Pub. L. No. 103-134, 110 Stat. 1321-265 to 1321-293 (1996)). While HOPE and the accompanying appropriation bill effectively overrode LIHPRHA, LIHPRHA was never actually repealed. See Quirk, *supra* note 17, at 664.

<sup>104</sup> See 42 U.S.C. § 1437f(t) (2012); Kristin A. Siegesmund, *Essay: The Looming Subsidized Housing Crisis*, 27 WM. MITCHELL L. REV. 1123, 1133 (2000).

<sup>105</sup> See 42 U.S.C. § 1437f(t)(2); Siegesmund, *supra* note 104, at 1134.

such tenants with a voucher to cover the difference between the affordable rent the tenant was paying and the new market rent the owner decided to charge.<sup>106</sup>

Still, enhanced vouchers are tied to the particular tenant.<sup>107</sup> The tenant may use the voucher in her current unit or bring it with her to a new unit.<sup>108</sup> Once the tenant leaves her unit, however, the government no longer subsidizes rent for the old unit for any incoming tenant, and another affordable housing unit is permanently lost.<sup>109</sup> Consequently, in Massachusetts alone, between 1996 and 2009 approximately 15,300 federally- and state-assisted units were lost, mostly due to mortgage prepayment.<sup>110</sup> Approximately 8600 of the 15,300 lost units became less affordable to low-income tenants, though they retained some affordability protections.<sup>111</sup> The approximately 6700 remaining units retained no affordability protections at all and were lost forever from the affordable housing stock.<sup>112</sup>

Despite these congressional measures, efforts to stop the hemorrhaging of affordable units due to mortgage prepayment are about to become moot, as most of the mortgages subject to Section 236 will soon reach maturity.<sup>113</sup> In other words, there will no longer be an issue of prepayment after these mortgages reach the forty-year mark.<sup>114</sup> At that point, the problem will simply be the expiration of all use restrictions on these properties and the widespread, unchecked conversion of affordable units to market-rate rent.<sup>115</sup>

## II. MATURING MORTGAGES AND THE INADEQUACIES OF HOUSING LEGISLATION AND LITIGATION

The forty-year deadline has therefore created a problem for the federal and state governments and those who rely on affordable housing.<sup>116</sup> While the measures passed by Congress in the late 1980s helped avoid a major housing crisis, they were only a stopgap.<sup>117</sup> The emergency legislation to prevent owners from prepaying their mortgages was able to preserve some affordable hous-

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<sup>106</sup> See Siegesmund, *supra* note 104, at 1133.

<sup>107</sup> See Achtenberg, *supra* note 14, at 6.

<sup>108</sup> See Cowing, *supra* note 8, at 244.

<sup>109</sup> *Id.* at 237.

<sup>110</sup> See Achtenberg, *supra* note 14, at 6.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See Cowing, *supra* note 8, at 238.

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*; Freedman, *supra* note 36, at 761.

<sup>117</sup> See Siegesmund, *supra* note 104, at 1332–33.



ing, despite court challenges.<sup>118</sup> Still, the legislation had an inherent sunset date when the mortgages at issue arrived at the forty-year mark and matured.<sup>119</sup> The maturity date is the source of the looming crisis in affordable housing.<sup>120</sup> All of the concerns of the 1980s remain—namely, that owners of affordable developments will choose to exit the affordable housing business in order to convert the units in their developments to the more profitable market rate, and that tenants will be left without alternative affordable housing for the foreseeable future.<sup>121</sup>

Currently, exiting affordable housing programs is the most logical economic decision for development owners.<sup>122</sup> The value of land has increased and the profit that owners may make by renting on the open market has far surpassed the financial benefits they once received from federal subsidies to develop properties.<sup>123</sup> When owners are able convert affordable units to mar-

<sup>118</sup> See, e.g., *CCA Assocs. v. United States*, 667 F.3d 1239, 1244, 1248 (Fed. Cir. 2011) (holding owner did not have a valid takings claim against HUD and therefore could not prepay his mortgage without following LIHPHA); *Cienega Gardens v. United States (Cienega IV)*, 194 F.3d 1231, 1246 (Fed. Cir. 1998) (holding owner did not have a contract claim against HUD due to a lack of privity). In *CCA Associates v. United States*, the owner of a housing development in New Orleans sued the United States government under theories of breach of contract and regulatory takings when he was prevented from prepaying his federally subsidized mortgage because of restrictions under LIHPHA. 667 F.3d at 1243–44. The court held that the owner’s demonstrated eighteen percent loss in the value of the property due to the LIHPHA restrictions did not constitute a regulatory taking. *Id.* at 1247. The court also held that CCA’s contract claim was foreclosed by its earlier decision in *Cienega IV*, which denied the owner’s contract claim because of lack of privity between it and HUD. *Id.* at 1249; see also *Cienega IV*, 194 F.3d at 1246. The *Cienega* line of cases grappled with the issues of whether the restriction on owners’ rights to prepay their Section 221(d)(3) and 236 mortgages introduced by the ELIHPA and LIHPHA legislation constituted a regulatory taking under the Fifth Amendment. See *CCA*, 667 F.3d at 1242, 1244 (summarizing the Federal Circuits’ string of *Cienega* cases). Taken together, the *Cienega* cases held that the inquiry into whether an owner had a valid takings claim against the government turned on the circumstances of each case, and specifically required the owner to show economic harm, as defined by the Supreme Court in *Penn Central Transportation Co. v. New York City*, but that the harm had to be evaluated with respect to the value of the property as a whole and not limited to the discrete time period that the legislation was in force. See *Cienega Gardens v. United States (Cienega X)*, 503 F.3d 1266, 1277 (Fed. Cir. 2007); *Cienega Gardens v. United States (Cienega VIII)*, 331 F.3d 1319, 1353 (Fed. Cir. 2003); see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>119</sup> See *Cowing*, *supra* note 8, at 238.

<sup>120</sup> See *id.* (stating that the crisis is expected to affect 190,000 total units nationally).

<sup>121</sup> See *House Hearing on Loss of Subsidized Units*, *supra* note 83, at 2–3 (laying out Congress’s concern about prepayment in the 1980s); *Cowing*, *supra* note 8, at 239–41 (noting that, in Los Angeles, an area where property is especially expensive, tenants are particularly vulnerable to the maturing mortgage problem); *Achtenberg*, *supra* note 14, at 5 (noting that tenants will be inadequately protected after the subsidized mortgages mature).

<sup>122</sup> See *Geller*, *supra* note 54, at 162.

<sup>123</sup> See *id.*; see also *House Hearing on Loss of Subsidized Units*, *supra* note 83, at 2–3 (statement of Rep. Barney Frank) (warning, in 1986, that in Texas and Massachusetts, the increased value of land would prompt owners to convert subsidized developments to market rate).

ket-rate rents, the damage to the affordable housing stock will be severe.<sup>124</sup> Nationwide, between 2012 and 2020, the crisis is predicted to cause approximately 72,000 units unassisted by subsidies like Section 8 to be completely lost to the affordable housing market, and will affect, in total, approximately 190,000 units.<sup>125</sup> Not only will there be far fewer units for low-income individuals, but there are also fewer protections in place for the tenants that will be displaced once their affordable units are no longer affordable.<sup>126</sup>

### A. The Unlikelihood of Successful Federal Efforts to Preserve Affordable Housing

On the federal level, there is currently little political will to extend government-funded housing.<sup>127</sup> Budgetary constraints have squeezed all government programs, and federal housing programs are likely to continue to be downsized.<sup>128</sup>

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<sup>124</sup> See Cowing, *supra* note 8, at 238; Achtenberg, *supra* note 14, at 12–13 (noting that, due to recent increased demand for rental housing following the financial crisis, the stress on the housing market will be exacerbated when these mortgages mature and affordable units are lost).

<sup>125</sup> See Cowing, *supra* note 8, at 238. If a unit's only source of affordability is through a use restriction clause in a Section 221(d)(3) or Section 236 mortgage, then the unit is completely free to be rented at market rate after those mortgages expire. *See id.* at 240. Some units, however, are subsidized through a combination of programs so that, if its Section 221(d)(3) or Section 236 mortgage matures, the unit will maintain some affordability according to the terms of the other programs that cover it, such as project-based Section 8 subsidies. *See id.*

<sup>126</sup> See Cowing, *supra* note 8, at 238 (noting that, in 2011, Congress passed legislation that set aside funding for vouchers to protect unassisted tenants who are at risk due to maturing subsidized mortgages, and therefore implying that those tenants might at least be partially protected by the voucher).

<sup>127</sup> See Freedman, *supra* note 36, at 742–43; *President's Budget Calls for \$1 Billion for NHTF Sixth Year in a Row*, NAT'L LOW INCOME HOUS. COAL. (Mar. 7, 2014), <http://nlihc.org/article/president-s-budget-calls-1-billion-nhtf-sixth-year-row> (noting that President Obama's 2014 proposed budget calls for funding to be indefinitely suspended for the National Housing Trust Fund ("NHTF")). The NHTF was created in 2008 as a provision of the Housing and Economic Recovery Act. *See* Pub. L. 110-289, 122 Stat. 2654 (2008) (to be codified in scattered sections of 12 U.S.C. and 42 U.S.C.). The NHTF normally allocates ninety percent of its funds to the "production, preservation, rehabilitation, or operation of rental housing" for extremely-low income households. *See National Housing Trust Fund Frequently Asked Questions*, NAT'L LOW INCOME HOUS. COAL. (Sept. 2013), [http://nlihc.org/sites/default/files/NHTF\\_FAQ.pdf](http://nlihc.org/sites/default/files/NHTF_FAQ.pdf). Under the statute, Fannie Mae and Freddie Mac fund the NHTF by transferring a portion of the new business that they receive to the NHTF. *Id.* This requirement was suspended when Fannie and Freddie were taken into receivership, and, as of the publication of this Note, the suspension remains in place. *Id.* This type of budget freeze is not a new trend. *See* Bryson, *supra* note 103, at 1156 (describing the high cost of running HUD, the conservative movement against HUD in the early 1990s and the liberal response that reinvented many of HUD's programs to focus more on private sector solutions).

<sup>128</sup> See James E. McDermott, *What Will 2013 Mean for the Housing Industry?*, 21 J. AFFORDABLE HOUS. & CMTY. DEV. L. 265, 266 (2013) (describing the effect of the sequestration on HUD programs including Section 8); Freedman, *supra* note 36, at 742 (describing the shift away from government funded housing beginning in the Reagan administration). In his 2013 budget, under the

The Enhanced Voucher program established in 1999 has operated as a major safety net to households affected by the conversion of affordable housing, but it applies only to those who live in developments where the owners decided to prepay their mortgages.<sup>129</sup> Congress has not extended the Enhanced Voucher program to cover tenants displaced due to maturing mortgages.<sup>130</sup> This means that tenants who can no longer afford to live in their units because they are converted to market-rate rent as a result of an expiring mortgage are ineligible for the Enhanced Voucher program and will have to find a new place to live if they cannot afford the higher rent.<sup>131</sup> In some cases, this may mean reapplying for a different federal program, most likely the Section 8 program.<sup>132</sup> This is almost an utterly meaningless protection, however, because the Section 8 program is already overwhelmed.<sup>133</sup> In many areas around the country, there are significant wait times in order to become eligible for a Section 8 voucher.<sup>134</sup>

Further, for those seeking to prevent this conversion from happening, there are fewer options today than there were in the 1980s.<sup>135</sup> During the prepayment crisis, attempts by Congress and HUD to legislatively revise their

thumb of sequestration, President Obama proposed a cut of \$640 million from project-based rental assistance. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2013 BUDGET OF THE U.S. GOVERNMENT 124 (2013) [hereinafter OBAMA'S 2013 PROPOSED BUDGET], available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/budget.pdf>. See generally *Estimated Cuts in Federal Rental Assistance Due to Sequestration*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 5, 2013), <http://www.cbpp.org/files/1-28-13hou.pdf> (detailing reductions in housing vouchers and public housing in nearly every state).

<sup>129</sup> See Siegesmund, *supra* note 104, at 1133; Achtenberg, *supra* note 14, at 12.

<sup>130</sup> See Cowing, *supra* note 8, at 243–44 (noting that advocates of subsidized housing are pressing owners to prepay their mortgages so that the tenants may qualify for the Enhanced Voucher program).

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*; Williams, *supra* note 7, at 442 (noting that local housing authorities use Section 8 vouchers to assist tenants who are displaced and that Section 8 is the most prominent source of funding for low-income tenants).

<sup>133</sup> See Williams, *supra* note 7, at 442–43. For the last ten years, the national average time on the waiting list has been between ten and eleven months. See *id.* at 442 (describing the national average wait time for Section 8 assistance in 2004 as eleven months); Yumiko Aratani et al., *Rent Burden, Housing Subsidies and the Well-Being of Children and Youth*, NAT'L CTR. FOR CHILD. & POVERTY 7 (Nov. 2011), [http://www.nccp.org/publications/pdf/text\\_1043.pdf](http://www.nccp.org/publications/pdf/text_1043.pdf) (describing the national average wait time to receive a Section 8 voucher in 2011 as ten months). In some states, the wait is much longer. Aratani et al., *supra*, at 8. In Massachusetts, the wait time in 2011 was nineteen to twenty-four months; in California the wait was anywhere from twenty-five to thirty months. *Id.*

<sup>134</sup> See Aratani et al., *supra* note 133, at 7, 9 (noting that HUD reported a national average time on the waiting list of eleven months or longer for a spot in public housing and twenty-eight months for a Section 8 voucher).

<sup>135</sup> See *Cienega X*, 503 F.3d at 1283 (discussing the importance of weighing the public benefit of LIHPRHA against the private cost to owners and partially justifying LIHPRHA based on this public benefit); Freedman, *supra* note 36, at 747 (discussing the effect of the federal prepayment legislation on state laws that tried to prevent the prepayment crisis); Geller, *supra* note 54, at 167 (discussing the questionable legality of legislation aimed at preventing prepayment).

previous agreements on mortgage prepayment were legally and politically challenged, and in some cases were ultimately defeated.<sup>136</sup> Because Congress stood on legally untenable ground when it enacted measures to prevent prepayment, the current Congress likely would face similar challenges, should it seek to force owners to extend a contract that contains no provision mandating such an extension.<sup>137</sup>

Similarly, efforts to extend the Enhanced Voucher program to tenants displaced by expiring subsidized mortgages would likely face an uphill battle because an extension would require Congress to allocate scarce federal funding to the program.<sup>138</sup> Although Congress passed legislation in 2012 allowing HUD to award vouchers to tenants residing in units affected by expired HUD-subsidized mortgages, the program is limited.<sup>139</sup> This program, passed as part of the 2012 appropriations bill, is in effect until the funding is exhausted; it is therefore reliant on the future will of Congress to continue to allocate funds for these vouchers.<sup>140</sup> Initially, Congress limited the appropriation to \$10 million, but HUD, due to funding constraints in other housing programs, has allocated only \$4 million of the appropriation to the new voucher program.<sup>141</sup> Given the limited and tenuous nature of the 2012 voucher appropriation, Section 8 remains the primary federal program that assists with rental affordability even though it is already at capacity.<sup>142</sup>

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<sup>136</sup> See *CCA*, 667 F.3d at 1244, 1248 (holding that the owner did not have a valid contract or takings claim against HUD, but affirming the precedent in *Cienega X* recognizing takings claims against LIHPRHA); *House Hearing on Loss of Subsidized Units*, *supra* note 83, at 3 (suggesting there would be no increase in federal housing assistance in budget climate).

<sup>137</sup> See *Cienega X*, 503 F.3d at 1283; Geller, *supra* note 54, at 167; Freedman, *supra* note 36, at 748.

<sup>138</sup> See Achtenberg, *supra* note 14, at 12 (noting the vulnerability of tenants in maturing mortgage units because they are not guaranteed Enhanced Vouchers); McDermott, *supra* note 128, at 265 (noting the budgetary constraints created by sequestration for all federal programs). Between fiscal year 2005 and fiscal year 2006, the requested federal budget for HUD fell by nine percent. See MAGGIE MCCARTY ET AL., CONG. RESEARCH SERV., RL32899, HOUSING ISSUES IN THE 109TH CONGRESS (2005) (located at “Summary” page, which is prior to the Table of Contents). From 2010 to 2013, the budget allotment to HUD fell from \$46.9 billion to \$33.6 billion. See MAGGIE MCCARTY & DAVID RANDALL PETERMAN, CONG. RESEARCH SERV., R42578, TRANSPORTATION, HOUSING AND URBAN DEVELOPMENT, AND RELATED AGENCIES (THUD): FY2013 APPROPRIATIONS 5 (2013).

<sup>139</sup> See Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 677 (2012) (codified in 42 U.S.C. § 1437f(t)); U.S. DEP’T OF HOUS. & URBAN DEV., NOTICE PIF-2013-08 2 (2013) [hereinafter HUD NOTICE PIF-2013-08] (noting that of the ten million dollars allocated by Congress for the new voucher program, HUD will only allocate four million to that program due to funding concerns in other existing programs).

<sup>140</sup> See 125 Stat. at 676.

<sup>141</sup> See HUD NOTICE PIF-2013-08, *supra* note 139, at 1.

<sup>142</sup> See Williams, *supra* note 7, at 442–43 (noting that in New York City, families typically wait for eight years, and that likewise in Los Angeles, the wait for a Section 8 voucher can be up to ten years).

### B. State Efforts to Preserve Affordable Housing

The dearth of funding and initiative at the federal level leaves the problem of expiring mortgages to the states.<sup>143</sup> States administer the federal subsidized housing programs through local public housing authorities, state housing agencies, and their own legislation and regulation.<sup>144</sup> As a result, some states attempted to take action to combat the maturing mortgage crisis and enacted their own legislation, requiring owners of affordable housing developments to meet strict criteria before prepaying their mortgages.<sup>145</sup> In the 1980s, this state legislation met court challenges.<sup>146</sup> In *Forest Park II v. Hadley*, the U.S. Court of Appeals for the Eighth Circuit held that a Minnesota state law that required owners to clear hurdles in addition to those required by LIHPRHA before paying their mortgages was preempted by the federal statute.<sup>147</sup> The court held that the Minnesota statute impermissibly restricted or inhibited the owners' ability to prepay their mortgages.<sup>148</sup> *Forest Park II* serves as a warning to states that legislation addressing low-income housing may unconstitutionally interfere with federal low-income housing programs.<sup>149</sup>

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<sup>143</sup> See Freedman, *supra* note 36, at 761.

<sup>144</sup> See, e.g., MASS. GEN. LAWS ch. 40T, §§ 1–10 (2012) (mandating requirements that owners of developments in Massachusetts must follow to preserve affordable housing).

<sup>145</sup> See *id.*; Freedman, *supra* note 36, at 777 (discussing California laws that place restrictions on owners before prepayment). States with preservation laws include California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Minnesota, Ohio, Rhode Island, Texas, and Washington. See *State & Local Preservation Initiatives*, NAT'L HOUS. L. PROJECT, <http://nhlp.org/resourcecenter?tid=129> (last visited Oct. 31, 2014).

<sup>146</sup> See Freedman, *supra* note 36, at 774; see, e.g., *Forest Park II v. Hadley*, 336 F.3d 724, 733–34 (8th Cir. 2003).

<sup>147</sup> See *Forest Park II*, 336 F.3d at 732–34. Minnesota enacted statutes that required owners to clear additional hurdles before prepaying their Section 236 mortgages. See *id.* at 730.

<sup>148</sup> See *id.* at 733. The court reasoned that housing is not a traditional area of state concern, so its statutes were not entitled to a presumption against preemption. *Id.* at 731. The Minnesota law was attempting to control a contractual relationship between the federal government and private actors. *Id.* at 731–32. The court held that this law was expressly and impliedly preempted by LIHPRHA's prepayment provision. *Id.* at 732. The court stated that "to the extent that compliance with additional state regulations is required, the statutes have the direct effect of impeding, burdening, and inhibiting the prepayment of federal mortgages even if additional requirements may be minimal." *Id.* at 733.

<sup>149</sup> See *id.* at 733; see also *Mother Zion Tenant Ass'n v. Donovan*, 865 N.Y.S.2d 64, 66–67 (App. Div. 2008) (holding New York City law that codified notice requirements and rights of first offer and first refusal when owners of subsidized developments decided not to renew their Section 8 contract to be preempted by federal law allowing owners to opt out without these requirements). *But see* *Topa Equities, Ltd. v. City of L.A.*, 342 F.3d 1065, 1068, 1071 (9th Cir. 2003) (holding Los Angeles's rent stabilization ordinance, which prevented the owner from raising the rent on existing tenants, even after he prepaid his mortgage, was not preempted and distinguishing factually from *Forest Park II*).

Nevertheless, some states have passed legislation aimed at assisting tenants who face rent increases due to mortgage maturity.<sup>150</sup> Twelve states, including Massachusetts and California, have imposed notice requirements on owners who plan to convert affordable units when their federally subsidized mortgages mature.<sup>151</sup> California state law requires owners to provide two sets of notices to both tenants and the local government entity, at both twelve months and six months before the rent restrictions expire.<sup>152</sup> Owners must also provide a separate notice to qualified entities that have directly contacted the owner or are on a list maintained by the state.<sup>153</sup> This notice informs these qualified entities of their right to make an offer to purchase the development.<sup>154</sup> If an owner does not comply with this law, tenants may seek injunctive relief against the sale.<sup>155</sup>

Massachusetts has enacted similar protections.<sup>156</sup> In 2009, the Massachusetts Legislature enacted its chapter 40T provisions as part of “An Act Preserving Publically Assisted Housing.”<sup>157</sup> Chapter 40T targets the housing crisis in two ways.<sup>158</sup> First, the statute imposes notice requirements on landlords whose federal use-restricted mortgages are about to expire.<sup>159</sup> Second, chapter 40T offers the Massachusetts agency in charge of housing, the Department of Housing and Community Development (“DHCD”), a right of first offer and first refusal to purchase the property when an owner prepays or opts out of maintaining affordability.<sup>160</sup>

The chapter 40T notice requirements mandate that landlords who are planning to prepay or opt out of their Section 8 contracts provide notice of these actions to a number of parties, including tenants and tenant organizations, DHCD, and legal services organizations.<sup>161</sup> To satisfy chapter 40T’s notice requirements, landlords must: (1) provide notice to the listed parties twenty-four to thirty-six months prior to the termination of the affordability pro-

<sup>150</sup> See, e.g., CAL. GOV’T CODE §§ 65863.10–.11, 65863.13 (West 2009); MASS. GEN. LAWS ch. 40T, §§ 1–10 (2012); see also Cowing, *supra* note 8, at 244 (discussing the California preservation law); Achtenberg, *supra* note 14, at 13 (discussing the Massachusetts preservation law).

<sup>151</sup> See *State & Local Preservation Initiatives*, *supra* note 145.

<sup>152</sup> See §§ 65863.10–.11, 65863.13; Cowing, *supra* note 8, at 244.

<sup>153</sup> See GOV’T § 65863.11(f).

<sup>154</sup> See *id.*

<sup>155</sup> *Id.* § 65863.10.

<sup>156</sup> See MASS. GEN. LAWS ch. 40T, §§ 1–10 (2012).

<sup>157</sup> *Id.*; Quirk, *supra* note 17, at 667.

<sup>158</sup> See ch. 40T, §§ 2–3.

<sup>159</sup> See *id.* §§ 1–2.

<sup>160</sup> See *id.* § 3; Quirk, *supra* note 17, at 667. Chapter 40T requires owners to offer DHCD an opportunity to purchase their affordable housing prior to the owner entering into an agreement to sell such property. See ch. 40T, § 3(a).

<sup>161</sup> See ch. 40T, § 2.

gram (a “Two Year Notice”), (2) send notice to the listed parties twelve to eighteen months prior to termination (a “One Year Notice”), and (3) must send an “Offer to Sell” to the DHCD.<sup>162</sup>

Chapter 40T affords DHCD the right of first offer to buy and the right of first refusal for four years after the contract’s termination date.<sup>163</sup> Under the statute, the owner must allow DHCD to make the first offer to buy the development prior to entering into any other agreement to sell a development subject to affordability restrictions.<sup>164</sup> If the owner and DHCD cannot reach a deal, and the owner finds another willing buyer, the property owner must again notify DHCD and allow it to match the offer or negotiate a deal that the owner finds acceptable.<sup>165</sup>

Still, there are a number of exemptions to chapter 40T that allow owners to circumvent these requirements.<sup>166</sup> One of the major exemptions permits an owner to sell to a purchaser that has either agreed to preserve the affordability of the units or agreed to renew the Section 8 contract.<sup>167</sup> The Legislature, however, did not specify the standards under which an owner’s proposal should be deemed sufficient to “preserve affordability.”<sup>168</sup> Instead, this determination is explicitly delegated to DHCD in the statute.<sup>169</sup> DHCD’s definition is context- and fact-specific as to whether a buyer will preserve affordability.<sup>170</sup> This is significant because advocates will have to devote resources to monitoring whether this fact-sensitive standard is indeed resulting in affordable housing preservation.<sup>171</sup>

<sup>162</sup> See *id.*; *A Primer on Chapter 40T*, COMMONWEALTH WORKFORCE COAL., CMTY. ECON. DEV. ASSISTANCE CORP. ¶2 [hereinafter *CEDAC Primer*], [cwc.cedac.org/Uploads/Files/AprimerOnChapter40T.pdf](http://cwc.cedac.org/Uploads/Files/AprimerOnChapter40T.pdf) (last visited Oct. 31, 2014).

<sup>163</sup> See ch. 40T, § 10; Quirk *supra* note 17, at 668.

<sup>164</sup> Ch. 40T, § 3.

<sup>165</sup> See *id.* § 4; Quirk, *supra* note 17, at 668. DHCD may transfer the right of first offer and first refusal to a government approved third party under the statute. See ch. 40T, § 3; Quirk, *supra* note 17, at 668.

<sup>166</sup> See ch. 40T, § 6 (enumerating specific exemptions to the mandates in sections 2 and 3 of the statute); *CEDAC Primer*, *supra* note 162.

<sup>167</sup> See MASS. GEN. LAWS ch. 40T, § 6 (2012).

<sup>168</sup> See generally *id.* §§ 1–10.

<sup>169</sup> See *id.* §§ 1, 6.

<sup>170</sup> See *id.* § 6(iv) (stating that the notice and rights of purchase requirements are not imposed upon “a proposed sale to a purchaser pursuant to terms and conditions that preserve affordability, as determined by the department”). DHCD has issued regulations governing whether affordability has been preserved and places the burden of proof on the owner seeking the exemption. See 760 MASS. CODE. REGS. 64.02 (2013).

<sup>171</sup> Cf. *Housing Impact Advocacy*, GREATER BOS. LEGAL SERVS., <http://gbls.org/impact-advocacy/housing> (last visited Oct. 31, 2014) (noting that, following the passage of Chapter 40T, Greater Boston Legal Services (“GBLS”) has decided to “monitor the implementation of the new state notice protections” in order to protect tenants from landlords who want to sell their mortgages after the use restrictions on the mortgages expire).

### III. THE WAY FORWARD: ENACTING STATE PROTECTIONS AND ENSURING ENFORCEMENT

States must take the lead in ensuring that affordable housing is preserved.<sup>172</sup> The federal government has not taken steps to directly address the expiring use problem since it effectively overrode the Low Income Housing Preservation and Resident Homeownership Act of 1990 (“LIHPRHA”) with the Housing Opportunity Program Extension Act (“HOPE Act”) in 1996.<sup>173</sup> In contrast, several states have sought to address the crisis by enacting laws similar to LIHPRHA that put in place protections for tenants.<sup>174</sup> These state laws typically include notice requirements and give the state agency a right of first offer and first refusal upon sale of an affordable housing development.<sup>175</sup> Nonetheless, even if these laws are passed, state agencies and housing advocates should not rest until compliance with the adopted state preservation laws is ubiquitous.<sup>176</sup> Without both enactment and enforcement of these preservation laws, hundreds of thousands of affordable housing units that provide homes for tenants in need are at risk of disappearing from the market.<sup>177</sup>

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<sup>172</sup> See OBAMA’S 2013 PROPOSED BUDGET, *supra* note 128 (calling for hundreds of millions of dollars in cuts to federal rental assistance); Achtenberg, *supra* note 14, at 5 (describing the impending affordable housing crisis in Massachusetts); Freedman, *supra* note 36, at 742–43 (noting that the federal government no longer focuses on providing affordable housing and that there is little political will within the federal government to focus on affordable housing again); see also Kelli Harsch et al., *Initiatives and Tools for the Preservation of Affordable Housing in Illinois*, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 403, 417 (2009) (describing the state of Illinois’ efforts to take the lead on notice, offer, and refusal rights).

<sup>173</sup> See Housing Opportunity Program Extension (“HOPE”) Act of 1996, Pub. L. No. 104-120, §§ 1–13, 110 Stat. 834 (1996) (codified in scattered sections of 12 U.S.C. and 42 U.S.C.); Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA), 12 U.S.C. §§ 4101–4125 (2012) (codified as Title VI within the Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990)); Quirk, *supra* note 17, at 664 (noting that the HOPE Act effectively overrode LIHPRHA). HOPE effectively defunded LIHPRHA and generally moved funding from mortgage subsidies toward Section 8. Quirk, *supra* note 17, at 664. HOPE also reversed LIHPRHA’s moratorium on prepayment and allowed owners to pay off their mortgages without HUD approval. *Id.* Importantly, because LIHPRHA was never repealed, owners continued to rely on LIHPRHA’s preemption clause to counter state attempts to impose restrictions on owners declining to renew their HUD contracts or to pay off their mortgages. See, e.g., *Forest Park II v. Hadley*, 336 F.3d 724, 733 (8th Cir. 2003) (holding LIHPRHA preempted a Minnesota state statute that placed additional requirements on owners seeking to exit federal housing contracts).

<sup>174</sup> See LIHPRHA §§ 4101–4125; CAL. GOV’T CODE §§ 65863.10–11, 65863.13 (2009); 310 ILL. COMP. STAT. 60/2 (2012); MASS. GEN. LAWS ch. 40T, § 6 (2012).

<sup>175</sup> See, e.g., GOV’T § 65863.10 (establishing notice requirements); ch. 40T, § 2 (same).

<sup>176</sup> *Housing Impact Advocacy*, *supra* note 171 (stating that GBLS, a housing advocacy organization, is maintaining efforts to ensure landlords are complying with the Massachusetts preservation laws in order to protect tenants from losing their subsidized housing).

<sup>177</sup> Cowing, *supra* note 8, at 238 (noting that by 2020 the expiring use problem is expected to affect 190,000 affordable housing units); James R. Grow, *State and Local Regulatory Initiatives to Preserve At-Risk Affordable Housing*, NAT’L HOUS. L. PROJECT 1, <http://www.housingpolicy.org/>



### A. The Importance of Enacting Strong State Preservation Laws

Twelve states and ten cities have enacted legislation aimed at preserving affordable housing.<sup>178</sup> These jurisdictions must ensure that the laws are protected and enforced.<sup>179</sup> States should learn from the litigation surrounding the efforts to remedy the prepayment crisis and be prepared to defend their preservation statutes.<sup>180</sup> In the late 1990s and early 2000s, some statutes that granted tenants protections beyond those promised in federal legislation were challenged by development owners in court.<sup>181</sup> States seeking to protect their preservation statutes must be ready for potential preemption challenges because some state laws that have required owners to follow additional preservation requirements have already been preempted by LIHPRHA.<sup>182</sup> In Minnesota, for example, the Eighth Circuit in *Forest Park II v. Hadley* held that the procedures required of owners under LIHPRHA were exhaustive and therefore states could not impose additional conditions on owners.<sup>183</sup>

First, state preservation laws, such as those enacted by Massachusetts and California, should include robust notice provisions to ensure that tenants, tenant organizations, community development organizations, and state agencies have a chance to act to preserve housing threatened by sale or expiring mortgages.<sup>184</sup> As in Massachusetts, notice should be provided at least one or two

assets/preservation%20resources/Grow.pdf (last visited Feb. 18, 2015) (discussing the importance of enacting preservation legislation in states and local governments to preserve affordable housing due to the impending expiring use crisis); *Housing Impact Advocacy*, *supra* note 171 (discussing the importance of compliance with the notice provisions of the preservations laws).

<sup>178</sup> See *State & Local Preservation Initiatives*, *supra* note 145. The states include California, Colorado, Massachusetts, Ohio, Rhode Island, and Washington. *Id.* The cities include Chicago, the District of Columbia, Portland, San Francisco, and Seattle. *Id.*

<sup>179</sup> Cowing, *supra* note 8, at 241–42 (noting the impending crisis in Los Angeles and calling for local policymaking to preserve affordable housing); *cf.* *Forest Park II*, 336 F.3d at 734 (holding state statute meant to protect low-income tenants was unconstitutional because it was preempted by LIHPRHA).

<sup>180</sup> See *Cienega Gardens v. United States (Cienega X)*, 503 F.3d 1266, 1281 (Fed. Cir. 2007) (holding that LIHPRHA, and statutes similar to LIHPRHA, may constitute an unconstitutional taking); *Forest Park II*, 336 F.3d at 734 (holding state statute preempted by LIHPRHA because it added additional requirements to the federal law).

<sup>181</sup> See, e.g., *Forest Park II*, 336 F.3d at 733.

<sup>182</sup> See *id.* (holding additional requirements preempted by LIHPRHA); see also *Mother Zion Tenant Ass'n v. Donovan*, 865 N.Y.S.2d 64, 66–67 (App. Div. 2008) (holding that LIHPRHA preempted New York City law that codified notice requirements and rights of first offer and first refusal when owners of subsidized developments decided not to renew their Section 8 contract).

<sup>183</sup> See *Forest Park II*, 336 F.3d at 734.

<sup>184</sup> See CAL. GOV'T CODE §§ 65863.10–11, 65863.13 (2009); MASS. GEN. LAWS ch. 40T, § 6 (2012); Grow, *supra* note 177, at 1 (noting the important efforts by states and local governments to preserve affordable housing due to the impending expiring use crisis); *Housing Impact Advocacy*, *supra* note 171 (stating that notice provisions are critical for organizations seeking to preserve affordable housing).

years prior to an event that could result in the loss of affordable housing.<sup>185</sup> These events include both the expiration of a subsidized mortgage and the sale of the property that would undo any affordability provisions.<sup>186</sup> Advance notice provided to the state housing agency as well as to designated community development agencies and legal services organizations would create a system that allows both the state and tenants to mobilize their resources to preserve affordable units.<sup>187</sup>

Second, state preservation statutes should include a provision that requires that the state housing agency or its designated representative receive a right of first offer and first refusal.<sup>188</sup> A right of first offer requires the owner to first consider an offer by the state agency or community development organization to buy the property and preserve its affordability.<sup>189</sup> These provisions are important because they give teeth to the notice requirements.<sup>190</sup> Development owners that are not subject to these requirements could simply give notice of an intent to sell, then promptly execute a sale that did not preserve the development's affordability without ever considering an offer from a housing authority, tenant association, or non-profit organization.<sup>191</sup> In other words, notice requirements alone, without a right of first offer and first refusal, only provide tenant associations with the dubious protection of allowing tenants lead time to attempt to find new housing before their current rent increases.<sup>192</sup>

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<sup>185</sup> See ch. 40T, § 2 (establishing notice requirement); Harsch et. al., *supra* note 172, at 419 (describing the danger of insufficient notice for tenants seeking to purchase the property); *CEDAC Primer*, *supra* note 162 (describing the chapter 40T notice requirements).

<sup>186</sup> See Cowing, *supra* note 8, at 244 (describing the various events that could result in the loss of housing affordability as well as the various events where owners should give notice).

<sup>187</sup> See, e.g., *Housing Impact Advocacy*, *supra* note 171 (noting that, as a legal services agency, GBLS is committed to monitoring the implementation of the Massachusetts notice requirements and is also committed to organizing tenant associations that fight to preserve affordable housing).

<sup>188</sup> See, e.g., ch. 40T, § 3; see also Freedman, *supra* note 36, at 766–67 & n.107 (noting that advocates describe the rights of first refusal and first offer as the best tools to preserve affordable housing).

<sup>189</sup> See Freedman, *supra* note 36, at 767–68.

<sup>190</sup> See *id.* (identifying the California law that requires owners to make offers to sell the converting property to a list of preservation owners maintained by the state at least twelve months before paying off the subsidized mortgage). *But see* Harsch et al., *supra* note 172, at 419 (describing that tenant associations have difficulties gathering capital in time to buy the specific property to maintain its affordability even with the notice requirements).

<sup>191</sup> See CAL. GOV'T CODE §§ 65863.10–.11, 65863.13 (2009) (placing no other sale restrictions on owners other than notice requirements and rights of first offer and first refusal); MASS. GEN. LAWS ch. 40T, §§ 1–10 (2012) (also placing no other sale restrictions on owners besides notice requirements and rights of first offer and first refusal).

<sup>192</sup> See Harsch et al. *supra* note 172, at 419 (noting that, even when the state has implemented notice restrictions, tenant associations often cannot afford to bid on the specific property); Williams, *supra* note 7, at 442 (noting that other affordable housing programs, like the availability of Section 8 vouchers, are currently overwhelmed and oversubscribed).

Unlike earlier preempted state statutes that limited an owner's ability to prepay mortgages, notice requirements applied to expiring subsidized mortgages should avoid the preemption challenges.<sup>193</sup> This is because state preservation statutes that require notice before owners sell developments with expiring mortgages are not governed by LIHPRA.<sup>194</sup> In addition, requiring notice and providing the state with rights of first offer and first refusal would not harm the owners' property rights when the preservation statutes do not mandate that the owner accept the local housing authority or tenant association's offer to purchase.<sup>195</sup> Instead, preservation statutes should only require that the

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<sup>193</sup> See *Independence Park Apartments v. United States*, 449 F.3d 1235, 1241, 1243–45 (Fed. Cir. 2006) (holding that state laws imposing onerous rent control requirements upon buildings that have expiring use restrictions are not preempted by federal law, and explicitly rejecting the argument that the state law is preempted because it reduced the value of the initial incentive for owners to enter into subsidized mortgage contracts); *Forest Park II*, 336 F.3d at 733 (holding that state laws were preempted by LIHPRA because they effectively delayed the owners' ability to convert their units); cf. *Topa Equities, Ltd. v. City of L.A.*, 342 F.3d 1065, 1070 (9th Cir. 2003) (holding that state laws were not preempted by LIHPRA because they did not "restrict or inhibit" the owners' ability to prepay their subsidized mortgage). In *Topa Equities, Limited v. City of Los Angeles*, the U.S. Court of Appeals for the Ninth Circuit analyzed the state rent control law for express preemption—when the federal statute has a preemption provision which would apply to the state's law—and implied conflict preemption where complying with the state law frustrates the purpose of the federal law. 342 F.3d at 1069. The court held that the state law was not expressly preempted by LIHPRA because it neither prohibited nor limited the owner's right to prepay its mortgage. *Id.* at 1070. In holding the state law was not expressly preempted by LIHPRA, the court distinguished the Eighth Circuit's decision in *Forest Park II* by noting that the statutes at issue in that case "prohibit[ed] prepayment" and forced the owner to continue to receive assistance from the federal government, when both parties would otherwise have terminated their relationship. See *id.* at 1071 (citing *Forest Park II*, 336 F.3d at 733). In contrast, in *Topa Equities*, prepayment rights were not affected and the owner was not required to continue in the federal program. See *id.* at 1070. Furthermore, the Ninth Circuit in *Topa Equities* held that the state statute did not frustrate the purpose of federal housing laws and was not preempted on conflict grounds because there was no guarantee within any of the federal housing laws that the owners would not be subject to state regulations upon the expiration of their mortgages. See *id.* at 1071–72. Likewise, in *Independence Park Apartments v. United States*, the Federal Circuit expanded on its *Cienega* decisions and held that the Los Angeles rent controls that became effective on developments once they exited federal housing programs were neither preempted by LIHPRA, nor preempted by the federal housing statutes that created the federal programs the owners were exiting. See 449 F.3d at 1242, 1244. The Federal Circuit noted that while state laws may restrict "downstream" profitability for development owners and could affect the owners' decision to prepay their mortgages, such a restriction was insufficient to cause these state laws to be impliedly preempted. See *id.* at 1245.

<sup>194</sup> See Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRA), 12 U.S.C. § 4122 (2012) (codified as Title VI within the Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990)) (stating that state laws that restrict or inhibit prepayment under LIHPRA are preempted, but not discussing state laws that restrict owners after mortgages expire); cf. *Independence Park*, 449 F.3d at 1244–45 (noting that neither HUD regulations nor the federal mortgage program preempted state rent control laws that applied to developments that exited the federal program).

<sup>195</sup> See, e.g., MASS. GEN. LAWS ch. 40T, § 3(a) (2012) ("[N]o owner shall be under any obligation to enter into an agreement to sell [the property with expiring use restrictions] to the department [which

housing authority and tenant associations be given the opportunity to make a competitive offer.<sup>196</sup>

States could further limit any potential negative impact that notice requirements may have by exempting owners from the notice requirements when the owner is able to show that it is selling the property to an entity that has promised to keep the units affordable at current levels.<sup>197</sup> Still, when a state legislature does exempt owners from notice requirements and the owners have a buyer who promises to “preserve affordability,” the legislature should objectively define the phrase “preserve affordability.”<sup>198</sup> Otherwise, such an exemption could require affordable housing advocates of affordable housing to monitor any potential exemption to ensure that owners are meaningfully complying with the statute.<sup>199</sup>

Additionally, notice requirements must be meaningfully enforced to provide protection for tenants.<sup>200</sup> One of the primary purposes of state notice laws is to allow preservation organizations, such as non-profits, or the municipality itself, to purchase the property from the owner in order to preserve the development’s affordability.<sup>201</sup> In California, during the first six months of the notice period, only qualified entities, or those that would preserve the development’s affordability, may make offers to buy the property.<sup>202</sup> Similarly, in Massachusetts, entities offering to preserve the affordability of the expiring subsidized units have a right to first offer.<sup>203</sup> These offer provisions are meaningless if the right to notice is not enforced.<sup>204</sup> Notice provisions allow the local housing au-

had offered to purchase the property].”); *Cienega X*, 503 F.3d at 1272–73 (noting that notice requirements should not affect the date owners can prepay if notice is timely filed).

<sup>196</sup> See ch. 40T, § 3(c); *Cienega X*, 503 F.3d at 1272–73.

<sup>197</sup> See, e.g., ch. 40T, § 6 (stating that owners proposing a sale to a buyer that would preserve the affordability of the development is exempt from the notice and rights of first offer and refusal requirements).

<sup>198</sup> Cf. *id.* § 1 (directing that the state agency define “preserve affordability” without providing the agency objective standards of what such language means); 760 MASS. CODE REGS. 64.02 (2013) (requiring the agency to enter into a subjective, fact-intensive inquiry when the agency considers whether the landlord was exempt from the notice requirements of chapter 40T because the landlord sold to an owner who promised to preserve affordability).

<sup>199</sup> See *Housing Impact Advocacy*, *supra* note 171 (noting that GBLS has decided to monitor whether landlords in Massachusetts are actually preserving the affordability of their properties with expiring use restrictions pursuant to chapter 40T).

<sup>200</sup> See Cowing, *supra* note 8, at 244 (noting that notice laws provide tenant organizations and other preservation advocates time to respond to the owner’s intention to sell and possibly convert the affordable units).

<sup>201</sup> See *id.*; Achtenberg, *supra* note 14, at 13 (stating that sufficient notice periods are a critical element of rights of first offer and refusal).

<sup>202</sup> See CAL. GOV’T CODE § 65863.11(1) (2009).

<sup>203</sup> See MASS. GEN. LAWS ch. 40T, §§ 2, 3(b) (2012).

<sup>204</sup> See Cowing, *supra* note 8, at 244 (noting the role of notice laws in allowing preservation buyers to make offers and in generally preserving affordability); Harsch et al., *supra* note 172, at 419

thority and tenant associations to have time to act on their rights of first offer and first refusal.<sup>205</sup> Both localities and tenants must plan for purchasing these properties and may need time to gather the necessary capital to make the purchase.<sup>206</sup> Time is the enemy of tenants in developments that are being converted to market rate and sufficient notice is a key tool in the preservation toolbox.<sup>207</sup>

### *B. The Importance of Monitoring Compliance with State Preservation Laws*

Finally, state agencies and advocates should monitor compliance with these statutes to ensure all notice and first offer requirements are met.<sup>208</sup> State housing agencies and community development organizations are often working at capacity because of diminished budgets and staff shortages.<sup>209</sup> Ensuring that notice requirements are met, however, must be a priority, and there must be state systems established to receive and analyze notice given by developers.<sup>210</sup> As in Massachusetts, state agencies should enlist the support of local tenant organizations, legal services providers, and housing non-profits to help ensure that notice requirements are followed.<sup>211</sup> These organizations should make cer-

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(noting that longer notice periods better allow tenant organizations to gather the necessary capital to make an offer to buy the development).

<sup>205</sup> See Cowing, *supra* note 8, at 244; Harsch, et al., *supra* note 172, at 419.

<sup>206</sup> See Cowing, *supra* note 8, at 244–45 (noting that, because notice can provide tenants with fair warning in time to plan ahead, providing notice allows for “preservation purchasers” to acquire the property and maintain its affordability); see also 310 ILL. COMP. STAT. 60/2, 60/4(b) (2012) (providing tenants with the opportunity to form tenant associations and enabling those associations to make an offer to purchase the property from the owner as a qualified entity).

<sup>207</sup> See Harsch et al., *supra* note, 172 at 419 (noting that time and money are the two main obstacles to implementing legislation that provides for a right of first offer and first refusal).

<sup>208</sup> See Cowing, *supra* note 8, at 244–45 (noting the importance of enforcing notice and rights of purchase requirements); *Housing Impact Advocacy*, *supra* note 171 (noting GBLS’s role as an advocacy organization in monitoring compliance with notice requirements).

<sup>209</sup> See Phil Oliff et al., *States Continue to Feel Recession’s Impact*, CTR. ON BUDGET & POL’Y PRIORITIES 2, 6 (June 27, 2012), <http://www.cbpp.org/files/2-8-08sfp.pdf> (noting that budget crunches lead to layoffs, cancelled contracts, and decline in funding given to non-profit organizations, and that thirty-one states—including California, Illinois, and Massachusetts—faced budget crunches in 2013); *Support GBLS*, GREATER BOS. LEGAL SERVS., <http://gbls.org/support-gbls> (last visited Oct. 31, 2014) (noting that despite private funding, the demand for legal services far surpasses the supply, and stating that GBLS can only help two out of every five people that seek its services).

<sup>210</sup> See Cowing, *supra* note 8, at 244; Harsch, et al., *supra* note 172, at 419.

<sup>211</sup> 760 MASS. CODE REGS. 64.03 (2013) (requiring that an owner’s notice to sell a subsidized property be sent to affected tenants and tenant organizations, the municipality, CEDAC, and the DHCD); *Housing Preservation*, CMTY. ECON. DEV. ASSISTANCE CORP., <http://cedac.org/housing/preservation.html> (last visited Mar. 26, 2015) (maintaining a list of at-risk properties throughout Massachusetts, reporting on successful preservation efforts, and monitoring areas of concern).

tain that procedures, including the timelines for notice set down by statute, are followed.<sup>212</sup>

In addition, community development groups should monitor regulatory efforts to make sure that the rights enshrined in the legislation are not undercut by state agencies facing their own budget crunches.<sup>213</sup> Moreover, if necessary, community organizations should support tenants in undertaking litigation to ensure that developers and the state are following state legislative intent.<sup>214</sup> Taken together, enactment and enforcement of state preservation laws will ensure that expiring use developments are preserved as affordable housing and will protect hundreds of thousands of the most vulnerable families across the United States.<sup>215</sup>

### CONCLUSION

Affordable housing developments funded through mortgages subsidized and insured by the federal government in the 1960s are nearing their maturity date. When the vast majority of these mortgages expire in the next six years, all use restrictions that required the owners to maintain a certain percentage of their developments for affordable housing will expire as well. The federal government, facing both limited funding and limited political will, is unlikely to address this maturing mortgage crisis. Thus, state governments and municipalities must lead the charge to preserve affordable housing to mitigate this looming housing crisis.

State preservation laws should include important notice provisions that prevent development owners from quickly selling their properties and turning over affordable units to market-rate rent. In addition, state preservation laws should afford a right of first offer and a right of first refusal to the local housing authorities, or their designee, so that those with an interest in preserving affordability have a seat at the bargaining table. Finally, these laws must be monitored and defended in court if necessary. Legal services and community organizations should watch for compliance by landlords and be ready to de-

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<sup>212</sup> See *Housing Impact Advocacy*, *supra* note 171; see also Harsch, et al., *supra* note 172, at 419 (noting the importance of notice requirements).

<sup>213</sup> See, e.g., *Housing Impact Advocacy*, *supra* note 171 (monitoring DHCD, the Massachusetts housing agency); *Housing Preservation*, *supra* note 211 (maintaining a list of at-risk properties throughout the state, reporting on successful preservation efforts, and monitoring areas of concern).

<sup>214</sup> See *Housing Impact Advocacy*, *supra* note 171 (implying that, as a low-income legal services organization, it is necessary for GBLS to ensure through litigation on behalf of low-income tenants, that landlords comply with the Massachusetts preservation laws).

<sup>215</sup> See Cowing, *supra* note 8, at 238 (noting the hundreds of thousands of units with expiring use restrictions that are expected to be lost by 2020); Grow, *supra* note 177, at 1 (noting that, without the enactment of state preservation laws, tenants will not have critical tools—such as notice and the rights of first offer and refusal—to protect themselves from losing their affordable housing).

fend these laws against cash-strapped state legislatures that may look to roll back tenant protections.

The maturing mortgage crisis will hit its peak in 2020. Consequently, it is critical that states take immediate action to preserve the existing stock of affordable housing. Enacting preservation laws, such as those in place in Massachusetts, will prevent the loss of hundreds of thousands of units of affordable housing and preserve the homes of tens of thousands of low-income families that depend on these programs for shelter.