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# A Constitutional Analysis of the Affordable Housing Credit Improvement Act of 2019

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**In this article, the authors consider the constitutionality of certain provisions of proposed legislation, the Affordable Housing Credit Improvement Act of 2019.**

## EXECUTIVE SUMMARY

This article considers the constitutionality of certain provisions of proposed legislation, the Affordable Housing Credit Improvement Act of 2019. One provision of the bill—apparently offered in legislative response to a federal court decision in Washington state—is plainly structured to rewrite or retroactively change the interpretation of thousands of existing contracts between non-profit entities and private investors in low-income housing properties across the country, thereby reallocating existing property rights in ways that differ from the original agreements and expectations of the parties. Because this legislative provision falsely describes this change as a "clarification" and because, by its terms, it applies retroactively to negotiated private agreements entered into decades before the date of its enactment, it raises serious, and likely fatal, constitutional concerns.

The proposed legislation would make several changes to the Low-Income Housing Tax Credit ("LIHTC") program. Currently codified at § 42 of the Internal Revenue Code, the LIHTC program offers tax credits to investors in exchange for providing capital for the development of property used for low-income rental housing. Based on this decades-old framework, non-profit developers and private investors have entered into thousands of LIHTC partnership agreements. In 1989, Congress

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adopted an amendment to the LIHTC program, codified at § 42(i)(7), to provide a safe harbor under which non-profit developers could hold a below-market "right of first refusal," or ROFR, to purchase the property without disturbing the allocation of tax benefits. This § 42(i)(7) ROFR has been incorporated into many LIHTC partnership agreements. Congress did not expressly define "right of first refusal" in § 42(i)(7), but that term has a well-established common-law meaning that, according to standard principles of statutory construction, Congress presumptively adopted.

Far from providing any reason to disregard the normal presumption that Congress adopts the common-law meaning of a common-law term, the legislative history of § 42(i)(7) makes clear that in the 1989 statute Congress deliberately adopted the common-law meaning of ROFR. Indeed, the core attributes of a ROFR at common law—(i) a bona fide third-party offer and (ii) a willing seller—were critical in ensuring that § 42(i)(7) did not run afoul of tax law and policy. Congress considered creating a safe harbor under which the non-profit developer could hold an *option* to purchase the property at a below-market price, rather than a right of first refusal that did not afford such an option. Congress rejected that approach. After consideration, Congress instead created the tax safe harbor for agreements including a ROFR (but not a below-market option) to avoid jeopardizing the tax benefits that flow to investors in the form of tax credits. The difference between a ROFR and a below-market option was critical in this respect. An option gives the holder the affirmative power to compel an unwilling owner to sell his or her property, but a ROFR is a defensive right that does not give the holder such a power. By including a ROFR in § 42(i)(7), Congress structured the safe harbor consistent with a core principle of tax policy—the "economic substance" doctrine—under which a party must share both upside and downside economic risk in order to be a true property owner and claim tax benefits related to that property. Because a below-market option can be exercised unilaterally by the holder to force an unwilling owner to sell, a below-market option would have vitiated the owner's rights to alienability, including any upside potential to the owner, inconsistent with the "economic substance" doctrine, thereby putting the owner's right to claim tax benefits at risk.

The common-law right of first refusal respects these tax principles while striking a clear balance between the parties. On one hand, the ROFR's common-law protections provide investors and the partnership itself with assurance that LIHTC property cannot be sold at a below-market price without their consent. This protects their interest in possible appreciation in property value, a core real-property ownership interest. On the other hand, the ROFR gives assurance to the non-profit developers that they can remain in the partnership, because the property cannot be sold without first providing the developer the opportunity to buy the property at a favorable price. This balance has been a feature of LIHTC agreements for decades.

The proposed legislation would fundamentally revise § 42(i)(7) on a retroactive basis and disrupt this settled arrangement. In particular, the legislation would redefine the § 42(i)(7) ROFR to provide that it (i) "may be exercised with or without the approval" of the


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owner and (ii) "may be exercised in response to any offer to purchase the property, including an offer by a related party." The legislation would therefore extinguish the two critical common-law attributes of a ROFR—the requirement of a willing seller and the requirement of a bona fide offer. As the proposed legislation is framed, this dramatic change applies not only prospectively (that is, to future agreements) but also retroactively; it expressly applies "to agreements among the owners of the projects . . . entered into before, on or after the date of enactment of this Act." By redefining the § 42(i)(7) ROFR (which Congress of course knows has been codified in a number of LIHTC agreements structured to take advantage of the tax benefits it assures) on a retroactive basis, and by falsely labelling that redefinition as a "clarification" rather than conceding that it represents a change in existing law, the proposed legislation has been deliberately structured to interfere with existing property rights. The legislation would either be deemed directly to rewrite existing contractual ROFRs or prompt courts to interpret ROFRs in existing LIHTC agreements in an ahistorical manner that imposes the *new* § 42(i)(7) definition of a ROFR—one that has been stripped of its common-law protections—rather than the version that existed at the time the contracts were negotiated. Because LIHTC agreements frequently were drafted to take advantage of the tax safe harbor in § 42(i)(7), a court accepting Congress's purported "clarification" could conclude that the parties intended to incorporate in the agreements the definition Congress now incorrectly claims existed all along.

Whether the proposed legislation was understood directly to rewrite existing LIHTC agreements (transforming contractual ROFRs into below-market options) or to do so indirectly (by prompting courts to give credit to Congress's false "clarification")—the only two plausible constructions—the legislation would interfere with existing property rights in a manner that raises serious, and likely fatal, concerns under the Fifth Amendment to the U.S. Constitution.

Insofar as the proposed legislation directly transforms the meaning of existing LIHTC agreements, the legislation would violate the Takings Clause of the Fifth Amendment. The proposed legislation would compel the owners of LIHTC real property (usually the partnership itself) to sell that property at the option of a ROFR holder and at what we understand would typically be substantially below fair market value. The legislation would afford the owner no additional compensation for this expropriation. This government-mandated duty to convey property to a third party is a *per se* taking without affording the owner market-value compensation, and thus would violate the Takings Clause. Just as the government may not seize the properties at issue for itself without paying just compensation, it may not command a forced sale to a third party without just compensation.

Moreover, from the perspective of private investors (who are typically limited partners in the agreements governing these properties), the proposed legislation would nullify those investors' contractual rights to receive the financial upside from the sale of these properties and to block below-market sales of the properties. Whether this effect should be analyzed under a *per se* or regulatory takings framework is doctrinally complicated, but the legislation raises serious constitutional con-


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cerns under either framework. Specifically, because this economic effect of the proposed legislation would in many respects constitute an outright appropriation of investors' significant interests in LIHTC properties, it raises serious, and likely fatal, concerns under *per se* takings doctrine. Additionally, because we understand that it would have a severe and adverse economic effect on investors, and because it would be contrary to investors' reasonable expectations that they would benefit from appreciation in property value, this economic effect of the legislation raises serious, and likely fatal, concerns under regulatory takings doctrine.

Finally, Congress may not deliberately adversely affect property rights without a proper legislative purpose. If courts would understand the law as "clarifying" pre-existing tax law, rather than *directly* rewriting existing agreements, the proposed legislation's false claim of "clarification" would intentionally trigger ahistorical reallocations of property rights without just compensation to those adversely affected. As explained above, Congress may not directly accomplish such an uncompensated taking of property. Nor can it have a legitimate purpose for this deceptive provision in the present circumstances.

Thus, for this additional reason, the proposed legislation raises significant, and likely fatal, constitutional concerns under the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Retroactive legislation is generally disfavored in the law, consistent with fundamental notions of justice. Congress may legislate retroactively only in service of a legitimate legislative purposes and through rational means. It is clear from the way that the proposed legislation is drafted and structured that its intended effect is to interfere with existing property rights by misleading courts and contractual parties to believe that pre-existing contracts incorporated this new so-called "ROFR"—really a below-market option—rather than the common-law ROFR that was in fact embodied in federal tax law at the time. It is highly doubtful that Congress could be acting with a constitutionally legitimate purpose by falsely "clarifying" an interpretation of law that is in fact a significant statutory change, with the predictable effect of triggering the reinterpretation of private contractual agreements by courts that Congress could not effectuate on its own.

For these reasons, however the proposed legislation is interpreted, it raises serious, and likely fatal, constitutional problems.

## BACKGROUND

Congress created the Low-Income Housing Tax Credit ("LIHTC") program to promote the development of rental housing for people with low incomes, a critically important public policy objective. The LIHTC program began with the Tax Reform Act of 1986.[1] It replaced the then-existing federal tax preference for low-income housing because, in Congress's judgment, those incentives had "not been effective in providing affordable housing for low-income individuals."[2] The program is currently codified at § 42 of the Internal Revenue Code.[3]

The key incentives of the LIHTC program are tax credits granted to low-income housing property owners as compensation for agreeing to affordability restrictions.[4] As described further below, LIHTC properties are frequently developed and operated by a non-profit entity working in connection with private investors


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who receive tax credits for a period of ten years in partial exchange for capital to fund property development. This financial structure is required to generate substantial investment in low-income housing because LIHTC tax credits offer little benefit to non-profit developers, which typically have low-to-nonexistent tax burdens and rarely have significant capital. Conversely, the tax benefits help make affordable housing projects more attractive to investors than available alternatives.

The first few years of the LIHTC program failed meaningfully to advance Congress' goal of spurring private investment in low-income housing.[5] Congress thus enacted changes to the program as part of the Omnibus Budget Reconciliation Act of 1989[6] and the Omnibus Budget Reconciliation Act of 1990.[7] Among other things, the 1989 statute created a tax safe harbor that permits a non-profit developer to enter into a partnership agreement with private investors that includes a right of first refusal, or ROFR, for property tenants to purchase the property at a statutorily defined minimum price without sacrificing the ability of investors to receive tax credits.[8] The 1990 statute expanded this safe harbor to such ROFRs granted to the non-profit developers as well.[9]

The LIHTC program does not provide permanent tax credits. Instead, private investors have a right to receive LIHTC tax credits only for a ten-year "credit period."[10] If the property does not maintain low-income housing for five additional years, however, the government can recapture the tax credits.[11] This fifteen-year window is known as the "compliance period."[12] At the end of the compliance period, IRS jurisdiction ceases, but the property must continue to provide low-income housing for at least an additional fifteen years and, in many cases, substantially longer.[13] State agencies continue to enforce compliance during these additional years, which are known as the "extended use period."[14]

Thus, today, § 42(i)(7)(A) of the Internal Revenue Code provides that "[n]o Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a right of 1st refusal held by," among others, a "qualified nonprofit organization."[15] To qualify under the § 42(i)(7) safe harbor, a ROFR must come into effect "after the close of the compliance period."[16] The statute also establishes a formula for calculating a "minimum purchase price" under the ROFR, which is the lowest price at which the ROFR may be exercised. The minimum purchase price is, with limited exceptions, the sum of "the principle amount of outstanding indebtedness secured by the building," plus "all Federal, State, and local taxes attributable to such sale."[17] Importantly, and as described further below, Congress deliberately structured § 42(i)(7) to create a right of first refusal, rejecting proposals to create a tax safe harbor for partnership agreements including below-market options.

Reflecting the success of these statutory revisions, non-profit developers and investors entered into thousands of LIHTC partnership agreements. Although the specific terms of these agreements vary, we understand that they generally involve "a nonprofit [that] will function as a one percent general partner . . . and the limited partners who invest will receive ninety-nine percent of the tax benefits."[18] The agreements also typically provide that the partnership itself owns the property. Proceeds from cash flow as well as a sale of the property are often distributed in a waterfall struc-


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ture, with the investor typically receiving at least 99% of money remaining after payment of various debts, fees, and taxes. These contractual provisions confirm that LIHTC investors, like all real estate investors, are entitled, and expect, to receive financial returns from real property in the form of (i) tax benefits; (ii) cash flow from use or rental of the property; and (iii) any appreciation in property value. Those expected returns are the incentives that drove the original investments in low-income housing.

We also understand that LIHTC partnership agreements often include the following provisions:

- If it qualifies as a non-profit entity under the Internal Revenue Code, the non-profit developer will frequently have a ROFR for a period of time, following the end of the compliance period (often two to four years) to purchase the property at the statutory minimum price, as determined by the formula found in 26 U.S.C.A. § 42(i)(7)(B). In this way, these agreements often refer to the § 42(i)(7) safe harbor without further defining the ROFR.

- In addition to a ROFR, the non-profit has an option to purchase the property at fair market value during the same two-to-four-year period following the end of the compliance period.

- The limited partner investors have the right, for the same two-to-four-year period following the end of the compliance period, to force a sale of the property at or above market value, subject only to the non-profit's ROFR.

- The non-profit general partner may not sell the property on behalf of the partnership—or take a range of other actions with capital implications—absent the limited partner investors' consent. This is known as the "blocking right."

These provisions will be discussed in more detail below.

## DISCUSSION

This article assesses the constitutionality of the proposed legislation, and it proceeds in three parts.

First, it explains as a matter of statutory interpretation how the current ROFR in § 42(i)(7) reflects the common-law requirements of a bona fide offer and willing seller.

Second, it discusses how the proposed legislation appears designed to rewrite or change the interpretation of existing LIHTC agreements so that these protections are removed retroactively through a false "clarification."

Third, it explains why this raises serious constitutional questions: a direct rewriting of the agreements would plainly be unconstitutional under the Takings Clause and, under the Due Process Clause, Congress cannot legitimately act to effectuate indirectly this significant retroactive redefinition of property rights through a false clarification. There is no reasonable interpretation of the proposed legislation that fails to raise serious, and likely fatal, constitutional concerns.


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## THE CURRENT § 42(i)(7) RIGHT OF FIRST REFUSAL REFLECTS THE COMMON-LAW ROFR ATTRIBUTES OF A BONA FIDE THIRD-PARTY OFFER AND A WILLING SELLER

In recent years, disputes have arisen between non-profit general partners and private investor limited partners as to whether the statutory ROFR described in § 42(i)(7), and which is referenced and effectively codified in many LIHTC partnership agreements, is a common-law right of first refusal—meaning that the ROFR requires both a bona fide third-party offer to purchase the property and a willingness of the owner to sell—or instead is essentially a common-law option, one that allows the non-profit general partner, at a time wholly of its own choosing within the prescribed period, to purchase the property at the statutory minimum price.[19]

Section 42(i)(7) creates a tax safe harbor for LIHTC partnership agreements that include a "right of 1st refusal." Consistent with settled interpretive principles, that statutory ROFR reflects its common-law meaning, one fundamentally different from an option. Claims that § 42(i)(7) as written today reflects an option—and the premise of the proposed legislation, that it merely "clarifies," but does not change, § 42(i)(7)—are at best misguided.

### As It Has Existed For Decades, The Existing § 42(i)(7) Right Of First Refusal Reflects A ROFR's Common-Law Meaning

Whether, and the extent to which, today's § 42(i)(7) ROFR incorporates the common-law concept of a ROFR is a question of statutory interpretation. The inquiry thus "begins, as always, with the statutory text."[20] In analyzing statutory text, moreover, courts employ a "general rule that a common-law term comes with its common-law meaning."[21] Because of the "well-established principle that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms,' "[22] it is apparent that—except as specifically provided—the statutory "right of 1st refusal" in § 42(i)(7) should be understood as reflecting its common-law meaning.

As shown below, under the common law, a ROFR is very different from an option. A ROFR is a defensive right—one that can be exercised only when the owner had received a bona fide offer from a third party unrelated to the ROFR holder and when the owner was willing to sell. An option, by contrast, is an offensive right to buy property—one which an option-holder may exercise any time the holder wished. Put simply, the holder of an option can dictate the sale of property whenever the right-holder desires, while the holder of a ROFR right is dependent on others—including the property owner—to choose to act to make the right usable.

This distinction, and its deep common-law roots, is reflected in the *Restatement (Third) of Property (Servitudes).*[23] The *Restatement* commentary explains that "[r]ights of first refusal are used to give" other parties "the right to purchase the property when the [owner of the property] decides to sell."[24] That same commentary reflects that ROFRs are triggered when there is a "third party" offer to purchase the property.[25] By contrast, the *Restatement* explains that "options . . . require transfer to a particular person at a time selected by that


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person."[26] Unlike a ROFR, then, the holder of an option can trigger the sale entirely on its own accord.

Other authoritative sources recognize these fundamental differences. *Williston on Contracts*, for example, explains that there is "a clear and classic distinction" between an option and a ROFR.[27] Options "must be accepted and then performed within the time limit specified . . ., whereas a right of first refusal has no binding effect unless the offeror decides to sell."[28] In a similar vein, *Black's Law Dictionary* defines a "right of first refusal" as "a potential buyer's contractual right to meet the terms of a third party's higher offer if a seller intends to accept that offer," thus reflecting the critical requirements of a bona fide third-party offer and a willingness to sell.[29] Indeed, the well-established view that an option holder may invoke the option at its choosing but a ROFR holder may only do so when certain conditions—including the seller's decision to sell—are met is reflected in case law, including decisions from numerous state high courts issued prior to Congress's creation of the § 42(i)(7) safe harbor.[30] Given this established common-law meaning, Congress is presumed to have incorporated that common-law understanding in creating the § 42(i)(7) "right of 1st refusal."

In terms that have been used by the Supreme Court, the above analysis "yields a clear answer" about the nature of the statutory ROFR, and is thus sufficient to "stop" further inquiry into Congress's intent.[31] That said, § 42(i)(7)'s "legislative history . . . confirms [this understanding] with unusual clarity."[32] As discussed below, the history of § 42(i)(7) demonstrates that Congress consciously avoided enacting a safe harbor covering below-market options. Its choice instead to reference a defensive ROFR struck a deliberate balance between competing policy objectives.

As referenced above, the "initial response" by the market to the LIHTC program was "not strong."[33] In fact, just "approximately twenty percent of the authorized credits were allocated in 1987, the first year of the program."[34] This was not spurring the more widespread availability of affordable housing Congress had hoped for. Professor Tracy A. Kaye—who between 1987 and 1991 served as a tax legislative assistant to Sen. John C. Danforth (R-Mo.), a senior member of the Senate Finance Committee—has explained that this lackluster start spurred Senators Danforth and George J. Mitchell (D-Me.) to create a task force to improve the LIHTC program.[35] The task force's report "became the basis for . . . legislation introduced by Senators Danforth and Mitchell."[36]

One specific recommendation of the task force was that "[n]on-profit organizations and tenant cooperatives should be able to negotiate below-market purchase options during a project's initial development and financing without disqualifying investors from claiming the [tax credits] while they own the project."[37] This proposal was then included in S. 980, the Low-Income Housing Tax Credit Act of 1989.[38] "Congress," however, "would not accept this modification because of the tax policy concern that use of such options removed any reasonable expectation that investors would derive a profit independent of tax benefits."[39] Requiring consent to any below-market sale by the seller is obviously a central aspect of a reasonable expectation of profit "independent of tax benefits."


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Congress' rejection of a below-market option on these grounds was well-founded. The Supreme Court has held that the tax consequences of transactions should be honored according to the parties' intent, so long as the transaction has "economic substance . . . and is not shaped solely by tax-avoidance features."[40] Under this economic substance doctrine, "when a transaction 'is one designed to produce tax gains not real gains'—such as when the challenged transaction has no prospect for pre-tax profit—then it . . . lies outside of the intent of the Tax Code."[41] The Internal Revenue Service has promulgated a regulation subjecting LIHTC tax credits to this doctrine.[42]

The economic substance doctrine raised serious questions for the recommendation that Congress create a below-market option under § 42(i)(7). Consistent with that doctrine, LIHTC tax credits may go only to the "owners" of low-income rental property. Under the doctrine, moreover, an owner is the entity that "possesse[s] the benefits and burdens of ownership."[43] Plainly, as relevant here, "the benefits and burdens of ownership" include the potential upside gain in the appreciation of the property's value (and of course, the concomitant risk of downside loss). If non-profit developers had a below-market option right to buy LIHTC property, Congress was concerned that, consistent with this long-accepted understanding of tax policy, private investors might well not be deemed the "owners" of the LIHTC property for tax purposes, because a below-market option would effectively "cap" the value the investor could receive from a sale of the property, depriving the investor of the most salient benefit of owning real estate. This inability to benefit from the property's appreciation would foreclose the investor from being treated as the owner of the property, thereby making it unable to receive the LIHTC tax credits flowing to that property. That outcome would have been highly detrimental to the LIHTC program and its goal of triggering investment in affordable housing, because the tax credits are critical incentives for investors, but have little value to the non-profit developers, which tend to face little tax liability. Without assurance of the tax benefits, the needed investments would not flow. Moreover, the denial of a potential to benefit from appreciation in the value of the property would have further diminished the overall value of investing, dealing a further blow to Congress' goal of incentivizing the injection of badly needed capital into the low-cost housing market.

Congress accordingly rejected the below-market option approach and instead enacted "a special rule that permits owners to receive the credit and other tax benefits even though the tenants hold a right of first refusal for the purchase of their units (at the end of the fifteen-year compliance period) for a specified minimum purchase price."[44] Structuring the non-profit developers' rights this way "leaves more power in the hands of the owner" because, unlike an option, it "does not give the holder the power to compel an unwilling owner to sell."[45] Indeed, as legislative history from both the House and Senate recognizes, Congress meant for this ROFR to only be viable "should the owner decide to sell."[46]

This statutory history and Congress's decision to reject legislation including a below-market option are compelling evidence that Congress intended to differentiate between an option and a ROFR; that it intended to adopt the common-law understanding of right of first


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refusal; and that it did not intend the statutory ROFR to be exercised without a willing seller and a bona fide offer from a third party.[47]

### Contrary Arguments Regarding The Meaning Of The Current § 42(i)(7) ROFR Are Not Persuasive

For the reasons set forth above, the best reading of the existing safe harbor for rights of first refusal in § 42(i)(7) today is that it creates a safe harbor for ROFRs as they would have been understood at common law. We have considered potential arguments that might be raised against that interpretation, and none is persuasive.

First, § 42(i)(7)'s inclusion of a minimum pricing formula for the statutory ROFR does not affect the conclusion that Congress intended to codify a common-law ROFR. One court has opined that "[b]ecause a right of first refusal granted under § 42(i)(7) . . . allows the nonprofit organization to purchase the property at a below-market price . . . it is difficult to imagine why a third party would make a bona fide offer for the property, knowing that the nonprofit organization has this right and is likely to exercise it."[48] That is not a sufficient basis on which to conclude that Congress intended to omit the common-law ROFR requirement of a bona fide third-party offer.

To displace the common law, Congress must speak clearly.[49] It does not follow from Congress's inclusion of a minimum ROFR price that Congress intended to abrogate the core common-law ROFR elements—receipt of a third-party offer, that the seller is willing to accept. To the contrary, under the common law, it is recognized that "the price at which the right of first refusal may be exercised" may be "fixed, either absolutely, or by reference to a formula," so long as the formula is reasonable.[50] Congress's decision to set a minimum price is thus not inconsistent with the common law. Moreover, even if Congress intended some deviation from the common law—as noted, this fixed price is not a deviation—courts must still "presume that Congress retained *all other elements* of [the common law] that are consistent with the statutory text."[51] Obviously, had Congress wished to change the common law rule here in this way it could easily have done so.

Second, there can be no persuasive argument that Congress's objectives in establishing the LIHTC program suggest that Congress intended to depart from the common-law meaning of ROFR in § 42(i)(7) without saying so expressly. "[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration."[52] The term "right of 1st refusal" has a clear meaning under the common law, and Congress's use of that term indicates it intended to facilitate greater ownership of low-income rental housing by non-profit developers through that particular right. And Congress had good reason for doing so: only in this way could it be assured that the tax credits would accord with traditional tax principles, and thus be available to the investors for whom they were a necessary incentive.

### With Common-Law Protections, The § 42(i)(7) ROFR Supports A Coherent LIHTC Program Structured To Promote Low-Income Housing

The foregoing establishes that Congress created a statutory safe harbor for LIHTC


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partnership agreements containing common-law ROFRs. Although parties to LIHTC agreements were free not to include a ROFR or to include a ROFR departing from the common law, it is our understanding that a substantial number of LIHTC agreements have ROFRs, and the ROFRs in a majority of those agreements are designed to conform to § 42(i)(7) in order to be assured of the tax benefits afforded thereby. In fact, we understand that non-profit developers and limited partner investors typically agree that LIHTC partnership agreements were drafted to implement, and take advantage of, the then-existing § 42(i)(7) ROFR, which as described above reflected the common-law meaning. Given that providing this assurance was the purpose of § 42(i)(7), this is not surprising.

The common-law protections of the ROFR work in tandem with other provisions of the agreement to create a coherent incentive scheme. Most notably, as discussed above, investors hold a "blocking right," that ensures that no below-market sale can occur without their consent. Because a common-law ROFR requires a willing seller, the ROFR does not infringe upon the protections provided to investors by their blocking right.[53] On the other hand, the ROFR provides a valuable right for the developer non-profits because it enables the non-profit partners to block the investor limited partner's right to force a sale of the property. This protection ensures that the non-profit partner can either maintain its ownership in the partnership or purchase property for the statutory minimum price, which in turn helps to ensure continued operation of the housing as low-income while preserving the tax benefits to the investor, as Congress contemplated was needed to stimulate investment.

## THE AFFORDABLE HOUSING CREDIT IMPROVEMENT ACT ATTEMPTS TO RETROACTIVELY MODIFY THIS STATUS QUO—EITHER DIRECTLY OR INDIRECTLY

In March 2017, Senators Maria Cantwell and Orrin Hatch introduced the Affordable Housing Improvement Act of 2017 (S. 548), legislation that, if enacted, would expressly convert the ROFR authorized by § 42(i)(7) into an option. This change to the nature of the ROFR was properly labeled as a "modification of rights related to the building purchase" and would have applied only prospectively to new projects. The 2017 bill thus would not have disrupted expectations of contracting parties through any retroactive application to existing projects that had been negotiated in reliance on the current law.

A new 2019 version of the bill was introduced by Senator Cantwell, only two months after the federal district court issued its decision in Senior Housing Assistance Group v. AMTAX Holdings 260, LLC. That decision held that a contractual ROFR in a LIHTC partnership agreement could not be exercised unless an independent third party had made a bona fide offer to purchase the property that the owner of the property was willing to accept.[54] The Affordable Housing Credit Improvement Act of 2019—introduced in both the House (H.R. 3077) and the Senate (S. 1703)—would make several amendments to the LIHTC program.[55]

It is apparent that the intended effect of the legislation is to interfere with existing LIHTC agreements and to convert (directly or indirectly) existing ROFRs into below-market options. Section 303—the relevant section of


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the proposed legislation—proceeds in three parts:

- *Section 303(a)—Prospective Transformation of a ROFR into an Option*: This subsection would strike the words "right of 1st refusal" from 26 U.S.C.A. § 42(i)(7)(A) and replace them with the words "an option." (The legislative draftsperson's felt need to modify this statutory language itself supports the point that a ROFR and option are distinct and that the existing statutory text means a common-law ROFR, not an option.)

- *Section 303(b)—Retroactive Transformation of a ROFR into an Option*: This subsection (inaccurately) claims to be a "clarification with respect to right of first refusal and purchase options." In relevant part, this subsection provides for the following language to be added to the end of § 42(i)(7):

  For purposes of determining whether an option, including a right of first refusal, to purchase property is described in the proceeding sentence—

  (i) such option or right of first refusal may be exercised with or without the approval of the taxpayer, and

  (ii) a right of first refusal may be exercised in response to any offer to purchase the property, including an offer by a related party.

  In this way, § 303(b) redefines the essential elements of a ROFR by dispensing with the common-law requirements of a bona fide third-party offer and a willing seller.

- *Section 303(c)—Retroactive Modification of or Interference with LIHTC Agreements that Incorporate § 42(i)(7)*: Section 303(c)(1) provides that § 303(a) applies only prospectively, but § 303(c)(2) states that § 303(b)—the so-called "clarification"—applies "to agreements among the owners of the project . . . entered into before, on, or after the date of the enactment of this Act."[56] Yet § 303(c)(3) states that nothing in "this amendment shall supersede the agreement among the parties as to the manner of execution or terms of a right of first refusal or option permitted by section 42(i)(7)."[57]

Section 303(a) is similar to the 2017 version of the bill. By making only a prospective change, it does not implicate retroactivity concerns.

Unlike § 303(a), § 303(b) is obviously intended to apply retroactively. Commentators have expressed confusion, however, about the scope of that retroactivity.[58] Evaluating these subsections in the context of the text, structure, and legislative history, it appears to be the intent of the drafters to cause past agreements to be retroactively reinterpreted—either directly or indirectly—with the intent to convert previously-agreed-to contractual ROFRs into below-market options. This conclusion follows from several factors.

To begin with, the "clarification" in § 303(b) is not a clarification at all, but instead a significant statutory change. By stating that a "right of first refusal" "may be exercised with or without the approval" of the investors and "may be exercised in response to any offer to purchase," § 303(b)(3) redefines ROFR in a way that materially departs from the common-law understanding that Congress adopted when it enacted the relevant parts of § 42(i)(7). Specifically, it would transform the statutory


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ROFR in § 42(i)(7) into a below-market option by eliminating both previously discussed key requirements of a ROFR—(i) a bona fide third-party offer and (ii) a willing seller.[59]

Significantly, the legislation not only expressly and falsely labels § 303(b)(3) a clarification, under § 303(c)(2), this so-called clarification is made retroactive. Thus, the legislation advances an (entirely indefensible) claim—proposing that the false claim be embodied in the statute—that the reengineered ROFR described in the bill was the ROFR that was always set forth in § 42(i)(7). That is the essence of a clarification: a statement of what the law always was, not a change in the law that is then meant to be applied retrospectively.[60]

In addition, if the drafters had other purposes in mind, there would be no need to structure the legislation in a way that risks interfering with existing property rights. For example, some might argue that the proposed legislation is designed only to expand the statutory tax safe harbor in § 42(i)(7) to include options. Under this interpretation, the direct retroactive effect of the bill would be to ensure that prior agreements that happened to contain express below-market options or waivers of certain ROFR requirements would fit within the safe harbor, thereby retroactively saving tax benefits that might have been at risk under the original version of § 42(i)(7). (We understand that there are few such agreements, because they would have fallen outside the statutory safe harbor. But to the extent such an agreement existed, there would be no bar to Congress enfolding them retroactively within the safe harbor going forward.)

If Congress simply wanted to expand the statutory safe harbor in § 42(i)(7) for existing LIHTC agreements in this way, it could enact straightforward legislation to revise the statute to provide that tax benefits shall not fail to be allowable merely because the parties to a contract have expressly waived one or more of the requirements of a right of first refusal. In fact, the change could be as simple as adding the words "or option" to the existing statutory language.[61]

Finally, the proposed legislation's context and timing add further support to the conclusion that the intended effect of the legislation is to interfere with existing LIHTC agreements. As explained, the legislation was drafted in the aftermath of the *SHAG* decision ruling that the ROFR was not an option and that the non-profit ROFR holders in that case had to satisfy both requirements of a common-law ROFR to exercise the right.

In summary, because the legislation falsely claims to be clarifying the law, rather than admitting that it is changing the law; because there would be far simpler language if Congress meant only to expand the statutory safe harbor; and because the context and timing of the proposal strongly suggest Congress's true intent, there is strong reason to conclude that a mere backwards-looking expansion of the statutory safe harbor is neither the purpose of this legislation nor its sole intended effect. To the contrary, even if the legislation is not interpreted directly to rewrite existing LIHTC agreements, it appears that the intended effect of the legislation would be to change the meaning of existing agreements in precisely the same way.[62]

This intended effect of the legislation flows from the closely interconnected nature of


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LIHTC agreements and § 42(i)(7). It is our understanding that thousands of partnership agreements between investor limited partners and non-profit general partners have been entered into against the backdrop of the existing § 42(i)(7) provision. These LIHTC agreements are typically designed to incorporate the § 42(i)(7) ROFR safe harbor. Given this tight linkage between LIHTC agreements and § 42(i)(7), if as this legislation asserts, a § 42(i)(7) ROFR *always* amounted to a below-market option, then the terms of *contractual* ROFRs would be understood as redefined in the *revised "clarification"* rather than the historical statute.

## THE PROPOSED LEGISLATION'S RETROACTIVE ATTEMPT TO MODIFY THE STATUS QUO RAISES SIGNIFICANT CONSTITUTIONAL PROBLEMS

For the foregoing reasons, the intended effect of the legislation appears to be to interfere with existing LIHTC agreements. The legislation either directly modifies agreements retroactively to convert common-law ROFRs into what are effectively below-market options or it is structured intentionally to accomplish that same outcome indirectly. Both readings are problematic from a constitutional perspective. Were the legislation effectively to modify agreements retroactively, it would constitute a straightforward violation of the Takings Clause. And there would also be significant, and likely fatal, problems raised under the Due Process Clause and/or the Takings Clause for Congress to attempt to achieve indirectly what it squarely cannot do directly.[63]

### If The Proposed Legislation Directly Modifies Agreements Retroactively, The Proposed Legislation Would Violate The Takings Clause

If the proposed legislation directly modifies agreements retroactively, converting the prior common-law ROFRs into what effectively constitute below-market options, the proposed legislation would violate the Takings Clause by accomplishing a *per se* taking of real property owned by the partnership. It would also likely violate the Takings Clause by nullifying, and thus taking, the contractual rights of the limited partner investors in those partnerships. (As noted and discussed below, even if it does not operate directly, by attempting to do so indirectly it would likely violate the Due Process Clause.)

#### *The proposed legislation would constitute a* per se *taking of real property owned by the partnership*

The Takings Clause mandates that "private property" shall not "be taken for public use, without just compensation."[64] It is clear that LIHTC properties are "private property" protected by the Takings Clause. It is our understanding that, under LIHTC agreements, the partnership typically, if not always, holds title to the real property. Although limited partner investors own more than 99% of the partnership interest, and although they are the "owners" of the property for tax purposes, the nominal owner of the real property is thus the partnership entity itself. There is no doubt that fee simple ownership of the property constitutes a cognizable property interest.

The next question, then, is whether that property would be "taken" by the proposed legislation. "[T]he classic taking is one in which


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the government directly appropriates private property for its own use," and "in the case of real property, such an appropriation is a *per se* taking that requires just compensation."[65] But "takings analysis is not necessarily limited to outright acquisitions by the government for itself."[66] Rather, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve," and "without regard to whether the State, or instead a party authorized by the State, is the occupant."[67]

The Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.* is instructive.[68] The government there required landlords to permit cable companies to install cable facilities on their property, in exchange for a nominal statutory fee. The Court held that this was an unlawful taking, "even though [the owner] could of course still sell and economically benefit from the property."[69] It explained that "[f]ew would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking,"[70] and that an even smaller physical invasion was no different. This is because a "permanent physical occupation . . . does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."[71]

The proposed legislation would accomplish an even more severe appropriation of property. The issue here is not whether the government can demand that a third party be allowed to install a small cable box or a swimming pool on property, against the owner's will. It is whether the government may authorize a third party to seize possession and ownership of the *entire* LIHTC property on the demand of a ROFR holder at a below-market price, when the partnership otherwise would have the right to possess and own that property indefinitely (or at least sell at fair market value). The government may not do so—as it would do here—without paying the property owner just compensation. "[P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury."[72] That principle is dispositive in the circumstances here.

Another important precedent is the Supreme Court's decision in *Louisville Joint Stock Land Bank v. Radford.*[73] There, a bank held a nonpurchase money mortgage on a farm, and the farmer defaulted and instituted bankruptcy proceedings. A subsequently enacted federal statute, "which by its terms applied only retrospectively, permitted the debtor to purchase the property for less than its fair market value."[74] The Supreme Court "held the statute was void because it effected a 'taking of substantive rights in specific property acquired by the Bank prior to' its enactment."[75] The Court explained that "[i]f the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."[76]

By analogy, the federal government would plainly be barred by the Takings Clause from seizing low-income properties from the owners without paying just compensation for that


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taking.[77] As in *Radford*, Congress may not sidestep that requirement by effectively compelling the property owner to sell to a third party at a below-market price. That is precisely what the proposed legislation would accomplish if it directly transformed contractual ROFRs into options.

There is no sound basis to distinguish *Loretto*, *Radford*, or similar precedents. Although LIHTC partnership agreements contain ROFRs and often market-value options, and although LIHTC properties are subject to rental restrictions for a set period, none of that refutes the conclusion that the partnership has a constitutionally protectable interest in the real property. As the Federal Circuit has explained, "owners are not somehow deprived of their Fifth Amendment rights merely because they temporarily relinquished some of their rights of fee simple ownership."[78] The existing ROFR, for example, does not alter the partnership's "expectation that [it] will be relatively undisturbed at least in the possession of [its] property."[79] Indeed, it only has any effect if the owner decides to sell.[80] There thus appears no reason to believe that any common attributes of the LIHTC program bear on this constitutional analysis.

Nor does it matter to the question whether a taking has occurred that when a § 42(i)(7) option (as transformed by the proposed legislation) is exercised, the partnership will typically receive some below-market compensation. The Supreme Court has rejected the suggestion that payments for property bear on the threshold question of whether a taking has occurred: "[W]hen there has been a physical appropriation, we do not ask . . . whether it deprives the owner of all economically valuable use of the item taken."[81] Instead, "once there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation."[82]

Finally, the observation that this appropriation is occurring in the context of a federal program designed to promote affordable housing does not change the constitutional analysis. In both *Horne v. Department of Agriculture* and *Loretto*, the Supreme Court rejected claims that the property invasions at issue were not takings because they could be imposed as conditions to engage in commerce.[83] "It is true that 'background principles' of law may 'inhere' in a plaintiff's title to his property and thereby limit his ability to recover for a taking," such as how there is no taking when an innocent owner's property is subject to forfeiture due to criminal acts of a lessee.[84] But there is no background principle suggesting that it would be reasonable to anticipate that Congress would authorize a third party to seize a partnership's property against its will at a below-market price.[85]

Because the proposed legislation would accomplish an appropriation, and taking, of real property under the Takings Clause, it would be unconstitutional unless it provides for "just compensation." Normally, "just compensation" means a property owner is entitled to "fair market value," which is "what a willing buyer would pay in cash to a willing seller" at the time of the taking.[86] Here, we understand that the statutory § 42(i)(7) minimum price will often be well below what is generally deemed fair market value for LIHTC properties. That is because in a number of areas of the country, multifamily housing projects have significantly appreciated in value since the 2008 recession.[87] Moreover, in many areas of the


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country, incomes have increased, and LIHTC properties' affordability restrictions are tied to median local incomes.[88] That, too, adds to LIHTC properties' values.

Ultimately, an economic analysis of the effects of the proposed legislation on particular LIHTC properties is beyond the scope of this article. It suffices to say that nothing in the proposed legislation guarantees just compensation; the legislation appears designed to result in forced sales to non-profit developers well below fair market value; and any application of the legislation that directly results in an appropriation of LIHTC property below fair market value of the property at issue would be unconstitutional.

### *The proposed legislation would likely effectuate a taking of limited partners' property rights under existing LIHTC agreements*

Independent of the foregoing analysis with respect to partnership rights, the limited partners' constitutional rights would also likely be violated were the proposed legislation enacted into law, given their substantial interests in the partnership and the burdens that the proposed legislation would place on their bargained-for contractual rights.

#### *Limited partner investors have constitutionally cognizable property interests*

The threshold question is: do limited partner investors have a constitutionally cognizable property interest affected by the proposed legislation?[89] The answer is yes. As explained above, limited partners not only own more than 99% of the interest in a partnership that holds title to property and rights to the appreciation in the property; those limited partners also have a contractual right to block a below-market sale of the property. Courts have held that interests in property that are short of fee simple interests constitute "property" that may be taken in violation of the Takings Clause.[90] Thus, in *Manufactured Housing Communities of Washington*, for example, the Supreme Court of Washington recognized a ROFR as creating an interest in property subject to takings analysis.[91] In addition, the U.S. Supreme Court has broadly described the Takings Clause as protecting "an interest in property;"[92] has recognized that interest generated on funds held in trust constitute property;"[93] and has established in multiple cases that contracts and contractual rights can be "property within the meaning of the Fifth Amendment, and if taken for a public use the government would be liable."[94] Taking this authority together, limited partners' rights with respect to LIHTC properties—although not fee-simple ownership interests—are a more substantial interest than rights already recognized as property for constitutional purposes, and are thus constitutionally protected property interests.

#### *The proposed legislation likely would unconstitutionally take the limited partners' property rights in LIHTC contracts*

Having established that limited partners have property interests in LIHTC contracts, the next question is whether the proposed legislation would unconstitutionally take that property. Although there is no case of which we are aware that is directly on point, precedent and the underlying legal principles strongly support the conclusion that the proposed legislation would accomplish a taking. By nullifying the ROFR protections of a willing


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seller and a bona fide offer, the proposed legislation would nullify the limited partners' ability to block the ROFR by withholding consent to a sale.[95] The effect of the legislation would thus be to allow the non-profit to self-trigger the ROFR (as if it were an option) and effectively take the limited partners' right to the appreciation of the property. By vitiating the key benefits of the agreement to which the limited partners are entitled, the proposed legislation likely would unconstitutionally take the limited partners' rights.

There is some doctrinal uncertainty regarding whether in addressing this issue a court would apply a *per se* takings or regulatory takings framework to determine whether the proposed legislation violates the Takings Clause. As explained above, the *per se* doctrine is often applied to the physical taking of interests in real property. By contrast, the Supreme Court has developed a regulatory takings doctrine, which recognizes that although the use of "property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."[96] This analysis is an " 'ad hoc' factual inquiry" that focuses on three factors set forth in *Penn Central Transportation Co. v. New York City*:[97] "[(i)] the economic impact of the regulation, [(ii)] its interference with reasonable investment-backed expectations, and [(iii)] the character of the government action."[98]

Here, it is an open question whether the proposed legislation's vitiation of limited partners' contractual rights would be more like a physical appropriation of property (subject to *per se* analysis) or more like a use restriction (subject to regulatory takings doctrine). Reasoning from first principles, there is a strong argument that a *per se* analysis should apply.[99] Although limited partners are not nominal fee simple owners of LIHTC properties, their interests are arguably sufficiently similar to property owners' interests to render *per se* analysis appropriate: (i) limited partners own more than a 99% interest in the partnership; (ii) the partnership was designed and structured solely for the purpose of owning and operating real property; (iii) limited partners are entitled to a substantial portion of the upside of property appreciation through the contractual waterfall structure; (iv) limited partners are owners of the property as a matter of tax law; (v) LIHTC property cannot be sold below-market without limited partners consent; and (vi) the proposed legislation would impair, if not destroy, these rights by allowing LIHTC properties to be sold below market value without their consent. These circumstances bear little resemblance to the classic application of the regulatory takings doctrine, where the government is merely *regulating* the use of property.[100] Instead, with a core right relative to property (the right to refuse to sell) being taken away, these circumstances point more to a *per se* takings analysis.

There is judicial support for the proposition that certain appropriations of contractual rights could be *per se* takings. In *Brooks-Scanlon Corp. v. United States*, for example, the Supreme Court held that there was an "expropriation" (and thus unlawful taking) of a party's contractual rights when the government "put itself in the shoes of claimant and took from claimant and appropriated to the use of the United States all the rights and advantages that an assignee of the contract would have had."[101] This decision predated *Penn Central* but came after (and did not cite) the Supreme Court's recognition of the regulatory takings


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doctrine. Based on *Brooks-Scanlon*, one commentator has opined that "[v]iewed as an appropriation rather than a regulatory interference, this category of legislative impairment of existing private contract rights [that is, a government-mandated takeover of contractual rights] would not be tested under" a regulatory takings framework.[102] Similarly, a scholar has written that "when the government takes over the contract rights of one of the contracting [parties], or transfers the rights to a third party . . . [t]his type of government action should be viewed as a kind of appropriation of private property warranting *per se* treatment."[103] If evaluated under the *per se* framework, the proposed legislation would retroactively modify existing contracts, thereby unconstitutionally taking without just compensation a limited partner investor's contractual rights to block the non-profit from purchasing the entire project at a below-market price (unless the non-profit meets the established criteria for triggering a ROFR).

There is also considerable likelihood that the proposed legislation is unconstitutional if the *Penn Central* regulatory takings doctrine, and its three-factor framework, is applied here:

*1. Character of the government action.* Not all government action that frustrates, or incidentally affects, contract rights constitutes a taking.[104] The character of the proposed legislation's appropriation of contractual property interests here would not merely frustrate limited partners' contractual rights under LIHTC agreements, however, nor would it "merely affect[] property interests through some public program adjusting the benefits and burdens of economic life to promote the common good."[105] Rather, the proposed legislation (as explained above) would unconstitutionally seize the property of the partnership and transfer it to another party, directly at odds with the limited partners' contractual rights to prevent such transfer.

*Cienega Gardens v. United States* provides a good analogy. There, low-income housing owners challenged a statute that eliminated their contractual right to prepay their federally insured mortgage and thereby avoid affordability restrictions. The Federal Circuit held that there was a taking, because this was not "legislation targeted at some public benefit, which incidentally affects contract rights."[106] Rather, it was "legislation aimed at the contract rights themselves in order to nullify them."[107] Similarly here, insofar as the proposed legislation directly rewrites the terms of existing LIHTC partnership agreements, it would directly nullify limited partners' contractual rights to prevent below-market sales.

In short, the proposed legislation's invasion of limited partners' contractual rights resembles in many ways a classic appropriation of property by the government. This factor would thus weigh heavily in favor of a taking in the regulatory takings analysis.

*2. Severity of the economic impact.* The economic impact of the proposed legislation on limited partners would also support a conclusion that it is a regulatory taking. Although calculating the legislation's aggregate economic effect is a fact question beyond the scope of this article, we understand that limited partners would suffer significant economic consequences if it were applied to permit non-profit developers to exercise ROFRs as below-market options.

The Federal Circuit has held that this factor "is measured by the change, if any, in the fair


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market value caused by the regulatory imposition."[108] It has further required a showing of "serious financial loss," while recognizing there is not "an automatic numerical barrier preventing compensation, as a matter of law."[109] Here, we understand that in many applications the statutory ROFR price in § 42(i)(7) is substantially below fair market value and below what the property would be worth if it remained with the partnership and continued to generate income. By stripping limited partners of their right to receive cash flow from the LIHTC properties and by appropriating the value of the property and transferring it from the limited partner investors to the non-profit developer, the proposed legislation would in many cases have a significant adverse economic effect on limited partners. For those reasons, this second *Penn Central* factor should also be satisfied.

*3. Interference with investment-backed expectations.* Finally, based on our understanding of the facts, the proposed legislation would likely interfere with limited partners' investment-backed expectations. This inquiry has subjective and objective components. Courts "require actual expectation of, or reliance on the government not nullifying the [plaintiff's] contractual and regulatory rights as a threshold matter. The [plaintiff's] expectation . . . would not really be 'investment-backed' unless they actually believed in a certain outcome and entered the program in reliance on it."[110] At the same time, the expectations must be reasonable; "[a]ssessing the reasonableness of a plaintiff's expectations is an objective, but fact-specific inquiry into what, under all the circumstances, the plaintiff should have anticipated."[111]

Both the subjective and objective prongs appear to be satisfied here. Because the subjective component relates to limited partners' "actual" expectations, this analysis could in theory vary among limited partners. The terms of the LIHTC partnership agreements themselves, however, leave no reason to doubt that limited partners investing in LIHTC properties expected to participate in the upside of property appreciation and not to have the property sold below-market against their will. First, LIHTC partnership agreements have waterfall provisions ensuring that limited partners receive a significant portion of any sale proceeds. Second, as discussed, the LIHTC partnership agreements provide broad rights to the limited partners to consent to any capital event. For those reasons, it would be reasonable for these sophisticated investors, like all real estate investors, to expect to reap any financial gains from property appreciation.

Although some have opined that limited partner investors may not have expected LIHTC properties to appreciate in value, and primarily invested to obtain tax credits,[112] that is far from dispositive of the analysis here, even if true. The question is not whether investors thought it was *likely* that the property would increase in value, but rather whether they expected that, *if* the property appreciated, they would benefit from that appreciation. As the Federal Circuit has put it, the issue is whether they relied on "the government *not nullifying* [their] contractual and regulatory rights."[113] Because continuing to have a stake in the potential upside of the property was a key consideration to ensure that limited partners would be able to receive tax credits, and because reaping the benefits of property appreciation, if any, is a typical incident of property ownership and reason to own property,


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there is every reason to believe that this would have been part of the limited partners' calculus when deciding to invest in low-income housing.

This expectation was also objectively reasonable. In assessing this question, the court in *Cienega Gardens* "start[ed] from the assumption that a contract term that was both material, in that it gave the duration of a business arrangement with limited profit, and apparently justified, in that it was consistent with (and identical to) the relevant regulation . . . is one that gives rise to *reasonable* expectations of fulfillment of the contract term."[114] The court then found no grounds "for changing this supposition," holding that "a Regulatory Agreement referring to regulations that contain a provision that they are amendable does not mean that program participants are reasonably on notice for every possible change and therefore could not have had a reasonable investment-backed expectation of no change to the prepayment right."[115]

Similarly, the court rejected the argument that investors should have anticipated that Congress might change a program created by statute that would impair their rights: "[O]ne would not reasonably expect Congress to make legislative changes that would actually discourage parties from participating in the programs in the future."[116] It is relevant that an area may be "heavily-regulated," but, the court explained, "that does not mean that *all* regulatory changes are reasonably foreseeable or that regulated businesses can have *no* reasonable investment-backed expectations whatsoever," concluding "[w]e have no evidence that the housing programs involved here were part of such an extreme field."[117]

The logic of *Cienega Gardens* applies here. As explained above, typical LIHTC partnership agreements give limited partners a right to block sales of the property; provide that the limited partner has a right to participate in the upside of property appreciation through the 99% ownership and waterfall provisions; and provide that the non-profit developer may have an option, but one to purchase the property *at fair market value.* These are plainly material terms of the contract and, consistent with *Cienega Gardens*, it appears reasonable to have expected that these terms would be fulfilled, especially against the backdrop of the economic substance doctrine and other tax policy requiring that LIHTC partnerships be structured in this manner. Also, as in *Cienega Gardens*, there is no apparent basis "for changing this supposition,"[118] such as a history of Congress previously nullifying or impairing similar contractual rights. For example, this is not a case like *Appolo Fuels, Inc. v. United States*, where a mining corporation should have been aware that its mining leases were subject to an existing federal regulatory structure that could deem areas unsuitable for mining.[119] *Cienega Gardens* itself was about another low-income housing program, and so the court's unwillingness to discredit the owners' reasonable expectations in that similar context is important.

In short, there is a compelling argument that the proposed legislation would take the contractual property interest of limited partners in existing LIHTC agreements by eliminating their opportunity to participate in the financial upside in appreciation of property value and by allowing the property to be sold at below-market value absent their consent and without having to satisfy all of the ROFR requirements. This government-mandated destruction of a


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contractual right—viewed through the *per se* and regulatory takings doctrines—is unlikely to survive a constitutional challenge under the Takings Clause.[120]

## Alternatively, By Indirectly Modifying Existing Agreements Retroactively, The Proposed Legislation Raises Likely Fatal Constitutional Concerns

The preceding analysis explains why the proposed legislation—insofar as it directly transforms contractual ROFRs in existing LIHTC agreements into the equivalent of below-market options—is unconstitutional under the Takings Clause. As discussed above, however, even if the proposed legislation does not directly rewrite contractual ROFRs in existing LIHTC agreements, there is significant reason to believe that could be its *effect* and that this effect is a primary, if not the sole, *purpose* of the legislation. This apparently novel attempt to diminish the property rights of LIHTC partnerships and investors through retroactive mischaracterization of the law raises serious, and likely fatal, constitutional concerns.

*First*, because there is significant reason to conclude that the intended effect of the proposed legislation is in fact to interfere with existing property rights on a retroactive basis, the proposed legislation likely runs afoul of the Fifth Amendment's Due Process Clause. That provision bars the federal government from "depriv[ing]" people "of life, liberty, or property, without due process of law."[121] "The Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation."[122] Retroactive legislation presents due process problems, the Supreme Court has explained, because Congress's "unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration," and because Congress's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."[123] Both concerns are present here.

"Retroactivity is generally disfavored in the law, in accordance with 'fundamental notions of justice' that have been recognized throughout history."[124] As such, retroactive legislation is constitutional only if "the retroactive application of the legislation is itself justified by a rational purpose."[125] The Supreme Court has emphasized that "[i]t does not follow" that this standard is met just because the prospective applications of legislation pass constitutional muster.[126] Indeed, "the justifications for [prospective application] may not suffice for [retroactive application]."[127] Although judicial deference in this area is quite high, and "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches," that is only so "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means."[128]

Because the intended effect of the proposed legislation is to interfere with and reallocate existing property rights, the constitutional prerequisites Congress must meet before deliberately affecting rights retroactively cannot be present here. It bears emphasis that the retroactivity of the legislation is significant both in temporal terms (because it risks interfering with the interpretation of agreements entered into decades ago) and in aggregate financial terms (because hundreds of millions of dollar of property value may be at


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stake). As explained above, a direct congressional abrogation of existing LIHTC agreements by transforming contractual ROFRs into below-market options would, absent just compensation, constitute a taking in violation of the Fifth Amendment. A more indirect—and indeed, misleading—effort would not render Congress's purpose any more legitimate. Congress may not, consistent with the Constitution, directly rewrite LIHTC agreements to take property rights without just compensation, and thus Congress may not act with the purpose of destroying or diminishing those rights without just compensation through the more indirect means of falsely claiming to "clarify" the meaning of a statutory framework that it knows or should know formed the basis for thousands of contracts incorporating that framework.

Interfering with property rights in this misleading way, and on a retroactive basis, is not a "legitimate legislative purpose." Nor are the means selected to do so "rational." A legislative aim of defeating the expectations of parties to existing contracts through the subterfuge of claiming to "clarify" while in fact changing the law, seems neither legitimate nor rational. Moreover, by attempting to redefine the attributes of a § 42(i)(7) ROFR in an obviously counterfactual manner, the proposed legislation will put at risk the property rights of investors; increase the likelihood of costly litigation that may result in erroneous judicial decisions interpreting LIHTC agreements; and result in a significant and unfair economic transfer from investors to non-profit developers under existing agreements. In those ways, the legislation would also create significant disincentives for investors to participate in the future in the LIHTC program by creating a justifiable fear Congress might again attempt a retroactive reengineering of property rights.

*Second*, in addition to those serious due process defects, the proposed legislation might well be deemed to lead to judicial takings of existing property interests. The Supreme Court has not formally adopted the judicial takings doctrine, but a plurality of four Justices would have done so in *Stop the Beach Renourishment v. Florida Department of Environmental Protection.*[129] The plurality explained that "if a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."[130] As explained above, the proposed legislation appears structured to invite courts to "declare[]" that existing property rights held by LIHTC partnerships or investors "no longer exist" (or falsely claim they never existed in the first place), decisions that would create serious concerns under the judicial takings doctrine.

## CONCLUSION

For the reasons explained above, the Affordable Housing Credit Improvement Act of 2019's effort to rewrite or change the interpretation of existing LIHTC agreements raises serious, and likely fatal, constitutional concerns. The text, structure, and context of the proposed legislation make clear that its intended effect is to interfere with existing property interests by transforming existing ROFRs into below-market options, transferring by legislative fiat the right to control the decision to sell from the investor to the non-profit developers. If enacted and implemented, the proposed legislation would in all likelihood take


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from investors hundreds of millions of dollars of appreciation in property to which their investments entitle them under current law. As explained above, such a transfer would likely violate the Takings and/or Due Process Clauses of the Fifth Amendment to the United States Constitution.

## NOTES:

[1]Pub. L. No. 99-514, 100 Stat. 2085, 2189–2208.

[2]S. REP. NO. 313, 99th Cong., 2d Sess. 758 (1986).

[3]26 U.S.C.A. § 42.

[4]Tracy A. Kaye, Vill. L. Rev. 871, 877 (1993).

[5]*Id.* at 883.

[6]Pub. L. No. 101-239, 103 Stat. 2106, 2306–2322.

[7]Pub. L. No. 101-508, 104 Stat. 1388, 1388–1475.

[8]*See* 26 U.S.C.A. § 42(i)(7)(A).

[9]*Id.*

[10]IRS, *IRC § 42, Low-Income Housing Credit* 10 (rev. Aug. 11, 2015).

[11]*Id.*

[12]*Id.*

[13]*Id.*

[14]*Id.*

[15]26 U.S.C.A. § 42(i)(7)(A).

[16]*Id.*

[17]*Id.* § 42(i)(7)(B).

[18]*Sheltering Social Policy In The Tax Code: The Low-Income Housing Tax Credit*, at 886; *see also* HUD, *What Happens To Low-Income Housing Tax Credit Properties At Year 15 And Beyond?* 25 (Aug. 2012) (“LIHTC projects have almost always been developed using a limited partnership ownership structure.”).

[19]*See Senior Housing Assistance Group v. AMTAX Holdings 260, LLC*, 2019 WL 687837 (W.D. Wash. 2019), clarified on denial of reconsideration, 2019 WL 827232 (W.D. Wash. 2019) and appeal dismissed, 2019 WL 5576461 (9th Cir. 2019); *Homeowner’s Rehab, Inc. v. Related Corporate V SLP, L.P.*, 479 Mass. 741, 99 N.E.3d 744 (2018).

[20]*U.S. v. Gonzales*, 520 U.S. 1, 4, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997).

[21]*Microsoft Corp. v. I4I Ltd. Partnership*, 564 U.S. 91, 102, 131 S. Ct. 2238, 180 L. Ed. 2d 131, 98 U.S.P. Q.2d 1857 (2011); *accord, e.g.*, *F.A.A. v. Cooper*, 566 U.S. 284, 292, 132 S. Ct. 1441, 182 L. Ed. 2d 497 (2012); *Neder v. U.S.*, 527 U.S. 1, 21, 119 S. Ct. 1827, 144 L. Ed. 2d 35, 99-1 U.S. Tax Cas. (CCH) P 50586, 83 A.F.T. R.2d 99-2668 (1999); *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 59, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

[22]*Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739, 109 S. Ct. 2166, 104 L. Ed. 2d 811, 16 Media L. Rep. (BNA) 1769, 10 U.S.P.Q.2d 1985 (1989) (quoting *N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc.*, 453 U.S. 322, 329, 101 S. Ct. 2789, 69 L. Ed. 2d 672, 2 Employee Benefits Cas. (BNA) 1489, 107 L.R.R.M. (BNA) 2769, 91 Lab. Cas. (CCH) P 12821 (1981)).

[23]*Restatement (Third) of Property (Servitudes)* § 3.4.

[24]*Id.*, cmt. f.

[25]*Id.*

[26]*Id.*, cmt. c.

[27]25 *Williston on Contracts* § 67:89 (4th ed. 1993).

[28]*Id.*

[29]*Black’s Law Dictionary* (7th ed. 1999).

[30]*See, e.g.*, *Nash v. Buchanan*, 716 F.2d 766, 767 (10th Cir. 1983) (“Unlike an option, a right of first refusal confers a right to purchase property only once the grantor has elected to sell.”); *Park-Lake Car Wash, Inc., v. Springer*, 352 N.W.2d 409, 411 (Minn. 1984) (difference between ROFR and option is that former requires “that the owner must have received a bona fide offer from a third party which he or she is willing to accept”); *Coniglio v. Hansl*, 220 Neb. 580, 371 N.W.2d 273, 274 (1985) (quoting *Williston* for proposition that “right of first refusal is separate and distinct from an option”); *Producers Oil Co. v. Gore*, 1980 OK 62, 610 P.2d 772, 773–774 (Okla. 1980) (“an option creates in the optionee a power to compel the owner of the property to sell it at a stipulated price whether or not he is willing to sell,” while ROFR “does not give the [holder] the power to compel the owner to sell; it merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the [ROFR] at a stipulated price”); *Ross v. Shawmut Development Corp.*, 460 Pa. 328, 333 A.2d 751, 754, 73 A.L.R.3d 847 (1975) (similar).

[31]*See Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364, 204 L. Ed. 2d 742 (2019).

[32]*Sturgeon v. Frost*, 139 S. Ct. 1066, 1085, 203 L. Ed. 2d 453 (2019).

[33]*See Sheltering Social Policy In The Tax Code: The Low-Income Housing Tax Credit,* at 883.

[34]*Id.*

[35]*Sheltering Social Policy In The Tax Code: The Low-Income Housing Tax Credit,* at 883–884.

[36]*Sheltering Social Policy In The Tax Code: The Low-Income Housing Tax Credit*, at 884.

[37]Report of the Mitchell-Danforth Task Force on the Low-Income Housing Tax Credit 19 (1989).

[38]*Sheltering Social Policy In The Tax Code: The*


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*Low-Income Housing Tax Credit*, at 875; *see* S. 980, 101st Cong., 1st Sess. (1989).

[39] *Sheltering Social Policy In The Tax Code: The Low-Income Housing Tax Credit*, at 896.

[40] *Frank Lyon Co. v. U. S.*, 1978-1 C.B. 46, 435 U.S. 561, 583–584, 98 S. Ct. 1291, 55 L. Ed. 2d 550, 78-1 U.S. Tax Cas. (CCH) P 9370, 41 A.F.T.R.2d 78-1142 (1978).

[41] *Santander Holdings USA, Inc. v. United States*, 844 F.3d 15, 23, 2017-1 U.S. Tax Cas. (CCH) P 50101, 118 A.F.T.R.2d 2016-6914 (1st Cir. 2016) (alterations incorporated).

[42] *See* 26 C.F.R. § 1.42-4(b).

[43] *Guaderrama v. C.I.R.*, T.C. Memo. 2000-104, T.C.M. (RIA) P 2000-104, 79 T.C.M. (CCH) 1752 (2000), decision aff'd, 21 Fed. Appx. 858, 2001-2 U.S. Tax Cas. (CCH) P 50714, 88 A.F.T.R.2d 2001-6620 (10th Cir. 2001).

[44] *Sheltering Social Policy In The Tax Code: The Low-Income Housing Tax Credit*, at 897 (describing the legislative history).

[45] *Sheltering Social Policy In The Tax Code: The Low-Income Housing Tax Credit*, at 897 (same).

[46] *See* H.R. Rep. No. 101-247 at 2665 ("The bill provides that any determination as to whether Federal income tax benefits are allowable to a taxpayer with respect to a qualified low-income building shall be made without regard to whether the tenants are given the [ROFR] . . . to purchase the building, for a minimum purchase price, should the owner decide to sell (at the end of the compliance period)."); 136 Cong. Rec. S30528 ("Under present law, any determination as to whether Federal income tax benefits are allowable to a taxpayer with respect to a qualified low-income building is made without regard to whether the tenants are given the [ROFR] to purchase the building, for a minimum purchase price, should the owner decide to sell them (at the end of the compliance period).").

[47] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–443, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987) (" 'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded.' ").

[48] *Homeowner's Rehab, Inc. v. Related Corporate V SLP, L.P.*, 479 Mass. 741, 758, 99 N.E.3d 744 (2018).

[49] *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739, 109 S. Ct. 2166, 104 L. Ed. 2d 811, 16 Media L. Rep. (BNA) 1769, 10 U.S.P.Q.2d 1985 (1989) ("It is, however, well-established that 'where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' ") (alterations incorporated); *accord Richards v. Ashcroft*, 400 F.3d 125, 128 (2d Cir. 2005) (Sotomayor, J.) ("In general, when a federal statute uses, but does not define, a term of art that carries an established common law meaning, we will give that term its common law definition (unless, again, Congress has *clearly* evinced intent to the contrary).").

[50] *Restatement (3d) of Property (Servitudes)* § 3.4, cmt. f.

[51] *Universal Health Services, Inc. v. U.S.*, 136 S. Ct. 1989, 1999 n.2 195 L. Ed. 2d 348, 41 I.E.R. Cas. (BNA) 709 (2016) (emphasis added).

[52] *Mertens v. Hewitt Associates*, 508 U.S. 248, 261, 113 S. Ct. 2063, 124 L. Ed. 2d 161, 16 Employee Benefits Cas. (BNA) 2169 (1993).

[53] In *SHAG* and *Homeowner's Rehab*, the courts held that, under the specific partnership agreements in those cases, the ROFR could be triggered absent the investor's consent, notwithstanding the investor's general blocking right. *Senior Housing Assistance Group v. AMTAX Holdings 260, LLC*, 2019 WL 687837, *7 (W.D. Wash. 2019), clarified on denial of reconsideration, 2019 WL 827232 (W.D. Wash. 2019) and appeal dismissed, 2019 WL 5576461 (9th Cir. 2019); *Homeowner's Rehab, Inc. v. Related Corporate V SLP, L.P.*, 479 Mass. 741, 760, 99 N.E.3d 744 (2018). *SHAG* and *Homeowner's Rehab*, however, were apparently based on unique contractual language that is not typical because in many agreements the language does not suggest the ROFR can be triggered absent the investor's consent. The precise rights enjoyed by investors in a LIHTC agreement are of course a matter of contract interpretation and may vary in individual cases.

[54] *Senior Housing Assistance Group v. AMTAX Holdings 260, LLC*, 2019 WL 687837, 6–7 (W.D. Wash. 2019), clarified on denial of reconsideration, 2019 WL 827232 (W.D. Wash. 2019) and appeal dismissed, 2019 WL 5576461 (9th Cir. 2019).

[55] Because the two bills are substantively identical, this article cites to the Senate version.

[56] *Id.* § 303(c)(2).

[57] *Id.* § 303(c)(3).

[58] *See* Dirk Wallace & Michael Novogradac, *Congress Considering Retroactive Changes Affecting Low-Income Housing Tax Credit Property Owners, Part I* (July 24, 2019), https://www.novoco.com/notes-from-novogradac/congress-considering-retroactive-changes-affecting-low-income-housing-tax-credit-property-owners.

[59] As described above, a pure option to purchase property is exercisable entirely at the option-holder's discretion. The new right enumerated in § 303(b)(3) of the proposed legislation, by contrast, requires an offer to purchase the property to be made before the non-profit developer could exercise the new right. That difference, however, is one of form not substance. Given the bill's specification that an offer could be made by a "related party," a non-profit developer could, when it wants to purchase the LIHTC property, arrange for a sham offer.


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In that sense, the § 303(b)(3) right is the functional equivalent of an option, and this article refers to it in that way.

[60]Tellingly, the proposed legislation is also inconsistent on this point. If § 303(b)(3) were truly a clarification of prior law, then there would be no need for the prospective change contemplated by § 303(a).

[61]The statute so revised would thus read:

No Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a right of 1st refusal *or option* . . . to purchase the property after the close of the compliance period for a price which is not less than the minimum purchase price . . .

[62]Now, to be sure, the fact that the proposed legislation mislabels its transformation of the statutory ROFR into a below-market option a "clarification" *should not* change the statutory analysis. The Supreme Court has made clear that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *U.S. v. Price*, 1960-1 C.B. 701, 361 U.S. 304, 313, 80 S. Ct. 326, 4 L. Ed. 2d 334, 60-1 U.S. Tax Cas. (CCH) P 9205, 5 A.F.T.R.2d 464 (1960). The Congress that passed the LIHTC enactments at issue clearly codified a common-law ROFR, and deliberately avoided adopting a below-market option. Transforming this statutory right into a below-market option is a substantive change in law, not a mere clarification, however Congress labels it. *See also U.S. ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 881 n.15, 135 Ed. Law Rep. 890, 15 I.E.R. Cas. (BNA) 18 (D.C. Cir. 1999), opinion supplemented, 173 F.3d 890, 15 I.E.R. Cas. (BNA) 32 (D.C. Cir. 1999) (explaining that although the Supreme Court has "occasionally" suggested that a subsequent statute declaring the intent of an earlier statute carries some weight, there is no "Supreme Court holding in which a subsequent declaration has been used, not to discern the current meaning of a statute post-declaration, but instead to interpret the meaning of a statute *prior to the declaration*").

[63]By contrast, we are aware of no constitutional objection to Congress retroactively broadening the scope of the statutory safe harbor, were that its only intent and effect. Thus, legislation that merely extended the statutory safe harbor to existing contracts—if any—containing options rather than ROFRs would not violate constitutional principles. It might, however, violate traditional principles of tax law and invalidate the tax benefits the LIHTC program purports to confer. As noted above, it was this concern—perhaps among others—that caused Congress to select a right of first refusal rather than a below-market option in the first place.

[64]U.S. Const. amend. V; *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1943, 198 L. Ed. 2d 497, 84 Env't. Rep. Cas. (BNA) 1713 (2017) ("Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.").

[65]*Horne v. Department of Agriculture*, 576 U.S. 350, 135 S. Ct. 2419, 2425-2426, 192 L. Ed. 2d 388 (2015) (alterations incorporated) (internal quotation marks omitted); *see Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322, 122 S. Ct. 1465, 152 L. Ed. 2d 517, 54 Env't. Rep. Cas. (BNA) 1129, 32 Envtl. L. Rep. 20627, 10 A.L.R. Fed. 2d 681 (2002) ("[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner").

[66]*U.S. v. Security Indus. Bank*, 459 U.S. 70, 78, 103 S. Ct. 407, 74 L. Ed. 2d 235, 9 Bankr. Ct. Dec. (CRR) 1071, 7 Collier Bankr. Cas. 2d (MB) 629, Bankr. L. Rep. (CCH) P 68875, 35 U.C.C. Rep. Serv. 1 (1982); *see also Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 713, 130 S. Ct. 2592,177 L. Ed. 2d 184, 70 Env't. Rep. Cas. (BNA) 1505 (2010) (plurality op.) ("[T]hough the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing.").

[67]*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 432 n.9, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005) (A "classic taking" includes those "in which government . . . ousts the owner from his domain.").

[68]*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982).

[69]*Horne v. Department of Agriculture*, 576 U.S. 350, 135 S. Ct. 2419, 2429, 192 L. Ed. 2d 388 (2015) (discussing *Loretto*).

[70]*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982).

[71]*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982).

[72]*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982).

[73]*Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A.L.R. 1106 (1935).

[74]*Sec. U.S. v. Security Indus. Bank*, 459 U.S. 70, 76–77, 103 S. Ct. 407, 74 L. Ed. 2d 235, 9 Bankr. Ct. Dec. (CRR) 1071, 7 Collier Bankr. Cas. 2d (MB) 629, Bankr. L. Rep. (CCH) P 68875, 35 U.C.C. Rep. Serv. 1 (1982) (discussing *Radford*).

[75]*Id.* (quoting *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A.L.R. 1106 (1935)).


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[76] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A.L.R. 1106 (1935). Similarly, in *Security Industry Bank*, the Supreme Court relied on *Radford* and concluded that there were constitutional concerns with a statute that would have retroactively transferred a property interest (a nonpossessory lien on personal property) "from a private creditor to a private debtor." *U.S. v. Security Indus. Bank*, 459 U.S. 70, 78, 103 S. Ct. 407, 74 L. Ed. 2d 235, 9 Bankr. Ct. Dec. (CRR) 1071, 7 Collier Bankr. Cas. 2d (MB) 629, Bankr. L. Rep. (CCH) P 68875, 35 U.C.C. Rep. Serv. 1 (1982).

[77] *See Horne v. Department of Agriculture*, 576 U.S. 350, 135 S. Ct. 2419, 2425, 192 L. Ed. 2d 388 (2015) (the " 'classic taking' " is where the government " 'directly appropriates private property for its own use' "); *see also Washoe County, Nev. v. U.S.*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) ("A physical taking generally occurs when the government directly appropriates private property or engages in the functional equivalent of a 'practical ouster of the owner's possession.' ") (alterations incorporated).

[78] *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1329, 33 Envtl. L. Rep. 20221 (Fed. Cir. 2003).

[79] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982).

[80] *See Manufactured Housing Communities of Washington v. State*, 142 Wash. 2d 347, 13 P.3d 183, 191–192 (2000) (abrogated by, Chong Yim v. City of Seattle, 194 Wash. 2d 651, 451 P.3d 675 (2019)) ("right of first refusal has no binding effect unless the offeror decides to sell").

[81] *Horne v. Department of Agriculture*, 576 U.S. 350, 135 S. Ct. 2419, 2429, 192 L. Ed. 2d 388 (2015) (internal quotation marks omitted); *see* also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–435, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982) (explaining that physical appropriation is takings even if it "has only minimal economic impact on the owner").

[82] *Horne v. Department of Agriculture*, 576 U.S. 350, 135 S. Ct. 2419, 2429, 192 L. Ed. 2d 388 (2015). And a below-market price by definition falls short of just compensation.

[83] *Horne v. Department of Agriculture*, 576 U.S. 350, 135 S. Ct. 2419, 2430, 192 L. Ed. 2d 388 (2015); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982).

[84] *A & D Auto Sales, Inc. v. U.S.*, 748 F.3d 1142, 1152 (Fed. Cir. 2014); *see also Abrahim-Youri v. U.S.*, 139 F.3d 1462, 1468 (Fed. Cir. 1997) (Clevenger, J., joining the opinion of the court) (explaining that "certain 'per se' takings . . . do not automatically result under the Fifth Amendment in compensation to the ousted property owner" and "[i]n such instances, whether or not the taking will require compensation depends on consideration of factors which are more familiarly applied in the regulatory takings setting").

[85] *See also Cienega Gardens v. U.S.*, 331 F.3d 1319, 1350, 33 Envtl. L. Rep. 20221 (Fed. Cir. 2003) (making similar point in context of regulatory takings analysis and finding limited partnerships had stated a takings claim).

[86] *U.S. v. 50 Acres of Land*, 469 U.S. 24, 25 n.1, 105 S. Ct. 451, 83 L. Ed. 2d 376, 21 Env't. Rep. Cas. (BNA) 2105, 15 Envtl. L. Rep. 20117 (1984).

[87] *See* John Fioramonti, "LIHTC Resale Market Flourishing," *Affordable Housing Finance* (Oct. 6, 2014).

[88] *See generally* 26 U.S.C.A. § 42(g).

[89] *See, e.g.*, *Huntleigh USA Corp. v. U.S.*, 525 F.3d 1370, 1377 (Fed. Cir. 2008) ("[O]nly persons with a valid property interest at the time of the taking are entitled to compensation").

[90] *See U.S. v. Security Indus. Bank*, 459 U.S. 70, 76, 103 S. Ct. 407, 74 L. Ed. 2d 235, 9 Bankr. Ct. Dec. (CRR) 1071, 7 Collier Bankr. Cas. 2d (MB) 629, Bankr. L. Rep. (CCH) P 68875, 35 U.C.C. Rep. Serv. 1 (1982) (holding a "nonpurchase-money, nonpossessory interest in personal property" is protected by the Takings Clause, and stating "[t]he 'bundle of rights' which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple, but the government cites no cases supporting the proposition that differences such as these relegate the secured party's interest to something less than property"); *Forest Properties, Inc. v. U.S.*, 39 Fed. Cl. 56, 70, 45 Env't. Rep. Cas. (BNA) 1679, 27 Envtl. L. Rep. 21454 (1997), judgment aff'd, 177 F.3d 1360, 48 Env't. Rep. Cas. (BNA) 1823, 29 Envtl. L. Rep. 21174 (Fed. Cir. 1999) (option to purchase recognized as property); *Daniels v. Area Plan Com'n of Allen County*, 306 F.3d 445, 459, 33 Envtl. L. Rep. 20049 (7th Cir. 2002) (restrictive covenant recognized as property); *see also* Robert Meltz, Takings Law Today: A Primer for the Perplexed, 34 Ecology L.Q. 307, 319 (2007) ("Almost all interests in land are recognized as 'property' under the Takings Clause, from fee simples to leaseholds, easements, liens, life estates, and some future interests. The case law is inconsistent, however as to some of the more insubstantial interests in land, such as options to purchase, restrictive covenants, and rights of first refusal, though the recent trend favors property status.").

[91] *Manufactured Housing Communities of Washington v. State*, 142 Wash. 2d 347, 13 P.3d 183, 192 (2000) (abrogated by, Chong Yim v. City of Seattle, 194 Wash. 2d 651, 451 P.3d 675 (2019)).

[92] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322, 122 S. Ct. 1465, 152 L. Ed. 2d 517, 54 Env't. Rep. Cas. (BNA) 1129, 32 Envtl. L. Rep. 20627, 10 A.L.R. Fed. 2d 681 (2002).

[93] *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 168, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998).

[94] *Omnia Commercial Co. v. U.S.*, 261 U.S. 502,


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508-509, 43 S. Ct. 437, 67 L. Ed. 773 (1923); *see also Lynch v. U.S.*, 292 U.S. 571, 579, 54 S. Ct. 840, 78 L. Ed. 1434 (1934) ("Valid contracts are property . . ."), *quoted in Piszel v. United States*, 833 F.3d 1366, 1374 (Fed. Cir. 2016); *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977) ("[C]ontract rights are a form of property" under the Takings Clause); *Palmyra Pacific Seafoods, L.L.C. v. U.S.*, 561 F.3d 1361, 1365, 68 Env't. Rep. Cas. (BNA) 1705 (Fed. Cir. 2009) ("contract rights can be the subject of a takings action"); *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1329, 33 Envtl. L. Rep. 20221 (Fed. Cir. 2003) ("[T]here is . . . ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment.") (citing *U.S. v. Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946)).

[95]As noted above, we assume for purposes of this analysis that the requirement of a willing seller, coupled with the blocking right, means that the limited partners have the contractual right to block the triggering of the ROFR. Note, however, that even if the limited partners cannot block the triggering of the ROFR, there may still be a question about whether the proposed legislation would violate a separate contractual right of the limited partners: their right not to have the property sold under the ROFR without a bona fide third-party offer made for the property that the partnership was willing to accept. Although *Homeowner's Rehab* determined that a bona fide third-party offer was not required in that case, and instead only an enforceable offer that the partnership was willing to accept was required, *see Homeowner's Rehab, Inc. v. Related Corporate V SLP, L.P.*, 479 Mass. 741, 759–760, 99 N.E.3d 744 (2018), *SHAG* found that, in that case, a bona fide third-party offer that the partnership was willing to accept was required and that neither element was met, *Senior Housing Assistance Group v. AMTAX Holdings 260, LLC*, 2019 WL 687837, *7 (W.D. Wash. 2019), clarified on denial of reconsideration, 2019 WL 827232 (W.D. Wash. 2019) and appeal dismissed, 2019 WL 5576461 (9th Cir. 2019).

[96]*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321 (1922).

[97]*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Envtl. L. Rep. 20528 (1978).

[98]*Horne v. Department of Agriculture*, 576 U.S. 350, 135 S. Ct. 2419, 2427, 192 L. Ed. 2d 388 (2015).

[99]That is particularly true insofar as the proposed legislation is understood to give the non-profit a below-market option to purchase not just the property, but also the limited partners' *partnership interests.* Section 303(b)(1) of the bill amends § 42(i)(7) to expand from options to purchase the "property," to also options to purchase "all of the partnership interests (other than interests of the person exercising such option or a related party thereto)." This may be interpreted to permit a taking not just of property of the partnership, but of the interests held by the limited partners directly. It is not clear whether the proposed legislation would have that effect, however, unless the underlying agreement itself provides the non-profit developer a ROFR to purchase the partnership interest in the first instance.

[100]*See Abrahim-Youri v. U.S.*, 139 F.3d 1462, 1465–1466 (Fed. Cir. 1997) (explaining there are "important analytical differences that must be respected between a claim for a taking based on a regulatory imposition that constrains an owner's continuing use of property, and one that is based on an outright governmental seizure or occupation of private property," and holding that a fact pattern in which plaintiff's claims "were not simply regulated in some manner, but were terminated . . . does not fit comfortably in the regulatory taking category").

[101]*Brooks-Scanlon Corporation v. U.S.*, 265 U.S. 106, 120, 44 S. Ct. 471, 68 L. Ed. 934, 1924 A.M.C. 856 (1924).

[102]Robert Meltz, Congressional Review Service, *When Congressional Legislation Interferes with Existing Contracts: Legal Issues* 16 (Aug. 20, 2012), https://fas.org/sgp/crs/misc/R42635.pdf.

[103]John D. Echevarria, Public Takings of Private Contracts, 38 Ecology L.Q. 639, 669 (2011).

[104]*See Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224, 106 S. Ct. 1018, 89 L. Ed. 2d 166, 7 Employee Benefits Cas. (BNA) 1001 (1986) ("[T]he fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking."); *Omnia Commercial Co. v. U.S.*, 261 U.S. 502, 43 S. Ct. 437, 510, 67 L. Ed. 773 (1923) (no unlawful taking when the government requisitioned all the steel produced by a private party—frustrating the claimant's contract to purchase steel produced by that party); *Palmyra Pacific Seafoods, L.L.C. v. U.S.*, 561 F.3d 1361, 1366, 68 Env't. Rep. Cas. (BNA) 1705 (Fed. Cir. 2009) (no taking where the government destroyed the value of the plaintiff's license by regulating available fishing in the area); *Huntleigh USA Corp. v. U.S.*, 525 F.3d 1370, 1377 (Fed. Cir. 2008) (no taking where the government changed how it regulated airline security and thus caused the plaintiff to lose all of its security screening business to TSA).

[105]*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005) (internal quotation marks omitted).

[106]*Cienega Gardens v. U.S.*, 331 F.3d 1319, 1325, 33 Envtl. L. Rep. 20221 (Fed. Cir. 2003).

[107]*Id.*

[108]*Seiber v. U.S.*, 364 F.3d 1356, 1371, 58 Env't. Rep. Cas. (BNA) 1246, 34 Envtl. L. Rep. 20026 (Fed. Cir. 2004) (quotations omitted).

[109]*Cienega Gardens v. U.S.*, 331 F.3d 1319, 1340, 33 Envtl. L. Rep. 20221 (Fed. Cir. 2003).

[110]*Cienega Gardens v. U.S.*, 331 F.3d 1319, 1346–1347, 33 Envtl. L. Rep. 20221 (Fed. Cir. 2003) (concluding that investors subjectively relied on expecta-


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tion that government would not nullify their right to prepay mortgage and thus get out from affordability restrictions because that right "was one of the primary incentives HUD offered precisely to encourage their voluntary participation in the public housing programs," was reflected in plaintiff's business plans, and was consistent with HUD regulations at the time).

[111] *Trebro Mfg., Inc. v. Firefly Equipment, LLC*, 748 F.3d 1159, 1159, 110 U.S.P.Q.2d 1429 (Fed. Cir. 2014) (internal quotation marks omitted).

[112] *See* Sheltering Social Policy In The Tax Code: The Low-Income Housing Tax Credit, at 887-888 ("The benefit of possible appreciation of the low-income housing units (residual value after the fifteen years) is not an important consideration for many corporate investors.").

[113] *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1346, 33 Envtl. L. Rep. 20221 (Fed. Cir. 2003) (emphasis added).

[114] *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1348, 33 Envtl. L. Rep. 20221 (Fed. Cir. 2003).

[115] *Id.* ("Once a plaintiff has shown that its expectation is reflected by a material contract term of which the government is aware, the government cannot establish a lack of reasonable expectations simply by showing that the regulations were amendable by HUD or nullifiable by Congress.")

[116] *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1350, 33 Envtl. L. Rep. 20221 (Fed. Cir. 2003).

[117] *Id.*

[118] *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1348, 33 Envtl. L. Rep. 20221 (Fed. Cir. 2003).

[119] *Appolo Fuels, Inc. v. U.S.*, 381 F.3d 1338, 1348, 59 Env't. Rep. Cas. (BNA) 1135, 34 Envtl. L. Rep. 20087, 163 O.G.R. 993 (Fed. Cir. 2004) (holding that " 'the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [its] expectations' ") (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633, 121 S. Ct. 2448, 150 L. Ed. 2d 592, 52 Env't. Rep. Cas. (BNA) 1609, 32 Envtl. L. Rep. 20516 (2001) (O'Connor, J., concurring)).

[120] The Supreme Court has upheld, against due process clause challenges, tax legislation that retroactively applies the changes to the tax code for "short and limited periods." *U.S. v. Darusmont*, 1981-1 C.B. 36, 449 U.S. 292, 296-297, 101 S. Ct. 549, 66 L. Ed. 2d 513, 81-1 U.S. Tax Cas. (CCH) P 9137, 47 A.F.T.R.2d 81-519 (1981). That line of cases is irrelevant here. *First*, these decisions are limited to the Due Process Clause; they have little if any significance to the Takings Clause analysis set forth above. *Second*, insofar as the proposed legislation purports to transform contractual ROFRs in existing LIHTC agreements into below-market option, that retroactive application has little to do with tax principles; instead, it is about transferring property value from one party to another. *Third*, the legislation's rewriting of partnership agreements would reach well beyond the limited instances of retroactivity found permissible in the tax context. It would extend to agreements entered into decades ago.

[121] U.S. Const. amend. V.

[122] *Landgraf v. USI Film Products*, 511 U.S. 244, 266, 114 S. Ct. 1522, 128 L. Ed. 2d 229 (1994).

[123] *Id.*

[124] *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532, 118 S. Ct. 2131, 141 L. Ed. 2d 451, 22 Employee Benefits Cas. (BNA) 1225 (1998) (plurality op.) (internal citations omitted).

[125] *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S. Ct. 2709, 81 L. Ed. 2d 601, 5 Employee Benefits Cas. (BNA) 1545 (1984).

[126] *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 4 O.S.H. Cas. (BNA) 1361, 1976–1977 O.S.H. Dec. (CCH) P 20833, 1 Fed. R. Evid. Serv. 243 (1976).

[127] *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 4 O.S.H. Cas. (BNA) 1361, 1976–1977 O.S.H. Dec. (CCH) P 20833, 1 Fed. R. Evid. Serv. 243 (1976).

[128] *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S. Ct. 2709, 81 L. Ed. 2d 601, 5 Employee Benefits Cas. (BNA) 1545 (1984).

[129] *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 130 S. Ct. 2592, 177 L. Ed. 2d 184, 70 Env't. Rep. Cas. (BNA) 1505 (2010).

[130] *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 715, 130 S. Ct. 2592, 177 L. Ed. 2d 184, 70 Env't. Rep. Cas. (BNA) 1505 (2010).


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