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ARTICLES

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IF IT QUACKS LIKE A DUCK: PSEUDO-SANCTUARY ACCOUNTABILITY THROUGH CONSUMER PROTECTION LAW

Cydnee Bence*

INTRODUCTION

I would like to start this article with a confession. I fed the giraffes; I paid money to drink wine next to a sloth; and I went to fundraisers where a penguin was propped up on a plastic table for no reason other than for humans to ogle. I have always loved animals and took every opportunity I could to get closer to them. I realize now, and should have realized then, that the penguin would have probably preferred to huddle up with other penguins than be jostled about in a loud lecture hall. But I happily poured money into these experiences thinking I was helping the creatures I held so dear. The facility was begging for donations to continue their conservation mission, to

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educate people about unique animals, and breed endangered species to bring them back from the brink of extinction. I was caught up in the thrill of up-close animal encounters and did not take time to think critically about the message I was being told. I saw "Accredited," "Species Survival Plan," and "registered charity" and by default assumed that this zoo "was one of the good ones." I was lost in the conservation-washing.

To its credit, the zoo is well managed, has a good compliance record, and engages in local conservation projects. I do not doubt the love that the volunteers, veterinarians, and handlers have for the animals at the zoo. But what became clear to me years later was that those donations were more for the people that like to watch animals than the animals themselves. Parading a wild animal around a fluorescent-lit room full of loud humans is not in the animal's best interest. By engaging in these encounters, I was prioritizing my own entertainment over an animal's wellbeing. My money was not being used to give vulnerable animals a gentle and dignified existence when they had nowhere else to go. Rather, I was funding programs that bred animals into existence that would live their entire lives in captive enclosures, subjected to human whims.

To be clear, this article is not debating the ethics of animal captivity, nor is it about outright shaming zoos. Rather, this article is more about promoting desperately needed transparency in the world of animal exhibition—calling a zoo a zoo. In doing so, this Article explores one way to prevent the worst animal exhibitors from guilting charitable people into donating money while hiding their cruelty and greed behind a false conservation narrative.

People have been progressively questioning the ethics behind animal enterprises like zoos, performing animal shows, and trophy hunting.[1] To avoid this increased skepticism and scrutiny, some animal enterprises have chosen to brand themselves as *sanctuaries*, *refuges*, *rescues*, *preserves*, or other terms that imply a place of animal

[1] *See* Kelly A. George et al., *Changes in Attitudes Toward Animals in the United States from 1978 to 2014*, 201 BIO. CONSERV. 237, 237, 239 (July 2016) (suggesting that positive changes in public perception of wild animals since 1978 as well as increased awareness of animal treatment through media correlates to greater concern for animals generally).

protection rather than exploitation.[2] These enterprises use sympathetic branding and misleading advertisements to appear more legitimate to attract consumers that would otherwise choose not to visit the exhibition.[3] Neither U.S. federal nor state governments regulate these terms, allowing exploitative animal industries to rebrand and benefit from unearned goodwill and marketability; these enterprises are *pseudo-sanctuaries*.[4]

Considering the lack of legislative intervention, consumer protection laws should be able to respond to misleading ethical marketing. However, using consumer protection laws to address pseudo-sanctuaries pose unique challenges.

This Article opens with a discussion on what is a *sanctuary* versus what is a *pseudo*-sanctuary.[5] This Part also explains why pseudo-sanctuaries persist and why pseudo-sanctuaries are a problem for consumers, the public, regulators, and animal advocates.[6] Next, this Article provides legal background for three different consumer protection laws: the federal Lanham Act, California state consumer protection laws, and Florida's False Advertising Law.[7] These laws provide distinct examples for how individuals can hold pseudo-sanctuaries accountable when governments have failed or declined to act. Part II analyzes whether falsely claiming to be a sanctuary is actionable under consumer protection laws.[8] In so doing, this Article introduces a central challenge of using consumer protection laws to address pseudo-sanctuaries: defining *sanctuary*.[9] I propose that, rather than searching for a single definition of sanctuary, courts should instead consider a fact-based balancing test that considers Animal

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[2] *See* Delcianna J. Winders, *Captive Wildlife at a Crossroads—Sanctuaries, Accreditation, and Humane-Washing*, 6 ANIMAL STUD. J. 161, 164 (2017), https://ro.uow.edu.au/cgi/viewcontent.cgi?article=1325&context=asj (highlighting the number of captive animal exhibitors using the term *sanctuary*, with only 8% having reputable accreditation).
[3] *Id.*
[4] *Id.* at 164, 168.
[5] *See infra* Part I.A.1.
[6] *See infra* Part I.A.
[7] *See infra* Part I.B.
[8] *See infra* Part II.
[9] *See infra* Part II.

Welfare Act compliance, public expectations regarding on-site practices, and financial management.[10] This Article then demonstrates how this balancing test could apply under the Lanham Act, California consumer protection laws, and Florida's false advertising law.[11] Additionally, this Part addresses possible defenses to a consumer protection claim, such as corporate speech protections under the First Amendment.[12] This Article closes with other important considerations to evaluating consumer protection law's potential efficacy in addressing pseudo-sanctuary accountability.[13]

I. BACKGROUND

A. Pseudo-Sanctuaries

1. What Is a Pseudo-Sanctuary?

A pseudo-sanctuary is precisely what it sounds like: a fake sanctuary.[14] Then, the definition of *sanctuary* becomes incredibly important in determining what a *pseudo*-sanctuary is. The term sanctuary is rather amorphous and there is no legal definition to rely upon.[15] The Global Federation of Animal Sanctuaries (GFAS), largely considered to be the premier sanctuary accreditation group, describes sanctuaries as:

> [A]ny facility providing temporary or permanent safe haven to animals in need while meeting the principles of true sanctuaries: providing excellent and humane

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[10] *See infra* Part II.
[11] *See infra* Parts II.A–B.
[12] *See infra* Part II.C.
[13] *See infra* Conclusion.
[14] *See pseudo-*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/pseudo (last visited May 10, 2022) (defining *pseudo-* as "pretended and not real").
[15] *But see* 9 C.F.R. § 1.1 (2021) (defining *sanctuary area* as "that area in a primary enclosure for a swim-with-the-dolphin program that is off-limits to the public and that directly abuts the buffer area").

> care for their animals in a non-exploitative environment and having ethical policies in place, regarding:
> - tours,
> - commercial trade,
> - exhibition,
> - acquisition and disposition,
> - breeding and more.[16]

However, understanding what *is* or *is not* a sanctuary is easier when considering "the principles of true sanctuaries."[17] Above all else, a sanctuary is a place where the interests of nonhuman animals are the primary consideration in all decisions, rather than human interests.[18] When evaluating how sanctuaries put animal interests first, it is important to note that sanctuaries exist as a practical solution to an ethical problem: animal captivity.[19] Very rarely is captivity in an animal's best interest.[20] The following discussion does not debate whether holding an individual animal in captivity is ethical, but rather whether holding an animal in captivity for exhibition is in *that* individual animal's best interest.

Ideally, animals could live their lives in the environment their species evolved to thrive in, engaging in behaviors and relationships they choose. However, the practical reality is that humans have made this scenario impossible through habitat destruction, removing wild animals from their environment, selective breeding, and precluding captive-bred animals from ever reentering "the wild."[21] Given this

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[16] *What Is a Sanctuary*, GLOB. FED'N OF ANIMAL SANCTUARIES (emphasis omitted), https://www.sanctuaryfederation.org/about-gfas/what-is-a-sanctuary/ (last visited May 10, 2022) [hereinafter GLOB. FED'N OF ANIMAL SANCTUARIES, *What Is a Sanctuary*].

[17] *Id.* (emphasis omitted).

[18] *See generally id.* (describing what a sanctuary is and how identifying true sanctuaries provides a model for others to follow).

[19] *See* Winders, *supra* note 2, at 164.

[20] *See, e.g.*, *id.* at 163 (providing an example of conflicting human and animal interests).

[21] *See* Sarah P. Otto, *Adaptation, Speciation and Extinction in the Anthropocene*, 285 PROCS. ROYAL SOC'Y BIOLOGY 1891, 1891, 1898 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6253383/pdf/rspb20182047.pdf (describing the impact of human development on the earth's ecosystems).

practical reality, sanctuaries exist as a second-best option.[22] There are several arenas where this philosophy plays out, such as breeding, human interaction, environment, acquisition, and disposition.[23]

One example where this animal-first priority is obvious is in captive breeding. Sanctuaries generally do not intentionally breed animals.[24] Returning to the premise that animal captivity is generally not in an animal's best interests, it follows that sanctuaries should not increase the number of animals in captivity. Breeding animals increases the number of animals in captivity. This conclusion may feel uncomfortable for many people. What about endangered species? Breeding in captivity may be the only way to ensure that a species does not go extinct. Certainly, species extinction is one of the greatest human-caused tragedies.[25] But breeding animals from endangered species for conservation can only go two ways: (1) the animals are bred to exist solely in captivity; or (2) the animals are being bred for eventual reintroduction. Breeding animals to exist solely in captivity is not prioritizing that animal's interests and does not align with sanctuary principles.[26]

Species reintroduction, at first, seems to be the best option for both captivity opponents and proponents. However, practically, species

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[22] *See* Winders, *supra* note 2, at 164.

[23] GLOB. FED'N OF ANIMAL SANCTUARIES, *What Is a Sanctuary*, *supra* note 16.

[24] *Position Statement: Breeding of Animals in Captivity*, GLOB. FED'N OF ANIMAL SANCTUARIES (2019), https://www.sanctuaryfederation.org/wp-content/uploads/2019/10/GFAS-Position-Statement-Captive-Breeding.pdf [hereinafter GLOB. FED'N OF ANIMAL SANCTUARIES, *Position Statement*].

[25] Gerardo Ceballos et al., *Accelerated Modern Human–Induced Species Losses: Entering the Sixth Mass Extinction*, 1 SCI. ADVANCES 1, 3–4 (2015), https://www.science.org/doi/epdf/10.1126/sciadv.1400253?adobe_mc=MCMID%3D33507152379678301942118810134397558057%7CMCORGID%3D242B6472541199F70A4C98A6%2540AdobeOrg%7CTS%3D1636764506 (concluding that modern extinction rates are exceptionally high and "[a]rguably the most serious aspect of the environmental crisis is the loss of biodiversity—the other living things with which we share Earth.").

[26] GLOB. FED'N OF ANIMAL SANCTUARIES, *Position Statement*, *supra* note 24 ("Animals are not brought into captivity for the purpose of breeding. Animals that are allowed to breed should enter a facility as a result of normal acquisition protocols such as surrender or government confiscation.").

reintroduction is almost always unsuccessful.[27] There is a reason the species is endangered, and without addressing that underlying issue, reintroduction is bound to fail. Unless the animals' habitat and population health are stable, reintroduction is likely to fail.[28] With largely unmitigated climate change and continued habitat destruction, there are fewer and fewer opportunities for reintroduction.[29] Therefore, if there are no stable habitat and population for the animal to return to, the animal is actually being bred to exist in captivity or to serve as an additional breeding machine for some remote possible future population. This is not putting the individual animal's interests first.

2. Why Do Pseudo-Sanctuaries Exist?

The primary reason pseudo-sanctuaries continue to exist is because the "sanctuary" designation is more profitable than not.[30] A "sanctuary" designation may draw the critical consumer's gaze away from looking further into the operation. A captive animal operation's image is more important than ever as more consumers are questioning captivity's place in the world.[31]

Following exposés on the treatment of elephants used for entertainment in circuses, ticket sales fell so dramatically that in 2016 the largest circus entertainment company, Ringling Bros. and Barnum

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[27] *See* Natasha M. Robinson et al., *Be Nimble with Threat Mitigation: Lessons Learned from the Reintroduction of an Endangered Species*, 28 RESTORATION ECOLOGY 29, 29 (2020) (documenting low success rates of species reintroduction).

[28] T. Gilbert et al., *Contributions of Zoos and Aquariums to Reintroductions: Historical Reintroduction Efforts in the Context of Changing Conservation Perspectives*, 51 INT'L ZOO Y.B. 15, 15 (2017), http://www.rhinoresourcecenter.com/pdf_files/157/1574515374.pdf.

[29] *Id.*

[30] *See* Neil Carr & Scott Cohen, *The Public Face of Zoos: Images of Entertainment, Education and Conservation*, 24 ANTHROZOOS 175, 178–80 (explaining the historical movement of public perception of zoos from a place of entertainment to a place of conservation).

[31] *See* Laure Boissat et al., *Nature Documentaries as Catalysts for Change: Mapping Out the 'Blackfish Effect*,*'* 3 PEOPLE & NATURE 1179, 1181 (detailing SeaWorld's "aggressive brand restoration campaign" after *Blackfish*).

& Bailey's Circus, ended animal entertainment.[32] The following year, the circus closed entirely after failing to recover from the poor publicity.[33] Similarly, in what has been called the *Blackfish* effect, SeaWorld has struggled to regain public confidence and ticket sales following the documentary *Blackfish*, which exposed the traumatic conditions imposed on captive cetaceans.[34] Consequently, SeaWorld is still facing hemorrhaging ticket sales,[35] the resignation of at least four different CEOs in the last seven years,[36] and has been subject to federal investigations and shareholder lawsuits.[37] The world is watching, and the captive-animal industry must respond.[38] While some operations chose to increase animal care standards, others simply masked their exploitative practices in hopes of evading public scrutiny.[39]

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[32] Cathy Free, *Former Circus Elephants Just Arrived at a New Sanctuary. They Are Swimming and Grazing on Fruit Buffets.*, WASH. POST (May 13, 2021), https://www.washingtonpost.com/lifestyle/2021/05/13/circus-elephant-ringling-sanctuary/.

[33] *See* Emma Bowman, *After 146 Years, Ringling Bros. and Barnum & Bailey Circus To Shut Down*, NPR (Jan. 15, 2017), https://www.npr.org/sections/thetwo-way/2017/01/15/509903805/after-146-years-ringling-bros-and-barnum-bailey-circus-to-shut-down. *But see* Jay Handelman, *Ringling Bros. and Barnum & Bailey Circus Could Be Making Comeback – But Without the Animals*, USA TODAY (Oct. 27, 2021), https://www.usatoday.com/story/money/2021/10/26/ringling-brothers-circus-comeback-without-animals/8551976002/ (announcing that Feld Entertainment plans to reopen circus performances without animal shows).

[34] Boissat et al., *supra* note 31, at 1188.

[35] *See id.* (detailing the continuous loss in income and visitors following the *Blackfish* documentary).

[36] *SeaWorld CEO Steps Down After Just Five Months on the Job*, REUTERS (Apr. 6, 2020), https://www.reuters.com/article/us-seaworld-entrnmt-ceo/seaworld-ceo-steps-down-after-just-five-months-on-the-job-idUSKBN21O1FU.

[37] *See, e.g.*, *id.* ("The company and an ex-CEO had agreed to pay more than $5 million to settle U.S. Securities and Exchange Commission charges in 2018 for misleading investors about the negative impact of the documentary.").

[38] *See generally*, Carr & Cohen *supra* note 30, at 176 ("In contrast to the original image of zoos as primarily sites of entertainment, according to contemporary socially/morally acceptable public opinion, zoos exist to aid the conservation of species under threat of extinction.").

[39] *See, e.g.*, Toria Barnhart, *New York Man Posing as Rescue Organization Charged with Trafficking Exotic African Cats*, NEWSWEEK (Oct. 18, 2021), https://www.newsweek.com/new-york-man-posing-rescue-organization-charged-

One major market the captive-animal industry relies on is millennials.[40] Millennials and their young children make up a substantial portion of zoo traffic, accounting for 32% and 57% respectively.[41] However, the millennial generation is more likely to look critically at captive animal operations for several reasons. First, they are more likely than other generations to spend their money on "ethical" products.[42] Millennials are also more likely than previous generations to be concerned with animal welfare.[43] Additionally, millennials prefer to spend their money on experiences rather than desirable products.[44] This creates a major target demographic that has more access to information than any other generation in history[45] and

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trafficking-exotic-african-cats-1640142 ("Casacci said that he was operating a big cat rescue organization to avoid New York's law against possessing and selling wild animals."); *In re* Stark, 79 Agric. Dec. 1, 15, 17 (U.S.D.A. 2020) (affirming the Chief Administrative Law Judge's decision that Wildlife in Need did not in operate in good faith as a rescue, rehabilitation, and wildlife sanctuary and amassed over 100 Animal Welfare Act violations).

[40] *Visitor Demographics*, ASSOC. OF ZOOS & AQUARIUMS, https://www.aza.org/partnerships-visitor-demographics (last visited May 10, 2022).

[41] *Id.*

[42] *See* Gui Costin, *Millennial Spending Habits and Why They Buy*, FORBES (May 1, 2019) https://www.forbes.com/sites/forbesbooksauthors/2019/05/01/millennial-spending-habits-and-why-they-buy/?sh=2ce2dc14740b ("Millennials consider social responsibility and environmental friendliness when considering their purchases . . . . Other values that brands should center upon are authenticity, local sourcing, ethical production, a great shopping experience, and giving back to society. 75% of Millennials consider it fairly or very important that brands give back to society instead of just making a profit.").

[43] Michael P. Rowland, *Millennials Are Driving the Worldwide Shift away from Meat*, FORBES (Mar. 23, 2018), https://www.forbes.com/sites/michaelpellmanrowland/2018/03/23/millennials-move-away-from-meat/?sh=48ad5ac4a4a4.

[44] *The Experience Movement: How Millennials Are Bridging Cultural and Political Divides Offline*, EVENTBRITE 4 (2017), https://s3.amazonaws.com/eventbrite-s3/marketing/landingpages/assets/pdfs/Eventbrite+Experience+Generation+report-2017.pdf.

[45] Sarah Landrum, *Here's Why Millennials Are the Most Data-driven Generation*, FORBES (Aug. 29, 2017), https://www.forbes.com/sites/sarahlandrum/2017/08/29/an-inside-look-at-millennials-love-of-data/?sh=2343dff3271e ("[M]illennials are effectively the first generation to grow up with nearly unlimited access to information.").

is willing to spend money on a specific experience but is concerned about ethical spending and ethical treatment of animals.

One relatively easy way to appeal to this demographic and try to evade the misfortune of SeaWorld and Ringling Bros. is to slap "sanctuary" in the title of the operation. Not only does this strategy evoke sympathy from critical demographics, it may serve as a driver of further revenue.[46] The public at large does not know the nuanced differences between a state-registered public charity, a 501(c)(3), and a for-profit operation that claims to be a "rescue" or "sanctuary."[47] It is very likely that members of the general public could think they are donating money to a registered, above-board, charity when they are simply handing over money to a road-side zoo.[48]

3. Are Sanctuaries and Pseudo-Sanctuaries Regulated?

Many people assume that all animals are protected by the Animal Welfare Act (AWA), as the name implies.[49] However, research suggests that very few people understand basic components of the

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[46] *See* Sean Norris, *The Art of the Rebrand: When, Why and How to Rebrand Your Nonprofit*, NONPROFIT PRO (July 14, 2015), https://www.nonprofitpro.com/article/art-rebrand-rebrand-nonprofit/all/ ("[M]ore than 50 percent of nonprofits that rebrand report that they've seen an increase in their revenue.").

[47] *See* Mckenzee Griffler, *Starting a Nonprofit Organization for Animal Sanctuaries in the United States*, OPEN SANCTUARY PROJ. (Aug. 19, 2020), https://opensanctuary.org/article/starting-a-non-profit-organization-for-animal-sanctuaries-in-the-united-states/ (explaining the difference between a public charity, a 501(c)(3), and a for-profit operation).

[48] *Cf. Before You Donate*, GLOB. FED'N OF ANIMAL SANCTUARIES, https://www.sanctuaryfederation.org/how-to-help/before-you-donate/ (last visited May 10, 2022).

[49] Mitchell M. Metzger, *Knowledge of the Animal Welfare Act and Animal Welfare Regulations Influences Attitudes Toward Animal Research*, 54 J. AM. ASS'N. FOR LAB'Y ANIMAL SCI. 70, 71 (2015) (drawing attention to a previous 1996 article that found that 19% of undergraduate psychology students were able to correctly answer a similar question, implying that the majority of educated students that may conduct research that falls under the AWA were not familiar with the basic mechanics of the law); *see* S. Plous, *Attitudes Toward the Use of Animals in Psychological Research and Education: Results from a National Survey of Psychology Majors*, 7 PSYCH. SCI. 352, 355 (1996).

AWA; one study found that only 2.5% of participants accurately identified which animals were protected by the Act.[50] Beyond which animals are protected, many people may be surprised to see how the AWA is actually administered and enforced.[51]

The basic regulatory scheme of the AWA requires persons engaging in regulated activities to receive a license from the United States Department of Agriculture (USDA) and abide by minimum care standards promulgated by the USDA Animal and Plant Health Inspection Service (APHIS).[52] Regulated activities include breeding, dealing, exhibition, and experimentation.[53] The AWA regulations set standards for the minimum care, treatment, transportation, and housing requirements of animals covered by the Act as well as record-keeping requirements.[54]

Despite the name, the AWA does not apply to most animals.[55] Arguably, it was not designed to.[56] The AWA as it is known today began as the Laboratory Animal Welfare Act of 1966, and accordingly,

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[50] Metzger, s*upra* note 49, at 74.

[51] Because this Article is limited to a discussion of animals in captivity, this discussion on other regulated activities like breeding, dealing, and research is limited. *See* Animal Welfare Act, 7 U.S.C. §§ 2131–2136 for provisions concerning other regulated activities.

[52] *Id.* §§ 2133–2134 (registration and licensing); *id.* § 2143 (a)(2)(A) (requiring the USDA to promulgate standards that "include minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary"); 7 C.F.R. § 2.22(a)(2)(vi) (2021) (authorizing APHIS' authority over the Laboratory Animal Welfare Act, which is now known as the AWA).

[53] 9 C.F.R. §§ 2.1, 2.30 (1989).

[54] *See generally id.* §§ 3.1–3.142 (1967).

[55] 7 U.S.C. § 2132(g) (defining *animal* as "any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet").

[56] *Animal Dealer Regulation: Hearings on S. 2322, S. 3059, and S. 3138 Before the S. Comm. on Com.*, 89th Cong. 14 (1966) (statement of Sen. Joseph S. Clark) ("The bill in no way curtails, curbs, or governs the handling of animals during or after experimentation. That kind of regulation would belong in a humane treatment bill . . . .").

only applied to animals used in experimentation.[57] But, more specifically, Congress enacted this law following public concern spurred by 1965 *Life* and *Sports Illustrated* exposés on "dog farms" and pet theft.[58] According to these articles, the animal laboratory suppliers would kidnap household pets to supply their dog farms.[59] Once on the farms, the dogs were kept in deplorable conditions, inspiring the *Life* article's title: *Concentration Camp for Dogs*.[60] Congress responded by regulating the purchase and sale of animals and setting minimum standards of care and housing for dogs, cats, primates, rabbits, hamsters, and guinea pigs—the animals most often kept as pets.[61] Interestingly, the incredible majority of animals used for experimentation, such as rats and mice, are explicitly excluded from protection.[62]

Since 1966, Congress has amended the AWA and has expanded protections to some animals not previously covered.[63] Under the AWA, *animal* is now defined as:

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[57] 7 U.S.C. §§ 2131–2156 ("[T]o insure that animals intended for use in research facilities . . . are provided humane care and treatment . . . it is essential to regulate . . . the transportation, purchase, sale, housing, care, handling, and treatment of such animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.").

[58] *Id.* §§ 2131(1), 2131(3) ("The Congress finds that . . . regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment . . . [and] (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.").

[59] Benjamin Adams & Jean Larson, *Legislative History of the Animal Welfare Act*, ANIMAL WELFARE INFO. CTR., https://web.archive.org/web/20130327214345/http://www.nal.usda.gov/awic/pubs/AWA2007/intro.shtml.

[60] *Id.*

[61] 7 U.S.C. §§ 2131–2156.

[62] *Id.* § 2132(g) (excluding cold-blooded animals, birds, rats, and mice bred for research from the definition of *animal*); *Animal Welfare Act*, ANIMAL WELFARE INST., https://awionline.org/content/animal-welfare-act (last visited May 10, 2022) (estimating that 95% of all animals used in research are excluded from protection).

[63] *See, e.g.*, 7 U.S.C. § 2156(f)(4) (amending the AWA in December 2019 to prohibit

> [A]ny live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus Rattus, and mice of the genus Mus, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes.[64]

However, many animals used in exhibition are not covered by the AWA, including reptiles, amphibians, and fish.[65] Notably, the definition of *animal* depends *both* on the animal's intended use and their biology. All cold-blooded animals like reptiles, amphibians, and fish are excluded from the definition of *animal*, and are not protected under the Act.[66] But some animals are not considered *animals* under the AWA's definition because of how humans intend to use them. Birds, mice, and rats that are intended to be used for experimentation are not protected, but conceivably the same animals could be protected

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animal fighting and defining *animal* as "any live bird, or any live mammal, except man" as it is used in the animal fighting section exclusively); *see also* ANIMAL WELFARE INST., *supra* note 62 (summarizing the AWA amendments, including the notable 1970 amendment extending the animal definition to include all warm-blooded animals in laboratories).

[64] 7 U.S.C. § 2132(g).

[65] *See id.* (protecting only warm-blooded animals, therefore excluding cold-blooded animals).

[66] *See* Henry Cohen, *The Animal Welfare Act*, 2 J. ANIMAL L. 13, 16 (2006) (providing a detailed history of the term *warm-blooded* as used in the Act, which does not include reptiles, amphibians, and fish).

if they were used for some other purpose.[67] Both horses *not* used for experimentation and "farm animals" that *are* used for experimentation are unprotected under the act.[68] Keeping this definition in mind, it is no wonder why 97.5% of people would misunderstand the AWA.[69]

Many may also be surprised to find out what standard of care the AWA requires. The AWA does not actually prevent all that many activities or require high quality exhibits. Rather, the AWA sets minimum care standards.[70] The AWA does impose administrative and record-keeping requirements, including allowing detailed APHIS inspections of facilities.[71] Further, the Act requires that each exhibitor has an attending veterinarian who is competent to treat each animal.[72] Animal care standards are broken into sections based on the animal species: dogs and cats; guinea pigs and hamsters; rabbits; non-human primates; marine mammals; and all other warm-blooded animals.[73] Each section is then divided into standards for facilities, animal health and husbandry, and transportation.[74] While the Act's regulations are relatively lengthy and can be quite specific for some categories of animals, it is important to note that quantity does not necessarily mean quality as the AWA sets *minimum* standards.[75] Certainly, regulated animals were far more vulnerable to abuse, exploitation, violence, and

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[67] *Id.* at 19–20.

[68] *See* ERIN H. WARD, CONG. RSCH. SERV., R46672, FEDERAL STATUTES PROTECTING DOMESTICATED AND CAPTIVE ANIMALS 2 (2021).

[69] Metzger, *supra* note 49, at 74 (referencing a study where "only 2.5% of the sample answered the first question (species covered by the AWA) entirely correctly," which implies that the majority of educated students that may conduct research that falls under the AWA were not familiar with the basic mechanics of the law); *see* Plous, *supra* note 49.

[70] 7 U.S.C. § 2143(a)(2).

[71] *See, e.g.*, 9 C.F.R. §§ 2.1–2.12 (1989).

[72] 9 C.F.R. § 2.40 (2021). As part of the veterinary care, the exhibitor must ensure there is a veterinary plan that accounts for "[t]he use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care." Additionally, exhibitors must provide for "[d]aily observation of all animals to assess their health and well-being," though the observation does not need to be by a veterinarian as long as there is a way to contact the attending veterinarian.

[73] *See generally* 9 C.F.R. §§ 3.1–3.142 (1967) (listing each subpart subject).

[74] *Id.*

[75] 7 U.S.C. § 2143(a)(2).

neglect prior to the AWA and its amendments.[76] However, when people see questionable conditions or activities at regulated facilities, they should not assume that the animals are being treated humanely because the AWA does not prevent all inhumane situations.[77]

Not only are many animals exempted from the AWA's protection of minimum care requirements, but enforcement of these minimum standards is insufficient and diminishing.[78] A recent review of agency enforcement actions conducted by People for the Ethical Treatment of Animals (PETA) found that "[b]etween FY2015 and FY2020, enforcement actions brought against AWA licensees plummeted by 90 percent, settlement agreements dropped by 86 percent, and warnings plunged by 100 percent." [79]

For decades, the USDA has been unable to adequately enforce the AWA. Since at least 1992, the USDA Office of the Inspector General (OIG) audits have found significant flaws in APHIS' ability to

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[76] *See, e.g.*, *Care of Animals Used for Research, Experimentation, Exhibition, or Held for Sale as Pets: Hearings on H.R. 13957 Before the H. Comm. on Agric.*, 91st Cong. 24–25 (1970) (statement of S. E. Badger). Discussing her career with captive animals during the debate to amend the AWA to include animals used in exhibition, Badger noted: "People come to look at them . . . and they do not know very much about them, they assume they are all right, they cannot see the cages very well, because usually they are dark. . . . No one worried about it. We, who worked there, were always pleased when some animal died to be out of a miserable life."

[77] *See, e.g.*, *Big Cat Public Safety Act*, ANIMAL WELFARE INST., https://awionline.org/legislation/big-cat-public-safety-act (last visited May 10, 2022) (urging support for the pending Big Cat Safety Act to protect big cats from, among other things, exploitative "cub petting" which is currently permissible under the AWA, and claiming that cub petting "fuels a vicious cycle of breeding and dumping . . . . After [the cats] outgrow their usefulness and profitability at about 12 weeks old, these cubs are funneled into the exotic pet trade, sold to another disreputable exhibitor, or killed to supply the black market trade for wildlife parts.").

[78] *Cf.* Rachel Fobar, *USDA Accused of Ignoring Animal Welfare Violations in Favor of Business Interests*, NAT'L GEO. (Oct. 13, 2021), https://www.nationalgeographic.com/animals/article/usda-accused-of-ignoring-animal-welfare-for-business-interests ("Between 2015 and 2020, U.S. enforcement actions brought against licensed animal facilities fell by 90 percent, according to a PETA assessment.").

[79] Letter from Rachel Mathews, Dir. of Captive Animal L. Enf't, PETA, to Thomas J. Vilsack, Sec'y of Agric., U.S. Dep't of Agric. & Phyllis K. Fong, Inspector General, U.S. Dep't of Agric. (June 3, 2021) (on file with PETA).

enforce the AWA.[80] The 1992 OIG report concluded that "APHIS could not ensure the humane care and treatment of animals at all dealer facilities as required by AWA" because the Agency did not inspect facilities frequently enough and did not penalize violators.[81] A follow-up 1995 audit revealed that the Agency "did not fully address problems disclosed in the prior report."[82] A 2005 audit concluded that "[d]ue to a lack of clear National guidance, [Animal Care]'s Eastern Region is not aggressively pursuing enforcement actions against violators of the AWA."[83] The audit found: issues in the rate of enforcement; frequent discounting of fines for violations; unreliable tracking of violation histories; and APHIS mismanagement of $398,354 worth of delinquent penalty payments.[84]

In 2010, the OIG audit concluded that, in attempting to address problematic animal dealers, Animal Care "chose to take little or no enforcement action against most violators" including repeat violators that "ignored minimum care standards."[85] A significant number of inspectors did not correctly report some of the more serious violations that affect animal health.[86] The lack of adequate reporting led to problems later during an administrative hearing against dealers.[87] Further, penalties continued to be minimal, and in nearly one-third of cases APHIS misused penalty guidelines to lower penalties for violators.[88] That same year, the OIG conducted an audit of animal

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[80] U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM INSPECTIONS OF PROBLEMATIC DEALERS, AUDIT REP. 33002-4-SF 6 (2010) [hereinafter INSPECTIONS OF PROBLEMATIC DEALERS] (noting that a 1992 OIG audit found that "APHIS could not ensure the humane care and treatment of animals at all dealer facilities as required by AWA" and that a follow up 1995 audit found that "that APHIS did not fully address problems disclosed in the prior report").

[81] *Id.*

[82] *Id.*

[83] *See* U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., W. REGION APHIS ANIMAL CARE PROGRAM INSPECTION AND ENFORCEMENT ACTIVITIES, AUDIT REP. 33002-3-SF i (2005). The Animal Care Unit's Eastern Region covers Minnesota, Puerto Rico, and states east of the Mississippi River.

[84] *Id.* at ii–iii.

[85] INSPECTIONS OF PROBLEMATIC DEALERS, *supra* note 80, at 8.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 30.

exhibitor licensing.[89] That audit found that inspectors did not report safety issues because they were not given sufficient guidance to conduct their inspections.[90] Additionally, the report noted significant issues with inspectors being unable to locate traveling exhibitors.[91]

In 2017, when addressing enforcement of marine mammal care standards, the OIG concluded "[i]nspections are not always uniformly completed or adequately documented because of insufficient guidance; this reduces assurance that those exhibitors are in compliance with the AWA."[92] A 2021 audit focusing on oversight of dog breeders found that information maintained by APHIS' Animal Care Information System database is unreliable due to mismanagement.[93] Further, APHIS did not "consistently address complaints it received or adequately document the results of its follow-up," resulting in potentially unregulated dog breeding.[94] Another 2021 audit focusing on licensing of animal exhibitors concluded that due to a lack of oversight, "APHIS cannot fully ensure the safety of animals exhibited or the safety of the public who view those animals."[95]

Even in light of its consistently poor enforcement history, APHIS formalized its "Teachable Moments" practice in 2016.[96] APHIS inspectors began using Teachable Moments as an alternative to citing licensees for violations for *minor noncompliant items*.[97] Teachable Moment violations are still violations of the AWA, but in theory will be corrected quickly, are not affecting animal welfare, and

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[89] U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., CONTROLS OVER APHIS LICENSING OF ANIMAL EXHIBITORS, AUDIT REP. NO. 33601-10-CH 1 (2010), https://www.usda.gov/sites/default/files/33601-10-CH.pdf.
[90] *Id.* at 2.
[91] *Id.*
[92] U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., APHIS: ANIMAL WELFARE ACT – MARINE MAMMALS (CETACEANS), AUDIT REP. 33601-0001-31 (2017).
[93] U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., ANIMAL CARE PROGRAM OVERSIGHT OF DOG BREEDERS, AUDIT REP. 33601-0002-31 3 (2021).
[94] *Id.* at 6.
[95] U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., FOLLOW-UP TO ANIMAL AND PLANT HEALTH INSPECTION SERVICE'S CONTROLS OVER LICENSING OF ANIMAL EXHIBITORS, AUDIT REP. 33601-0003-23 (2021).
[96] B. Taylor Bennett & Matthew R. Bailey, *Adapting to Change: The USDA's 'Teachable Moment*,*'* 45 LAB ANIMAL 207, 207 (June 2016).
[97] *Id.*

have not been previously cited.[98] The Teachable Moments practice has been criticized as a way to avoid public disclosure of violations and enable violators to continue to operate.[99]

Depending on the animals being exhibited, a captive animal operation may be required to comply with the Endangered Species Act (ESA).[100] The ESA, enforced primarily by the U.S. Fish and Wildlife Service (USFWS), applies to animals classified as *endangered* or *threatened*.[101] If an animal is covered by the ESA, no person may use the animal in interstate or international commerce unless they receive a permit to do so.[102] Further, no person may "take" a protected species without a permit.[103] Under the ESA, to *take* means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[104]

The ESA applies to captive animals in two major ways: (1) exhibitors must receive a permit from USFWS to obtain or sell an endangered species in interstate commerce;[105] and (2) while an endangered species is held captive, no person may harm or harass the animal.[106] However, the AWA somewhat undercuts the latter requirement. *Harass* is defined by regulation as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt

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[98] *USDA Animal Care Revises Its Animal Welfare Inspection Guide USDA Animal Care Revises Its Animal Welfare Inspection Guide*, ANIMAL AND PLANT HEALTH INSPECTION SERV. (U.S. Dep't of Agric., Washington, D.C.), (Jan. 26, 2016), https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/13044a6.

[99] *See, e.g.*, Press Release, David Perle, PETA, PETA Statement: Spending Bill Tackles USDA Secrecy, (June 5, 2019) (on file with PETA), https://www.peta.org/media/news-releases/peta-statement-spending-bill-tackles-usda-secrecy/ ("So-called 'teachable moments' are thinly veiled attempts to shield violators from public scrutiny and should never have been allowed.").

[100] *See Captive Animals*, ANIMAL LEGAL DEF. FUND, https://aldf.org/focus_area/captive-animals/ (last visited Mar. 21, 2022).

[101] Endangered Species Act, 16 U.S.C. §§ 1533(a)–(b) (2018). USFWS is part of the Department of the Interior, and the Secretary of the Interior is primarily responsible for ESA enforcement.

[102] *Id.* §§ 1538(a)(1), 1539(a)(1).

[103] *Id.* §§ 1538 (a)(1)(B)–(C).

[104] *Id.* § 1532(19).

[105] *Id.* § 1539(a)(1).

[106] Kuehl v. Sellner, 887 F.3d 845, 852 (8th Cir. 2018).

normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering."[107] However, as it applies to captive animals, *harass* does not include practices that meet or exceed the minimum care standards in the AWA.[108] Simply holding a license under the AWA does not provide shelter if the facility is still otherwise violating the AWA.[109] The regulatory definition of *harm*, does not include the same deference to the AWA: *harm* is defined as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[110] This interpretation of the ESA was supported in *Kuehl v. Sellner*, a 2018 Eighth Circuit case challenging the Cricket Hollow Zoo's treatment of captive endangered species.[111] The court in *Sellner* affirmed the lower court's finding that the Sellners' frequent AWA violations and treatment of endangered lemurs and tigers amounted to harm and harassment.[112] This means that a captive animal facility that kills or injures endangered species without a permit or fails to meet AWA care requirements may be violating the ESA.[113]

Importantly, the ESA does not establish care requirements but only prohibits certain activities without first obtaining a license and protects only specifically listed species.[114] The AWA does establish minimum care requirements, but those requirements only apply to a minority of animals.[115] Whether an animal is protected by law is only part of the equation—the AWA depends on government enforcement

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[107] 50 C.F.R. § 17.3(c) (1981).
[108] *Id.*
[109] *Kuehl*, 887 F.3d at 852.
[110] *Id.* (quoting 50 C.F.R. § 17.3(c)).
[111] *Kuehl*, 887 F.3d at 848.
[112] *Id.* at 853–54.
[113] *Id.* at 852.
[114] Endangered Species Act, 16 U.S.C. § 1538(a).
[115] *See supra* text accompanying notes 62–68.

which has been consistently insufficient.[116] The ESA does allow citizen suits, but as stated, the ESA applies only to some animals.[117]

So, what happens to the cold-blooded and non-endangered species? Some animals may be protected by state animal cruelty laws. State laws rarely provide specific requirements for animals, and if so, usually only encompass adequate food, water, shelter, and potentially veterinary care.[118] More often, state laws prohibit unjustified cruelty to animals such as torture, overloading, sexual contact, or withholding veterinary treatment.[119] But these laws generally make exceptions for: accepted animal husbandry practices; animals used for food or fiber; wildlife used for hunting; animals used for experimentation; "nuisance" animals; or whatever the state considers "justified" harm.[120] Even where an animal should be protected by state law, enforcement may still pose a substantial barrier to adequate protection.[121]

In reality, captive animals have very few meaningful legal protections. The treatment of captive animals is further complicated by trade association requirements. The Association of Zoos and Aquariums (AZA) is widely recognized by American consumers.[122] However, it remains unclear whether the general public understands what AZA accreditation—or any private accreditation—actually means.[123] Muddying the waters even more, is the presence of other accrediting groups that lend an air of credibility without actually requiring much from their members—if they require anything above legal compliance.[124] Given this complex legal framework, rife with

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[116] *See supra* text accompanying notes 77–97.
[117] *See* 16 U.S.C. § 1540(g) (allowing citizen suits to protect endangered or threatened species).
[118] Rebecca F. Wisch, *Brief Summary of State Cruelty Laws*, ANIMAL LEGAL & HIST. CTR. (2010), https://www.animallaw.info/intro/state-anti-cruelty-laws.
[119] *Id.*
[120] *See id.*
[121] *See id.* (listing enforcement issues such as "limited resources, incomplete investigations, pressure from the community to focus on other crimes, and even the personal feelings of the prosecutor toward animal abuse").
[122] *Benefits of Accreditation*, ASSOC. OF ZOOS AND AQUARIUMS, aza.org/benefits-of-accreditation?locale=en (last visited May 10, 2022).
[123] Winders, *supra* note 2, at 168.
[124] *Id.* at 165.

exceptions, it is easy to see how consumers can easily be misled by the unregulated claims of exhibitors.

B. Consumer Protection Law & Policy

While each consumer protection law is drafted differently with unique policy goals in mind, the underlying principle is the same: creating a fair market for businesses and consumers.[125] When facilities call themselves sanctuaries, consumers have expectations about the way animals are treated there.[126] The higher quality of care consumers expect from a sanctuary justifies their donation. When facilities fail to provide that quality of care, consumers should have some form of recourse.

Consumer protection laws have wide applicability, making them potentially useful for holding pseudo-sanctuaries accountable. Consumer protection laws also provide multiple forms of relief such as injunctions,[127] monetary damages,[128] and even punitive damages[129] in the most egregious cases. These laws may empower individuals to hold accountable pseudo-sanctuaries that deceptively solicited donations or delivered an experience far different from that advertised. Genuine sanctuaries may also have a cause of action against pseudo-sanctuaries

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[125] *See e.g.*, Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 8 (2005) (describing the Federal Trade Commission's dual purposes in regulating commercial activity and false advertising).

[126] *See* Rachel Hartigan, *Are Wildlife Sanctuaries Good for Animals?*, NAT'L GEO., (Mar. 20, 2014), https://www.nationalgeographic.com/animals/article/140320-animal-sanctuary-wildlife-exotic-tiger-zoo ("Animal lovers go to wildlife sanctuaries because they want to see animals up close and because they believe sanctuaries are in the business of taking care of animals that have nowhere else to go.").

[127] *See* DEE PRIDGEN ET AL., CONSUMER PROTECTION AND THE LAW § 6.9, fn. 2, Westlaw (database updated Nov. 2021) (listing the 33 states with private injunction remedies).

[128] *See* Syreeta Tyrell & Matthew du Mee, *Restitution: The Superior Remedy*, NAT'L ASSOC. OF ATT'YS GEN. (May 3, 2021), https://www.naag.org/attorney-general-journal/restitution-the-superior-remedy/ (discussing the benefits of restitution damages in consumer protection actions).

[129] *See* PRIDGEN ET AL., *supra* note 127, § 6.16, n.1 (listing the nine states with punitive damages available as relief in consumer protection cases).

that unfairly use the genuine sanctuaries' good reputation enable captive animal exploitation.[130] Similarly, advocacy groups may be able to show that pseudo-sanctuaries have frustrated their animal protection mission, requiring them to spend their limited resources.[131] These private causes of action may prove invaluable given that the government does not adequately enforce existing animal protection laws.

1. The Lanham Act

This Part looks at the Lanham Act's False Advertising section as a federal law that can be used without relying on government enforcement. The Lanham Act can only be used by a business competitor, but the underlying policy is still that of consumer protection.[132] The Lanham Act could possibly be used by a genuine sanctuary that is in competition with a pseudo-sanctuary.

The Lanham Act is a federal trademark law that includes consumer protection by preventing unfair competition through false advertising.[133] The false advertising provision is designed to make "actionable the deceptive and misleading use of marks in such commerce" and "protect persons engaged in such commerce against unfair competition."[134] The Lanham Act creates a cause of action for a business to sue a competitor for business practices that unfairly skew the market to favor the competitor.[135]

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[130] *Cf.* Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V., 69 F. Supp. 3d 175, 216 (D.D.C. 2014) (stating that the complainant successfully showed that a competing ice cream manufacturer attempted to use the complainant's "business reputation and goodwill" for the defendant's benefit).

[131] *See, e.g.*, Animal Legal Def. Fund v. Hormel Foods Corp., 258 A.3d 174, 179 (D.C. 2021) (finding non-profit ALDF had standing under D.C. consumer protection law to challenge false advertising by Hormel).

[132] POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 107 (2014) ("The Lanham Act creates a cause of action for unfair competition through misleading advertising or labeling. Though in the end consumers also benefit from the Act's proper enforcement, the cause of action is for competitors, not consumers.").

[133] *Id.*

[134] 15 U.S.C. § 1127.

[135] *POM Wonderful LLC*, 573 U.S. at 107; *see also* Keebler Co. v. Rovira Biscuit

The false advertising section is divided into two distinct kinds of claims.[136] Section 43(a)(1)(A) applies to "false designation of origin" or "'passing off.'"[137] This subsection is a more traditional trademark protection approach, designed to prevent consumer confusion as to the "affiliation, connection, or association" or "the origin, sponsorship, or approval" of the goods or services at issue.[138] Section 43(a)(1)(B) applies to false advertising that misrepresents the "nature, characteristics, qualities, or geographic origin" of the goods or services advertised.[139] This Part analyzes the latter.[140]

Notably, the Lanham Act only gives competitors a cause of action, not consumers.[141] Proper plaintiffs need to be within the "zone of interests" protected by the Lanham Act where the defendant's action is the proximate cause of the plaintiff's injury.[142] The Supreme Court has found that the Lanham Act's zone of interests requires a plaintiff show "an injury to a commercial interest in reputation or sales. A consumer who is hoodwinked into purchasing a disappointing product

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Corp., 624 F.2d 366, 372–73 (1st Cir. 1980) (citing Alfred Dunhill, Ltd. v. Interstate Cigar Corp., 499 F.2d 232, 236–37 (2d Cir. 1974)) ("The protection afforded by § 43(a) was designed to expand the rights of a 'purely commercial class' against the unscrupulous practices of their business competitors."), *overruled by* Miller Brewing Co. v. Falstaff Brewing Corp., 655 F.2d 5, 7 (1981) (overruling *Keebler* on a separate issue not related to the court's interpretation of § 43(a)).

[136] THOMAS M. WILLIAMS, FALSE ADVERTISING AND THE LANHAM ACT: LITIGATING SECTION 43(A)(1)(B) 5 (2012).

[137] *Id.* at 5–6.

[138] *Id.* (quoting Trademark Act of 1946 (Lanham Act) § 43(a)(1)(A), 15 U.S.C. § 1125(a)(1)(A)).

[139] *Id.* at 6 (quoting 15 U.S.C. § 1125(a)(1)(B)).

[140] At first read, it might seem that the trademark section (§ 43(a)(1)(A)) would also apply because a pseudo-sanctuary deceives people by attempting to pass as a genuine sanctuary. However, the term *sanctuary* is likely considered a generic term incapable of trademark protection because the term *sanctuary* and related terms describe the way in which the facility engages with the animals rather than a discrete and identifiable service. *See* Gimix, Inc. v. JS & A Grp., Inc., 699 F.2d 901, 906 (7th Cir. 1983) (quoting Union Carbide Corp. v. Ever-Ready Inc., 531 F.2d 366, 378 (7th Cir. 1976)) (describing generic terms as "merely descriptive of the ingredients, qualities, or characteristics of an article of trade" rather than denoting a specific source of a good or service).

[141] POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 107–08 (2014).

[142] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 130 (2014).

may well have an injury-in-fact . . . , but he cannot invoke the protection of the Lanham Act."[143] Further, a competitor need not be a *direct* competitor, but the plaintiff must still show proximate causation between the defendant's acts and the plaintiff's commercial injury.[144]

To successfully use the Lanham Act against a competitor for misleading advertising, the plaintiff must show that the defendant: (1) made false or misleading statements about the plaintiff or defendant's services or product; (2) through advertisements or promotions in interstate commerce; (3) that misrepresent "the nature, characteristics, qualities, or geographic origin of" the product or service;[145] (4) the deception is material to the target consumer's purchasing decision; (5) the advertisements have deceived, or are likely to deceive, consumers; and (6) causing, or likely to cause, the plaintiff injury.[146]

The false statement can be either literally false, false by necessary implication, or literally true but nonetheless misleading.[147] A literally false statement is one that makes a factual statement that is plainly false on its face.[148] Judge Posner describes a literally false statement as "bald-faced, egregious, undeniable, over the top."[149] However, if the challenged statement is ambiguous, and thus has more than one reasonable interpretation, it cannot be considered literally

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[143] *Id*. at 132.

[144] *Id.* at 134 (citing Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 458 (2006) ("For example, while a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses, the same is not true of the competitor's landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's 'inability to meet [its] financial obligations.'" (insertion in original)).

[145] 15 U.S.C. § 1125(a)(1)(B).

[146] J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:24, Westlaw (5th ed. database updated Dec. 2021) (detailing elements of a prima facie case under § 43(a)(1)(B) for false misrepresentation); WILLIAMS, s*upra* note 136, at 38–39.

[147] *See generally* Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, GMBH, 843 F.3d 48, 65 (2d Cir. 2016) (showing how a pregnancy test advertisement was impliedly false).

[148] Fair Isaac Corp. v. Experian Info. Sols., Inc., 650 F.3d 1139, 1151 (8th Cir. 2011).

[149] Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 513 (7th Cir. 2009).

false.[150] This is because a literally false statement, as compared to a misleading statement, does not require the complainant to show actual deception.[151] The court assumes that a literally false statement has probably misled some people and was made for "a malign purpose."[152]

A false statement by necessary implication is a statement that unambiguously and necessarily leads the listener to believe a falsehood.[153] False statements by necessary implications "leave[] 'an impression on the listener or viewer that conflicts with reality.'"[154] The court found a possible false statement by necessary implication in a TV advertisement for a satellite TV company in *Time Warner Cable.*[155] In an advertisement by DirectTV, William Shatner (playing Captain Kirk from *Star Trek*) states that "settling for cable would be illogical," much to Mr. Spock's umbrage.[156] Though William Shatner did not outright say that cable is clearly inferior to satellite TV, that was the necessary implication from the statement in that context.[157] A false statement by necessary implication is still a false statement, and accordingly receives the same evidentiary benefits as a literally false statement.[158]

A particularly useful aspect of the Lanham Act is that it does not require the plaintiff to show intent to deceive.[159] However, if the plaintiff can show an intent to deceive and literal falsity, some courts will presume injury to the plaintiff and/or consumer deception.[160] Showing literal falsity is also preferred because relying on misleading

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[150] Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 158 (2d Cir. 2007).
[151] *See Schering-Plough Healthcare Prods., Inc*., 586 F.3d at 512.
[152] *Id.*
[153] *Time Warner Cable, Inc.*, 497 F.3d at 158 .
[154] Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, GMBH, 843 F.3d 48, 65 (2d Cir. 2016) (quoting *Time Warner Cable, Inc.*, 497 F.3d at 153).
[155] *Time Warner Cable, Inc.*, 497 F.3d at 158.
[156] *Id.*
[157] *Id.*
[158] *See* Richard J. Leighton, *Literal Falsity by Necessary Implication: Presuming Deception Without Evidence in Lanham Act False Advertising Cases*, 97 TRADEMARK REP. 1286, 1287 (2007).
[159] *See* Suntree Techs., Inc. v. Ecosense Int'l, Inc., 693 F.3d 1338, 1348 (11th Cir. 2012) (listing the prima facie elements in a Lanham Act false advertising case).
[160] MCCARTHY, *supra* note 146, § 27:51.

statements requires the plaintiff to show extrinsic evidence of consumer confusion.[161]

A misleading statement may be a statement that is not literally false, but a reasonable person would nonetheless be misled.[162] To establish a misleading statement, there must be evidence that ordinary consumers are misled.[163] However, a term is not misleading simply because the defendant's use does not align with the plaintiff's chosen meaning.[164] Similarly, if there is proof that consumers misunderstand a literally true statement, such evidence may be insufficient to show consumer deception.[165] Misunderstanding a plainly true and unambiguous statement is not equivalent to being misled.[166] Further, plaintiffs cannot claim a statement is misleading where the defendant's advertisement clarifies the meaning of a term, thus removing any ambiguity.[167]

Whether false or misleading, courts require the plaintiff to show that the misrepresentation was material.[168] A material misrepresentation often involves an "inherent quality or characteristic" of the product or service.[169] The misrepresentation must be material in that it is likely to influence purchasing decisions.[170]

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[161] MALLA POLLACK, 111 AM. JUR. TRIALS 303, Westlaw (2d ed. database updated Feb. 2022).
[162] Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 297 (2d Cir. 1992).
[163] *Id*. at 298.
[164] First Health Grp. Corp. v. BCE Emergis Corp., 269 F.3d 800, 804–05 (7th Cir. 2000).
[165] Mead Johnson & Co. v. Abbott Lab'ys, 209 F.3d 1032, 1034 (7th Cir. 2000).
[166] Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc., 653 F.3d 241, 252 (3d Cir. 2011) ("[T]here are circumstances under which the meaning of a factually accurate and facially unambiguous statement is not open to attack through a consumer survey. In other words, there may be cases, and this is one, in which a court can properly say that no reasonable person could be misled by the advertisement in question.").
[167] *Id.* (finding that the term *Havana Club* is not misleading because the phrase is not interpreted in isolation and the label makes clear the product was from Puerto Rico).
[168] *See e.g.*, N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1224 (11th Cir. 2008).
[169] Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Lab'ys, Div. of/& Am. Home Prods. Corp., 850 F.2d 904, 917 (2d Cir. 1988).
[170] Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 245 (9th Cir. 1990).

The actionable misrepresentation must be from an interstate advertisement or promotion.[171] Showing the interstate commerce requirement of the Lanham Act is fairly simple in the internet age. Internet advertising is consistently considered interstate commerce.[172] Some courts have even gone as far as finding interstate activity where the defendant's *intrastate* activities affected the plaintiff's interstate sales. Whether the statement was made in an advertisement and promotion is often analyzed by determining whether the statement was "(1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services[;]' and (4) 'the representations . . . [sic] must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry."[173] Commercial speech generally is a statement made for commercial or economic interests.[174] Read together, an actionable statement must be made for commercial purposes with the intent to persuade consumers to purchase a specific good or service where the statement is actually disseminated to the target audience. While this definition is expansive, it does not include all statements that represent an opinion or misrepresent a fact.[175] Whether a statement is commercial becomes more difficult when the statement is soliciting donations for a non-profit. The Supreme Court established that:

> Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and

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[171] Suntree Techs., Inc. v. Ecosense Int'l, Inc., 693 F.3d 1338, 1348 (11th Cir. 2012) (listing interstate commerce as a required element in a prima facie case of false advertising under the Lanham Act).

[172] *See* Patrick Frye, *An Internet Advertising Service Can Constitute Use in Commerce*, SANTA CLARA COMPUT. & HIGH TECH. L.J. 89, 108 (2005–2006).

[173] Edward Lewis Tobinick, MD v. Novella, 848 F.3d 935, 950 (11th Cir. 2017) (quoting *Suntree Techs., Inc.*, 693 F.3d at 1349) (punctuation in original).

[174] *Id.*

[175] *See* Radiance Found., Inc. v. NAACP, 786 F.3d 316, 326 (4th Cir. 2015) ("[T]he specific use of the marks at issue here was too attenuated from the [NAACP's] donation solicitation and the billboard campaign to support Lanham Act liability.").

> perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money.[176]

Non-profits are not totally immune to Lanham Act challenges, but solicitations for charitable donations cannot be automatically classified as "purely commercial."[177] To come within the Lanham Act's authority, the statement should clearly be to induce some commercial transaction.[178]

The Lanham Act presents some way for a genuine sanctuary to hold a pseudo-sanctuary accountable. By empowering a genuine sanctuary, the Lanham Act could restore some of the lost donations that are mistakenly given to pseudo-sanctuaries.[179] If there is a settlement or damages awarded to the genuine sanctuary, obviously that monetary award will immediately serve the animals in the genuine sanctuary.[180] If the resolution is in the form of an injunction, at least this may prevent more mistaken donations in the future. In this way, the Lanham Act could serve as a direct means to help captive animals in genuine sanctuaries.

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[176] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 633 (1980).
[177] *Radiance Found. Inc.*, 786 F.3d at 326 (quoting *Vill. of Schaumburg*, 444 U.S. at 632).
[178] AvePoint, Inc. v. Power Tools, Inc., 981 F. Supp. 2d 496, 512 (W.D. Va. 2013) (discussing cases where internet advertising was held to be interstate commerce).
[179] *See, e.g.*, Birthright v. Birthright, Inc., 827 F. Supp. 1114, 1143 (D.N.J. 1993) ("In the context of not-for-profit fundraising, an award of all donations made to a willfully infringing defendant emerges from the deterrence rationale for awarding lost profits. This remedy protects the mark by functioning as a deterrent to potential infringers seeking to take advantage of the good will and reputation of a non-profit organization by fundraising under its protected mark. Moreover, it advances the interests of the relevant consuming public by ensuring that contributions reach their likely intended target.").
[180] *See id.*

2. State UDAP Statutes

Every state has its own consumer protection statutes and framework, protecting consumers from unfair and deceptive acts and practices (UDAP).[181] While there are some general similarities between state UDAP statutes, each state varies in interpretation. For that reason, this Part provides a broad overview of UDAP statutes' common features before calling attention to two state consumer protection laws. As discussed below, state UDAP laws tend to be more flexible than federal standards. For this reason, state consumer protection laws may be more effective at holding pseudo-sanctuaries accountable. Further, state UDAP laws directly empower consumers, in this case visitors and donors of pseudo-sanctuaries.

UDAP statutes arose out of common law fraud and breach of warranty actions.[182] At common law, purchasers were often held to *caveat emptor*, or the *buyer beware* standard.[183] This made proving fraud or deception incredibly difficult for ordinary consumers, except in the most egregious cases.[184] UDAP statutes have largely displaced these common law approaches, lowering the barrier to entry for ordinary consumers.[185] Further, every state has a private cause of action under their respective UDAP statutes.[186] UDAP statutes tend to lean strongly in favor of consumers as the purpose of such laws are to protect the consumer.[187] To this end, UDAP statutes tend to be interpreted broadly.[188]

Because the purpose of UDAP statutes is protecting the consumer, the intent of the deceptive actor is not necessarily dispositive

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[181] PRIDGEN ET AL., *supra* note 127, § 3:1.
[182] *Id.* § 2:1.
[183] *Id.*
[184] *Id.* § 2:9.
[185] *Id.*
[186] CAROLYN L. CARTER & JONATHAN SHELDON, NAT'L CONSUMER L. CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES 816 (10th ed. 2021).
[187] *See* New York v. Colorado State Christian Coll. of Church of Inner Power, Inc., 346 N.Y.S.2d 482, 489 (N.Y. Sup. Ct. 1973) ("[T]he purpose of the statute is not to punish the wrongdoer but to protect the public.").
[188] CARTER & SHELDON, *supra* note 186, at 815.

to whether a violation has actually occurred.[189] In some states, the UDAP statutes impose *knowing* scienter. However, appeals courts have interpreted *knowing* as closer to an imputed knowledge standard—that the actor *should* have known their actions would be misleading.[190] Even by this standard, the actor does not need to intend to defraud the public, but after reasonable diligence should know their actions could be misleading.

There is considerable variation among the states as to whether, and to what degree, consumers need to show reliance on misleading statements. Some jurisdictions require a showing of justifiable reliance, while others do not. On one end of the reliance spectrum there are states such as New York, which extend protection to those "ignorant, [] unthinking, and [] credulous [consumers] who, in making purchases, do not stop to analyze but are governed by appearances and general impressions."[191] On the other far end are states such as Georgia and Pennsylvania that adhere to a similar standard to the *caveat emptor* standard at common law.[192] Somewhere between these standards is the Federal Trade Commission's "reasonable consumer" standard which asks whether the act is "likely to mislead consumers acting reasonably under the circumstances."[193]

Some states also impose on private litigants (rather than government actors like attorneys general) an actual reliance

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[189] PRIDGEN ET AL., *supra* note 127, § 3:2 (explaining that Missouri, Alabama, Illinois, Utah, Kansas, and Pennsylvania impose some version of an intent to deceive standard, and that Connecticut allows a "good faith" defense to an Unfair Trade Practices Act violation).

[190] *See, e.g.*, Stevenson v. Louis Dreyfus Corp., 811 P.2d 1308, 1311–12 (N.M. 1991) ("We agree that the misrepresentation need not be intentionally made, but it must be knowingly made . . . . The 'knowingly made' requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading.").

[191] Guggenheimer v. Ginzburg, 372 N.E.2d 17, 19 (N.Y. 1977).

[192] *See* PRIDGEN ET AL., *supra* note 127, §§ 3:1–3:2 (discussing various Georgia and Pennsylvania consumer protection cases).

[193] U.S. FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS 10 (Dec. 22, 2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf.

requirement.[194] Therefore, private litigants must show that they actually relied on the seller's actions, causing the complainant actual injury. Further still, states like Illinois impose a proximate causation analysis to the actual reliance requirement.[195] In short, both reliance and causation standards are highly jurisdictionally dependent and are therefore difficult to paint in broad strokes. Yet, many states look to the Federal Trade Commission's (FTC) regulations and analysis to interpret their own legislation.[196]

State UDAP statutes may prove to be an exceptional tool to hold pseudo-sanctuaries accountable because of their flexibility. To demonstrate differences between UDAP laws, California and Florida provide excellent examples.

California has one of the most expansive consumer protection legal frameworks. Additionally, the California UDAP laws have significant case law and interpretation behind them.[197] California consumers have access to the California False Advertising Law (FAL),[198] Consumer Legal Remedies Act (CLRA),[199] and the Unfair

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[194] *See* CLRA, *infra* Part II.B.

[195] Shannon v. Boise Cascade Corp., 805 N.E.2d 213, 217 (Ill. 2004) ("[D]eceptive advertising cannot be the proximate cause of damages under the Act unless it actually deceives the plaintiff.").

[196] PRIDGEN ET AL., *supra* note 127, § 3:22.

[197] *See, e.g.*, Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 510, 513, 524 (Cal. 1985) (applying the UDAP statute to creditors); Quelimane Co., Inc. v. Stewart Title Guaranty Co., 960 P.2d 513, 523–24 (Cal. 1998) (applying the state's UDAP law to rate setting for insurance companies); People *ex rel.* Orloff v. Pac. Bell, 80 P.3d 201, 207–08, 212 (Cal. 2003) (applying the state's unfair competition law to utility services).

[198] CAL. BUS. & PRO. CODE § 17500 (West 2022), *recognized as preempted by* Silvas v. E*Trade Mortg. Corp., 421 F. Supp.2d 1315, 1319 (2006) (holding that the Home Owner's Loan Act expressly preempted state law claims regarding deceptive representations about a federal savings and loan's lending activities, including "its loan related fees or disclosure and advertising practices").

[199] CAL. CIV. CODE § 1750 (West 2022), *limited on preemption grounds by* Perez v. Nidek Co. Ltd., 657 F. Supp. 2d 1156, 1164 (S.D. Cal. 2009) (holding that the Food, Drug, and Cosmetic Act (FDCA) preempted § 1750, preventing private enforcement of the FDCA under the CLRA) and *In re* Apple iPhone 3G Products Liability Litigation, 728 F. Supp. 2d 1065, 1072 (N.D. Cal. 2010) (holding that the Federal Communications Act of 1934 completely preempted CLRA claims about commercial mobile service providers' rates and market entry).

Competition Law (UCL).[200] These laws work together to prohibit a wide range of activities and empower consumers directly.[201] This Article focuses on the FAL and CLRA.

California courts have often analyzed the FAL and CLRA together because of their similarities.[202] The FAL prevents any person from disseminating:

> [I]n any newspaper or other publication, or any advertising device . . . or in any other manner or means whatever, including over the Internet, any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . .[203]

Similarly, the CLRA gives consumers a cause of action against unfair and deceptive business practices, such as those prohibited by the Lanham Act.[204] Like many UDAP statutes, the FAL and CLRA require: (1) that the defendant made a material misrepresentation; (2) the complainant actually relied on that misrepresentation; (3) the complainant was injured; and (4) the defendant's misrepresentation was the immediate cause of the injury.[205] Both the misleading and materiality requirements are evaluated using an objective reasonable

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[200] CAL. BUS. & PRO. CODE § 17200 (West 2022). Several cases preempted this statute's applicability to furnishing information to credit reporting agencies, interstate sales of wholesale electricity, federal thrift regulation, and commercial mobile service providers' rates and market entry.

[201] *Id.* § 17500 (West 2022).

[202] *See, e.g.*, Boris v. Wal-Mart Stores, Inc., 35 F. Supp. 3d 1163, 1169 (C.D. Cal. 2014) ("The same standard determines whether a representation is misleading under the FAL and the CLRA."); *see also* Colgan v. Leatherman Tool Grp., Inc., 38 Cal. Rptr. 3d 36, 46 (Cal. Ct. App. 2006) ("The standards for determining whether a representation is misleading under the False Advertising Law apply equally to claims under the CLRA.").

[203] CAL. BUS. & PRO. CODE § 17500 (West 2022).

[204] CAL. CIV. CODE § 1770(a)(1) (West 2022) (amended Feb. 9, 2022) (amendment did not alter relevant provision).

[205] Wilson v. Frito-Lay N. Am., Inc., 260 F. Supp. 3d 1202, 1208–09 (N.D. Cal. 2017); Bower v. AT&T Mobility, LLC, 196 Cal. App. 4th 1545, 1556 (Cal. Ct. App. 2011).

person standard.[206] That is, whether the reasonable consumer would be misled by the statement.[207] Likewise, whether a statement is material is not what is material to the individual consumer, but what the reasonable consumer would consider material.[208] The Court stated the materiality requirement as whether "a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question."[209]

Florida consumer protection laws deserve attention because of the many captive animal operations present in the state.[210] In comparison to California, however, Florida's consumer protection laws are much more limited in application. Florida has both a false and misleading advertising law and a more general UDAP statute.[211] Florida's false and misleading advertising law (FFAL) maintains much of the common law fraud requirement.[212] By maintaining common law fraud requirements, the Florida law sets a higher bar for successful consumer protection claims.[213] However, both consumers and competitors have a cause of action.[214] To prove a violation of the Florida law, a consumer must show that: (1) the defendant "made a misrepresentation of material fact;" (2) the defendant knew or should have known that the statement was false or misleading; (3) the defendant intended for the misrepresentation to "induce" reliance on

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[206] Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995).
[207] *Id.*
[208] Waller v. Hewlett-Packard Co., 295 F.R.D. 472, 485 (S.D. Cal. 2013).
[209] *Wilson*, 260 F. Supp. 3d at 1208 (quoting *In re Tobacco II* Cases, 207 P.3d 20 (Cal. 2009)).
[210] As of January 4, 2022, USDA APHIS records indicate 222 active exhibitor license holders in Florida. U.S. DEP'T OF AGRIC., USDA ANIMAL CARE PUBLIC SEARCH TOOL, ACTIVE/EXPIRED LICENSE REPORT FOR WEB, (Jan. 4, 2022), https://www.aphis.usda.gov/animal_welfare/downloads/List-of-Active-Licensees-and-Registrants.xlsx [hereinafter U.S. DEP'T OF AGRIC., LICENSE REPORT] (listing persons licensed or registered under the AWA).
[211] *See generally* FLA. STAT. § 817.44 (2021) (prohibiting intentional false advertising); *id.* §§ 501.201–501.213 (2021) (regulating deceptive and unfair trade practices).
[212] Third Party Verification, Inc. v. Signaturelink, Inc., 492 F. Supp. 2d 1314, 1322 (M.D. Fla. 2007).
[213] CAROLYN L. CARTER, NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES 5, 25 (2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf.
[214] *Third Party Verification, Inc.*, 492 F. Supp. 2d at 1322.

the misrepresentation; (4) the complainant actually and justifiably relied on the misrepresentation; and (5) the misrepresentation caused injury to the complainant.[215] Competitors are held to a similar test but need to show a competitive relationship rather than reliance.[216] The FFAL also entitles the prevailing party to attorney's fees, even following voluntary dismissals where there has been no final judgement.[217] This fee entitlement may increase the financial risk to private litigants.

Because of the flexibility afforded by state UDAPs, they could potentially be the strongest candidate for consumer protection in pseudo-sanctuary accountability. Another factor to consider in selecting potential states would be the number of captive animals currently kept in pseudo-sanctuaries in that state. Depending on each particular state's interpretation of their UDAP statutes, the states of greatest concern may also prove to be the most risky.

II. DEFINING SANCTUARY

This Part analyzes whether consumer protection laws could actually hold pseudo-sanctuaries accountable based on false and misleading claims. Specifically, this Part focuses on the misuse of the term *sanctuary* and other similar animal protection terms like *rescue* or *preserve*. Resting a consumer protection claim only on the false or misleading use of the term *sanctuary* is challenging because the term is imprecise. Consumer protection claims are suited to deal with imprecision.[218] But as imprecision moves closer to vagueness or multiple interpretations, the term loses its actionability.[219] Further, the court is not the nation's lexicographer, and its job is not to create singular definitions.

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[215] *Id.*
[216] *Id.*
[217] Black Diamond Props., Inc. v. Haines, 36 So. 3d 819, 821 (Fla. Dist. Ct. App. 2010).
[218] CARTER, *supra* note 213, at 11 (describing strong UDAP statutes as containing "broad, general prohibitions against both deceptive conduct and unfair conduct" to better protect consumers).
[219] *See infra* Part II.C.

Defining *sanctuary* is important to successfully establish that the term can be false or misleading. This is for two important reasons: (1) showing a false statement comes with advantageous presumptions, like reliance[220]; and (2) a vague term, a subjective opinion, or a claim subject to multiple interpretations may not be actionable.[221] Subjective opinions are not actionable because a consumer cannot reasonably rely on those statements.[222] A consumer's understanding of the claim upon which they rely must be reasonable.[223] To be reasonable, the claim must have some objective meaning against which it can be measured.[224] Therefore, isolating the objective meaning of *sanctuary* is essential to proving consumer deception. Because there is no applicable statutory or regulatory definition, the court must interpret the term according to the common understanding of the word.[225]

Though, initially, finding the common understanding of *sanctuary* is difficult. *Sanctuary* is an imprecise term in application because reasonable people can disagree on the details.[226] But, even if no two consumers have an identical understanding of what a sanctuary is, the reasonable consumer can still identify certain qualities they

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[220] Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 512 (7th Cir. 2009).

[221] *See infra* Part III.C.

[222] *See* M. Neil Browne et al., *Legal Tolerance Toward the Business Lie and the Puffery Defense: The Questionable Assumptions of Contract Law*, 37 S. ILL. U. L.J. 69, 80 (2012) (quoting *In re* Countrywide Fin. Sec. Litig., 588 F. Supp. 2d 1132, 1144 (C.D. Cal. 2008)) (noting that terms like *high quality* are generally not actionable because they are "vague and subjective puffery").

[223] *Id.* at 69–70.

[224] *See id.* at 77 (noting that for a party's false advertising claim to go forward they had to show that the claim was "capable of being proved false or of being reasonably interpreted as a statement of objective fact.").

[225] *See* CONG. RSCH. SERV., STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 19 (2018) ("Where a term is not expressly defined in the statute, courts generally assume 'that Congress uses common words in their popular meaning, as used in the common speech of men.'") (citation omitted).

[226] *See* GLOB. FED'N OF ANIMAL SANCTUARIES, OPERATION STANDARDS 2 (2019) ("GFAS notes that there may be other acceptable ways of meeting the intent of each standard, aside from those detailed below, and that in some instances there may be legal, cultural or other significant barriers to meeting GFAS requirements.").

expect from a sanctuary.[227] Similarly, consumers expect that a sanctuary is somehow different than a regular zoo or a circus.[228] This differentiation is the core of the pseudo-sanctuary charade: pseudo-sanctuaries market themselves as something different from *just* a zoo.[229]

Accordingly, to establish whether the term is being used in a false or misleading way, this Article proposes a balancing test that considers multiple factors: (1) AWA compliance history; (2) on-site practices; (3) financial management; and (4) like all good balancing tests, any other relevant facts as justice may require. These factors align with established consumer protection policy and get to the heart of a common understanding of a sanctuary. This test asks not *what is a sanctuary* but rather—what makes this facility a sanctuary? Importantly, this test considers that there are multiple reasonable interpretations of *sanctuary* but also recognizes when a facility meets no reasonable understanding of the word.

The AWA compliance prong speaks to consumer's expectations that animals in a sanctuary are well-cared for.[230] The on-site practices prong looks to whether the facility behaves how consumers expect a sanctuary to operate. Put another way, this second prong asks whether the facility operates more like facilities we know are sanctuaries, or if it operates more like facilities we know are zoos, circuses, or other forms of exhibition. The third prong looks to whether the facility manages its finances as consumers would expect from a sanctuary; consumers likely expect that a sanctuary is a charity with a significant portion of the proceeds being used for the animals. The final prong is a catch-all that allows the court to consider any other relevant facts. This could be accreditation, whether the facility recently branded itself as a sanctuary, or evidence of other false statements.

Using AWA violations as a basis for distinguishing between sanctuary or pseudo-sanctuary may suggest that I am proposing a specific number of violations that is allowable for a sanctuary before it

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[227] *See* Hartigan, supra note 126 (describing the differences between sanctuaries and zoos from a visitor's perspective).
[228] *Id.*
[229] *See, e.g.*, Boissat et al., *supra* note 31, at 1189.
[230] Hartigan, *supra* note 126.

crosses over into pseudo-sanctuary territory. This is not the case. I argue that AWA violation history should be a major consideration in determining whether a facility is falsely holding itself out as a sanctuary. But, there does not need to be a specific calculation of an acceptable amount, frequency, or severity of violations. Rather, the court should consider the enforcement history as a whole to decide whether a particular facility is closer to a sanctuary than not. I am not recommending a standard of perfection—a genuine sanctuary may have AWA citations, or a facility may have a history of AWA violations but since made significant changes in management and facilities that have led to a demonstrated pattern of compliance. Additionally, not all violations are equal. Even the existing enforcement scheme recognizes this principle by distinguishing between *teachable moments* and violations.[231] A violation for a perimeter fence that is three inches too short is not comparable to a violation for physically battering a captive animal.

Additionally, the court should consider *positive* AWA compliance. That is, does the facility regularly exceed AWA requirements and to what extent? The AWA may set minimum enclosure sizes, but a facility that far exceeds these requirements may indicate that the facility is operating in such a way to justify the price premium and meet consumer expectations. This higher standard of care tends to align more closely with consumer expectations that sanctuaries treat animals differently than other exhibitors.[232]

In *In re Tiger Rescue*, discussed *infra*, the administrative court plainly found as fact that Tiger Rescue was falsely portraying itself as a sanctuary.[233] Though the court did not explicitly state how it came to that conclusion, the long history of non-compliance and severe violations at the facility could not be ignored.[234] While the term *rescue* was imprecise, there was simply no reasonable understanding of the term that would lead a person to think that Tiger Rescue was indeed a

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[231] Bennett & Bailey, *supra* note 96, at 207.
[232] Hartigan, *supra* note 126.
[233] *In re* Tiger Rescue, 67 Agric. Dec. 448, 451 (U.S.D.A. 2008); *see infra* Part II.A.
[234] *In re Tiger Rescue*, 67 Agric. Dec. at 450–51 ("The gravity of the violations detailed in this Decision is of the utmost severity. Respondent Tiger Rescue neglected and abused many animals.").

rescue. This conclusion was possibly so obvious it did not deserve explanation. Additionally, using long-term noncompliance history is common in AWA adjudications.[235] The adjudication takes into account the severity of offenses as well as the frequency and length of time.[236]

However, AWA compliance history should not be the only factor. After all, a pseudo-sanctuary may have a respectable AWA record; but providing minimum care does not make a zoo into a sanctuary. Another factor to consider is on-site practices, and whether they are more like those of a zoo or like known sanctuaries. This allows the court to consider on-site practices without having to determine which practices alone are in line with sanctuary principles. Further, this considers the differences between reputable sanctuaries while still disqualifying pseudo-sanctuaries. For example, consider a facility that exhibits animals but allows breeding for planned reintroduction. Reasonable people could disagree on that facility's sanctuary status.[237] However, a facility that exhibits, breeds for captivity, only temporarily houses animals, and allows direct public interaction, is far closer to operating like a zoo than a sanctuary.[238] This approach also supports the target audience's general expectations about sanctuaries. This prong is similar to evaluating claims like "green" on cleaning products. Just like the target population for sanctuaries may not have a checklist of sanctuary principles or practices, the target audience for "green" cleaning products does not have a list of "green" chemical compositions. Consumer protection laws do not protect only the most sophisticated consumers, they protect *reasonable* consumers.[239]

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[235] *See* 9 C.F.R. § 4.10(a)–(b) (2008) (detailing procedure for license suspension).

[236] *See, e.g.*, *In re* Stark, 79 Agric. Dec. 1, 15–16 (U.S.D.A. 2020).

[237] GLOB. FED'N OF ANIMAL SANCTUARIES, POSITION STATEMENT: BREEDING OF ANIMALS IN CAPTIVITY, (2019) ("GFAS believes that a true sanctuary (including those that rehabilitate animals for eventual release or adoption) does not engage in intentional breeding of animals in captivity, with limited exceptions.").

[238] *Zoo vs. Animal Sanctuary: What's the Difference?*, BLACK PINE ANIMAL SANCTUARY (May 13, 2021), https://www.bpsanctuary.org/blog/zoo-vs-animal-sanctuary-whats-the-difference/.

[239] *See Environmentally Friendly Products: FTC's Green Guides*, FED. TRADE COMM'N: GREEN GUIDES, https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides (last visited May 15, 2022) (providing guidance to companies on avoiding misleading customers with potentially deceptive marketing claims).

Accordingly, the court should not require consumers to understand every aspect of captive animal care but instead focus on reasonable consumer expectations of general practices.

Consumer surveys could also be used to show whether consumers expect certain practices. Using consumer surveys is standard in proving Lanham Act claims of misleading statements.[240] Accordingly, this method of showing consumer expectations is well established in consumer protection actions.[241] The court may also consider different accreditation standards for sanctuaries. The court does not need to enforce these requirements but rather can look to them for some guidance of what sorts of common practices are allowed or prohibited. The court should measure the facility against the most stringent accreditation standards because, conceivably, if a facility meets the highest standards, they are more likely to meet consumer expectations. Conversely, if the facility meets none of those standards, this weighs against the facility's claim. When looking to independent accreditation, it is important to note that the focus should not be on whether the facility is accredited by any particular organization, but rather on the accreditation standards themselves.

The third balancing consideration I propose is looking to the facility's financial structure and activities. The public likely assumes that a sanctuary would both be a legal non-profit and that the majority of funds would go directly to supporting the animals.[242] A for-profit facility is very likely not the sanctuary consumers expect.[243] Many sanctuaries and pseudo-sanctuaries are non-profits and prominently advertise their charity status.[244] However, failing operations

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[240] Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 298 (2d Cir. 1992).

[241] *Id.*

[242] *See* Carr & Cohen, *supra* note 30, at 178, 183–84 ("One of the most problematic issues that zoos have faced in recent years is that alongside the desire to see zoos as sites of conservation, research, and education is the reality of the need to ensure they gain the financial income to allow them to keep operating.") (citation omitted).

[243] *Id.* at 183.

[244] Karlyn Marcy, *Interesting Zoo and Aquarium Statistics*, ASSOC. OF ZOOS & AQUARIUMS (May 26, 2021), https://www.aza.org/connect-stories/stories/interesting-zoo-aquarium-statistics (estimating that 54% of AZA-accredited zoos are non-profits).

occasionally use a particularly devious method of soliciting donations—"*without immediate donations, the animals face euthanasia*."[245] Statements such as this, even if true, tend to indicate that the facility is not a sanctuary. Sanctuaries plan for life-long care, with many accredited sanctuaries having detailed, long-term succession plans that do not include euthanizing animals that can be transferred or released.[246] This is not to say that every sanctuary has an air-tight financial plan that is impervious to disaster. But, in the event of a financial crisis, euthanasia for the sake of tightening the budget is not in line with sanctuary principles.[247] More importantly to this

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[245] Megan Carr, *Coronavirus Kent: The Fenn Bell Zoo, Hoo, Fears It May Have to Euthanise Animals During COVID-19 Lockdown*, KENT ONLINE (Apr. 24, 2020), https://www.kentonline.co.uk/medway/news/i-dont-want-to-euthanise-our-animals-but-i-dont-see-an-alternative-225977/ (reporting that a UK zoo announced that "without public support they may have to make the tough decision of either letting animals starve or put them to sleep"); Matt Collette, *Patrick Accuses Zoo Officials of Scare Tactics*, BOS. GLOBE (July 13, 2009), http://archive.boston.com/news/local/massachusetts/articles/2009/07/13/patrick_accuses_zoo_officials_of_using_scare_tactics/ (reporting that the Boston governor rejected the zoo's assertion that without more funding the zoo would euthanize animals); *Cherry Brook Zoo at Risk of Closing Again After Guinea Pig 'Rage Killing' Allegations*, CBC NEWS (June 3, 2019), https://www.cbc.ca/news/canada/new-brunswick/cherry-brook-zoo-allegations-guinea-pigs-funding-1.5159826 (reporting that a Canada zoo facing closure alleged that "between 40 and 70 per cent of the animals might have to be euthanized if the zoo shuts down because many of them are elderly and other facilities won't want them"); Hannah C., *Zoos Forced Shut Down Due to Pandemic May Have to Euthanize Animals*, SCI. TIMES (June 17, 2020), https://www.sciencetimes.com/articles/26096/20200617/zoos-forced-shut-down-due-pandemic-euthanize-animals.htm (giving examples of zoos alleging that they may be forced to euthanize animals if they cannot obtain funding or new homes for the animals).

[246] GLOB. FED'N OF ANIMAL SANCTUARIES, OPERATION STANDARDS, *supra* note 226, at 12 ("The succession plan should include an emergency plan outlining who will carry out the key responsibilities in the event of a sudden and unexpected absence by the director or other key management in both short- and long-term scenarios.").

[247] GLOB. FED'N OF ANIMAL SANCTUARIES, *Low Impact Exit Strategy: A Guide for Sanctuaries* 6 (2015), https://www.sanctuaryfederation.org/wp-content/uploads/2013/02/GFAS-Low-Impact.pdf ("Euthanasia certainly is not encouraged as a way of population management or cutting expenses. In fact, GFAS standards state that euthanasia is only to be used as a 'final option.'").

discussion, the public should expect that animals in a sanctuary are not so easily disposable.

Another consideration in looking at financials is how and where the donations go. A higher percentage of funds going directly to animal care rather than salaries or advertisement weighs in favor of a facility being a genuine sanctuary. A facility with the majority of funds used for compensating board members likely does not align with the consumer's expectation for their donation. However, this metric should consider why some donations are spent on administration or advertisement. For example, it may be fully in line with sanctuary principles to spend money on security or bookkeeping. Though these do not directly address animal care, they may be essential to the long-term wellbeing and safety of the animals. Claims that 100% of donations go to animal care deserve particular attention.[248] If this is a true statement, it weighs heavily in favor of finding that the facility is a genuine sanctuary. If this statement is false, it should weigh heavily against the facility as it both misleads the consumer and may be evidence of charitable fraud.[249]

A. Lanham Act False Advertising Clause

This Part analyzes whether the Lanham Act could be applied to a pseudo-sanctuary in a hypothetical suit by a competing sanctuary. The following hypothetical is based on two actual facilities in California, one of which is now closed after the USDA revoked the owner's exhibitors license.[250] The pseudo-sanctuary in this hypothetical is Tiger Rescue owned by John Weinhart.[251] The facility

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[248] *About Us*, CATTY SHACK RANCH WILDLIFE SANCTUARY, https://cattyshack.org/about/ (last visited May 15, 2022) (stating that "100% of your donation goes to program services for the animals."); *Catty Shack Ranch Wildlife Sanctuary Inc.*, CHARITY NAVIGATOR, https://www.charitynavigator.org/ein/593698971 (last visited May 15, 2022) (recent filings suggest about 40% of revenue goes to program service expenses).

[249] CHARITY WATCH, *'100% to Program' Claims Confuse Donors* (Apr. 01, 2011), https://www.charitywatch.org/charity-donating-articles/39100-to-program39-claims-confuse-donors.

[250] *In re* Tiger Rescue, 67 Agric. Dec. 448, 451 (U.S.D.A. 2008).

[251] *Id.* at 469.

advertised itself as a "'sanctuary' for abused animals" and a "rescue" but was an extreme case of animal neglect.[252] A warrant executed in 2003 revealed approximately 90 captive animals died as a result of Weinhart's neglect.[253] Officers found dead and decaying animal bodies, severely malnourished and underweight big cats, animals with open wounds, animals unable to walk due to lack of care, cats with mite infestations so severe they required euthanasia, three dogs housed in a kennel meant for one, and excreta in "nearly all animal enclosures."[254] Despite this extreme cruelty and neglect, the Los Angeles Times printed that Weinhart "was portrayed in the local press and in his own literature as a devoted caretaker, lovingly hand-rearing newborn tiger cubs and, he said, providing 1,000 pounds a day of chicken and beef to their collection of tigers."[255] As far as the public could tell from the outside, Tiger Rescue was a legitimate operation.

However, this is not to say there were no red flags. Tiger Rescue allowed visitors to pet tiger cubs and have photo opportunities with them for a fee.[256] Weinhart was also accused of illegally breeding and selling tigers.[257] Though not easily or instantly accessible by the general public, Weinhart had a long history of noncompliance. In 1975, California authorities seized two dozen animals, including big cats, and charged Weinhart with four counts of permitting an animal to go without care and inadequate exercise for confined animals.[258] In 1981, the USDA ordered him to cease and desist from further violations of the AWA.[259] APHIS inspection records reveal that Weinhart accumulated 362 AWA violations, many of which were direct and repeated violations.[260] Weinhart was repeatedly cited for failing to

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[252] *Id.* at 470.
[253] *Id.*
[254] *Id.* at 475–76.
[255] Lance Pugmire et al., *Clashing Views of Owner of Tiger Sanctuary Emerge*, L.A. TIMES (Apr. 25, 2003), https://www.latimes.com/archives/la-xpm-2003-apr-25-me-tigers25-story.html.
[256] *Id.*
[257] *Id.*
[258] *Charges To Be Brought Against Animal Owner*, SUN-TELEGRAM, Aug. 29, 1975, at C-3.
[259] *In re Tiger Rescue*, 67 Agric. Dec. at 470.
[260] *Id.* at 466–67.

provide adequate veterinary care for multiple animals that were emaciated, clearly very ill, or had open untreated wounds.[261]

Compare Tiger Rescue to Shambala Preserve, owned by actress Tippi Hedren.[262] Shambala Preserve is a big-cat sanctuary located just over an hour away from Weinhart's facility and was in operation at the same time as Tiger Rescue.[263] Few would deny Shambala's sanctuary status. It is accredited by the American Sanctuary Association,[264] does not breed animals, has a consistent AWA compliance record,[265] does not allow public contact with the animals, and limits exhibition to a guided tour for one weekend a month.[266] In fact, once Weinhart's facility was closed, Hedren took in some of the displaced big cats.[267]

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[261] *See id.* at 471–86.

[262] This is not an endorsement of Shambala preserve, and as of writing, this author has not personally been to Shambala. This hypothetical is based off of publicly available information. SHAMBALA ROAR FOUND.: ABOUT US, http://shambala.org/about.htm (last visited May 15, 2022).

[263] Hedren has owned big cats since the early 70s and, by her own admission, was not always the most responsible owner, often letting her "pet" lion roam freely around the house. She previously used animals in films. She has since reformed her stance on interaction with big cats. Chloe Foussianes, *Dakota Johnson Confirms that Tippi Hedren Still Lives with Lions and Tigers*, TOWN & COUNTRY (May 26, 2020), https://www.townandcountrymag.com/leisure/arts-and-culture/a32671401/tippi-hedren-dakota-johnson-lives-with-lions-tigers/.

[264] *List of Accredited Sanctuaries*, AM. SANCTUARY ASS'N, https://www.americansanctuaries.org/accredited-sanctuaries (last visited May 15, 2022). The ASA has valid criticisms and the presence of a third-party certification is not a sole determination.

[265] The USDA issued one citation to Shambala in 2015 for problems with the height of a perimeter fence and not locking the back entrance to the facility; otherwise, the facility has a consistent record of compliance with the AWA and minimal citations. U.S. DEP'T OF AGRIC., INSPECTION REPORT 202151717450325 (July 21, 2015), https://aphis-efile.force.com/PublicSearchTool/s/inspection-reports (under "Customer/Organization Name" enter "Roar Foundation," under "State" select "California (CA)," click "Search" and then click "Query Inspection Reports"; select "View Inspection Report" for July 21, 2015). The USDA issued one citation in 2010 for the height of a gate on the perimeter fence. *Id.*

[266] *Safari Tours*, SHAMBALA, https://www.shambala.org/visitor_safari.htm (last visited May 15, 2022).

[267] Sandra Stokely, *Actress' Tiger that Mauled Caretaker Came from Notorious Colton*, PRESS-ENTER. (Dec. 05, 2007).

Could Hedren use the Lanham Act against Weinhart based solely on his use of the word *sanctuary* in advertising his facility? First, Hedren would need to have standing to bring a Lanham Act claim. Hedren could likely assert that Tiger Rescue unfairly drew away donations and potential visitors because the public mistakenly believed that Tiger Rescue was a sanctuary. Both facilities are in the same geographic region exhibiting many of the same animals, presumably competing for the same pool of potential donors or visitors.[268] Based on the good reputation of sanctuaries, many people may choose to donate to or visit a sanctuary *because* it is a sanctuary.[269] However, Weinhart had an unfair advantage because he was able to run his facility without the added costs and considerations of sanctuary philosophies. Further, he benefited from money-generating practices, such as cub petting, that a genuine sanctuary does not. This amounts to a commercial injury to Hedren and Shambala by unfairly collecting donations that could have otherwise gone to Shambala.[270] By falsely portraying its facility to the public as a sanctuary for abused animals, Hedren could likely assert that Tiger Rescue unfairly attracted donations and potential visitors away from Shambala because the public mistakenly believed that Tiger Rescue was a sanctuary.

Assuming that Hedren would have standing as a competitor, a successful Lanham Act claim requires the plaintiff to show: (1) the defendant made false or misleading statements about the plaintiff or defendant's services or product; (2) the falsely advertised or promoted services or product entered interstate commerce; (3) the defendant misrepresented "the nature, characteristics, qualities, or geographic

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[268] *Id.* (explaining that Tiger Rescue is located in Colton, CA and Shambala Preserve is located in Acton, CA, which are less than 75 miles from each other). *See* Driving Directions from Colton, CA to Acton, CA, GOOGLE MAPS, https://www.google.com/maps (In the "Search" bar enter "Colton, CA" and hit enter, click "Directions," in the "choose starting point" bar enter "Acton, CA" and hit enter to see the distance between Colton and Acton, CA.).

[269] *See* Hartigan, *supra* note 126 (describing the allure of visiting sanctuaries over zoos because sanctuaries tend to allow up-close, personal visits with wild animals that do not have anywhere else to go).

[270] *See* Birthright v. Birthright, Inc., 827 F.Supp. 1114, 1138–39 (D.N.J. 1993) (holding confusion between the identity of the companies that resulted in misdirected donations satisfied the likelihood-of-injury element of a cause of action under the Lanham Act).

origin of" the product or service;[271] (4) the deception is material to the target consumer's purchasing decision; (5) the advertisements have deceived, or are likely to deceive, consumers; and (6) the defendant has caused, or is likely to cause, the plaintiff injury.[272]

Though several claims could potentially serve as the basis of a Lanham Act challenge, could claiming to be a sanctuary be an actionable statement? Showing that the term *sanctuary* can be true or false is preferable to showing it is misleading.[273] Proving that the statement is literally false would negate the need to show actual public deception.[274] Existing case law seems to remove claims with multiple understandings from the "literally false" domain.[275] However, in the case of pseudo-sanctuaries, this standard is unworkable. Though there are multiple reasonable interpretations, none of those interpretations contemplates a facility like Tiger Rescue.

Tiger Rescue shows why using a fact-based balancing test aligns with consumer expectations. Looking to the first prong of the balancing test, Tiger Rescue's long history of serious non-compliance and patterns of extreme animal abuse weighs heavily against calling the facility a *sanctuary* or a *rescue*. No reasonable consumer would expect a sanctuary to engage in the prolific neglect uncovered at the facility. Tiger Rescue fails the first prong for the seriousness of the violations, the number of animals that faced neglect or abuse, and the decades-long pattern of non-compliance.

Tiger Rescue similarly fails the second prong because the activities taking place at Tiger Rescue are not those expected from a genuine sanctuary. Tiger Rescue allowed the public to have direct contact with animals;[276] was accused of breeding animals for captivity or the pet trade;[277] previously leased out animals to be used in

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[271] Trademark Act of 1946, 15 U.S.C. § 1125(a)(1)(B) (2018).
[272] MCCARTHY, *supra* note 146; WILLIAMS, s*upra* note 136, at 38–39.
[273] *See supra* notes 148–58 and accompanying text.
[274] Schering-Plough Healthcare Prod., Inc. v. Schwarz Pharma, Inc., 586 F.3d at 500, 512–13 (7th Cir. 2009).
[275] *See* Time Warner Cable, Inc. v. DIRECTTV, Inc., 497 F.3d 144, 158 (2d Cir. 2007) (stating that an advertisement cannot be false if it is susceptible to multiple reasonable interpretations).
[276] Lance Pugmire et al., *supra* note 255.
[277] *Id.*

entertainment;[278] and exhibited animals illegally without a license.[279] While consumers might incorrectly believe that breeding the tigers was a sound sanctuary practice, reasonable consumers would not expect that animals in a sanctuary would be exhibited or sold illegally.

Further, GFAS accreditation standards prohibit each of the above-listed activities.[280] The facility did not even meet minimum requirements for the record-keeping regulations under the AWA.[281] In short, the facility failed to meet even the most basic expectations for a zoo, much less the higher expectations of a sanctuary. As to the second prong, Tiger Rescue's standard practices are much further from what we expect from a sanctuary and much closer to a menagerie, animal dealer, or petting zoo.

The third prong, financial management, is more difficult to show in Tiger Rescue's standard practices because relevant documents are largely unavailable. It does appear that Tiger Rescue was a registered charity.[282] However, how the facility managed its donations is unclear. Information that shows financial mismanagement, charitable fraud, coercive solicitation, or false statements regarding the use of donations would all weigh against finding that the facility is a genuine sanctuary. However, based on the information available, the third prong weighs slightly in favor of finding Tiger Rescue as a sanctuary because of its charity status.

The second prong, an advertisement in interstate commerce, may be tricky. Assuming for the sake of the hypothetical that Weinhart's statements were on the internet and thus entered interstate commerce, Tiger Rescue's non-profit status requires further analysis of his claims. The Lanham Act applies only to commercial speech.[283]

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[278] *Id.*
[279] *In re* Tiger Rescue, 67 Agric. Dec. 448, 471 (U.S.D.A. 2008).
[280] GLOB. FED'N OF ANIMAL SANCTUARIES, OPERATION STANDARDS, *supra* note 226, at 16–18.
[281] *In re Tiger Rescue*, 67 Agric. Dec. at 481.
[282] *See Tiger Rescue in Riverside California*, NONPROFITFACTS.COM: TAX-EXEMPT ORGS., http://www.nonprofitfacts.com/CA/Tiger-Rescue.html (last visited May 15, 2022).
[283] Suntree Techs., Inc. v. Ecosense Int'l, Inc., 693 F.3d 1338, 1348–49 (11th Cir. 2012).

Statements by non-profit companies are not necessarily commercial.[284] Here, the central question is whether Tiger Rescue claimed to be a sanctuary to induce donation (commercial) or if the claim was made as part of some larger advocacy or educational scheme (non-commercial). Sanctuaries and pseudo-sanctuaries alike may, and commonly do, engage in education and advocacy.[285] However, simply claiming to *be* a sanctuary does not necessarily make any educational or advocacy claims. If Tiger Rescue were only soliciting donations for *conservation projects* that the facility engaged in because it was a sanctuary, this claim would comingle advocacy support with facility support. Tiger Rescue in effect would be asking for donations to support conservation through captive animal breeding. Even if the statement is false, it may not be a commercial statement capable of regulation under the Lanham Act. However, simply claiming to be a sanctuary does not advance any particular policy position; the donation is for the sake of the facility. Falsely claiming to be a sanctuary to induce donations can thus be considered commercial speech.

The third prong—misrepresentation of "the nature, characteristics, qualities, or geographic origin of" the product or service—can be proved much like the first.[286] The proposed balancing test focuses on the nature and qualities of the facility versus the nature and qualities of accepted sanctuaries. The purpose of a sanctuary is to protect and care for animals.[287] Tiger Rescue was not a facility of this nature. The facility did not protect or care for the animals.[288] Tiger

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[284] *See* Radiance Found., Inc. v. NAACP, 786 F.3d 316, 326–27 (4th Cir. 2015) (noting that charitable donations are not commercial unless the trademark holder shows "a sufficient nexus between the unauthorized use of the protected mark and clear transactional activity").

[285] Carr & Cohen, *supra* note 30, at 177 ("The modern zoo is, therefore, portrayed to the public as being a site of education, research, and conservation.").

[286] 15 U.S.C. § 1125(a)(1)(B).

[287] Hartigan, *supra* note 126.

[288] *In re* Tiger Rescue, 67 Agric. Dec. 448, 450–51 (U.S.D.A. 2008) ("The gravity of the violations detailed in this Decision is of the utmost severity. Respondent Tiger Rescue neglected and abused many animals. By April 2003, approximately 90 animals (mostly tigers) died as a direct result of Respondent Tiger Rescue's lack of care and husbandry. Respondent Tiger Rescue also handled animals in a manner that was unsafe for the animals and the public, failed to provide minimally-adequate

Rescue lacked the hallmark of a sanctuary that offers quality animal care.[289]

Indeed, misrepresentations concerning a company's ethics and morals are also actionable under the Lanham Act.[290] The Tenth Circuit Court of Appeals analyzed in *Proctor & Gamble Co. v. Haugen* the defendant's claims that Proctor & Gamble (P&G) was affiliated with the Church of Satan and thus engaged in immoral activities.[291] The court recognized that "products are often marketed and purchased not only on the basis of their inherent utility, *but also for the images they project and the values they promote*."[292] Accordingly, by falsely claiming that P&G's president was a Satanist and that the profits from P&G's products support the Church of Satan, the defendant's statements could concern the "nature, characteristics, [or] qualities" of P&G's products.[293] This case might support the assertion that ethical considerations are part of a consumer's expectation when making purchasing decisions. A consumer may choose to donate to a sanctuary because of their ethical or moral beliefs on animal captivity. There is a certain ethical weight attached to being an animal sanctuary as opposed to some other form of animal exhibition. In claiming to be a sanctuary, Tiger Rescue misrepresented the nature and qualities of the facility and satisfied this Lanham Act requirement.

Fourth, proving materiality may be challenging depending on the target consumer in question. The relevant consumer for pseudo-sanctuary accountability is not the general zoo-going public. A Lanham Act suit by a competing sanctuary narrows the target consumer group to those people interested in visiting and supporting *ethical* animal exhibitors. While there are multiple markets that each facility *could*

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housing or veterinary care to animals in obvious distress, and failed to provide sufficient food to animals.").

[289] *Id.* at 451 ("Tiger Rescue has not shown good faith, having falsely portrayed its facility . . . to the public as a 'sanctuary' for abused animals.").

[290] *See* Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1272 n.7 (10th Cir. 2000) (quoting Nat'l Artists Mgmt. Co. v. Weaving, 769 F. Supp. 1224, 1229–36 (S.D.N.Y. 1991)) (referring to a New York court's prior holding that "allegations that a competing theater booking agency engaged in improper and unethical practices" are actionable under the Latham Act).

[291] *Id.* at 1267.

[292] *Id.* at 1272 (emphasis added).

[293] *Id.*

appeal to including the general public, Shambala and Tiger Rescue concurrently competed for consumers interested in supporting sanctuaries. For example, this includes consumers who were misled into thinking cub petting was acceptable at Tiger Rescue *because* it was a sanctuary. Those consumers would choose to go to Tiger Rescue because both sanctuary designation and cub-petting opportunities are material to their decisions. Accordingly, the correct consumer group to analyze is people who are specifically interested in visiting sanctuaries *because* they are sanctuaries.

Fifth, consumers that visited or donated to Tiger Rescue *because* it claimed to be a sanctuary were very likely actually deceived. This would satisfy the fifth Lanham Act requirement. Finally, Shambala could likely show that Tiger Rescue's false sanctuary claim diverted donations from Shambala. Shambala was geographically near Tiger Rescue[294]; Tiger Rescue visitors might have chosen to go to Shambala instead of Tiger Rescue if they knew it was not actually a sanctuary. Lost donations are likely a sufficient economic injury to satisfy the Lanham Act's injury requirement.

B. State UDAP Statutes

Drawing on the California and Florida UDAP statutes, this Part argues that California's consumer protection laws could hold a pseudo-sanctuary accountable. On the other hand, Florida's statute is likely drafted and interpreted too narrowly to be a strong candidate for pseudo-sanctuary accountability. This is especially disappointing because of the sheer number of captive animals suffering in Florida and the state's massive exotic pet trade.[295]

First, this Part will consider California's false advertising law (FAL) and CLRA. The FAL prevents any person from disseminating

> "[I]n any newspaper or other publication, or any advertising device, . . . or in any other manner or means whatever, including over the Internet, any

[294] *See* footnote text accompanying Stokely, *supra* note 267.
[295] *See* footnote text accompanying U.S. DEP'T OF AGRIC., LICENSE REPORT, *supra* note 210.

> statement, . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."[296]

Case law extended the definition of *misleading* to also include statements that are likely to confuse the public.[297] The CLRA requires four elements: (1) the defendant made a material misrepresentation; (2) the complainant actually relied on that misrepresentation; (3) the complainant suffered economic injury from that reliance; and (4) the defendant's misrepresentation was the immediate cause of the injury.[298]

Conceivably, the FAL could address pseudo-sanctuaries. First, the FAL applies to any form of communication, which includes internet communication.[299] Even the smallest operations increasingly rely on social media marketing and online reviews.[300] Internet marketing not only provides consumers with easy access to evaluate a facility prior to visiting but also allows facilities to present a sterilized snapshot of the premises or to purchase positive reviews rather than earning them.[301] Thus, reasonable consumers might arrive to a much different facility than they previewed.

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[296] CAL. BUS. & PRO. CODE § 17500 (West 2022).
[297] Leoni v. State Bar of Cal., 704 P.2d 183, 193–94 (Cal. 1985) (en banc) (finding that the FAL "ha[s] been interpreted broadly to embrace not only advertising which is false, but also advertising which although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.").
[298] Wilson v. Frito-Lay N. Am., 260 F. Supp. 3d 1202, 1208–09 (N.D. Cal. 2017); Bower v. AT&T Mobility, LLC, 127 Cal. App. 4th 1545, 1556 (Cal. Ct. App. 2011).
[299] CAL. BUS. & PRO. CODE § 17500 (West 2022).
[300] *See, e.g.*, Jacqueline Tabas, *How Nonprofits Can Use Social Media To Increase Donations and Boost Visibility*, FORBES (Mar. 6, 2021), https://www.forbes.com/sites/allbusiness/2021/03/06/how-nonprofits-can-use-social-media-to-increase-donations-and-boost-visibility/?sh=3b1df7f82bb7 (underlining the importance of a social media presence for nonprofits); *see also* Natasha Daly, *Helping Kids Deal with Animal Exploitation on Social Media*, NAT'L GEO. (May 21, 2021), https://www.nationalgeographic.com/family/article/helping-kids-deal-with-animal-exploitation-on-social-media (drawing attention to "covert" animal exploitation popularized on social media).
[301] *See* Daly, *supra* note 300.

While mere puffery is not actionable,[302] statements that would likely mislead a reasonable consumer are.[303] Similar to the Lanham Act, subjective claims are unactionable under the FAL.[304] When determining whether a claim is vague unactionable puffery or an actionable objective claim, the key is whether the statement is "quantifiable" such that it "makes a claim as to the specific or absolute characteristics of a product."[305] I argue that "sanctuary" is such a claim. The term *sanctuary* implies that the facility has specific qualities that make it different from other animal exhibitors.[306] The proposed balancing test draws out these specific quantifiable metrics that separate sanctuaries from other facilities merely claiming to be sanctuaries. This balancing test uses objective qualities to measure the facility in question.

The materiality standard under California law is that of the reasonable consumer.[307]—hat is, whether the reasonable consumer would attach importance to the claim when deciding to donate or visit.[308] A statement may also be material if "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action."[309] Consumers are attaching increasingly more importance

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[302] Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., 911 F.2d 242, 245 (9th Cir. 1990).

[303] Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (Cal. Ct. App. 2003) ("'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.")

[304] Boris v. Wal-Mart Stores, Inc., 35 F. Supp. 3d. 1163, 1170 (C.D. Cal. 2014) (finding that a merchant's liability cannot be determined by features of a product that are "subjective and speculative").

[305] Beyer v. Symantec Corp., 333 F. Supp. 3d 966, 976 (N.D. Cal. 2018).

[306] *See* Hartigan, *supra* note 126 (noting that "[s]anctuaries occupy a 'gray area'").

[307] Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995).

[308] *Id.*

[309] Hinojos v. Kohl's Corp., 718 F.3d 1098, 1107 (9th Cir. 2013), *amended* July 8, 2013.

to the ethical treatment of captive animals.[310] This increased concern is likely one of the greatest motivations for facilities to rebrand themselves as a sanctuary. Therefore, because the speaker knows that the public believes sanctuary qualities are important, claiming to be a sanctuary should be considered material.

The CLRA requires actual reliance on the misrepresentation.[311] However, reliance may be presumed if the misrepresentation is proven material.[312] Accordingly, a consumer that visited a pseudo-sanctuary based on its misrepresentation is well suited to prove this requirement. The consumer need not prove that the facility's sanctuary status was the only, or even most important, factor in their decision to visit.[313] However, they would need to show that they relied upon the facility's claim that it was a sanctuary as an important part of their decision to visit.

Finally, the consumer would need to prove that this reliance caused injury.[314] That the consumer spent money they otherwise would not have spent, either as a donation or as admission price, is likely sufficient to show that the consumer suffered an economic injury.[315]

The FFAL is very similar to the CLRA. However, the FFAL also requires complainants to show the speaker's knowledge of the false statement and intention for consumers to rely on that misrepresentation.[316] In a pseudo-sanctuary context, proving that the

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[310] *See* Press Release, Ass'n of Zoos & Aquariums, According to New Study, Forty Percent of Americans Believe US Government Has Reduced Wildlife and Environmental Protections and Eighty Percent Unhappy with Rollbacks (Apr. 12, 2018) (on file with Ass'n of Zoos & Aquariums), https://www.aza.org/aza-news-releases/posts/new-study-calls-for-conservation?locale=en ("Eighty-seven percent [of Americans] are willing to help save animals from extinction.").

[311] Wilson v. Frito Lay N. Am., Inc., 260 F. Supp. 3d 1202, 1208 (N.D. Cal. 2017).

[312] *Id.*

[313] *Id.*

[314] Hansen v. Newegg.com Ams., Inc., 236 Cal. Rptr. 3d 61, 74 (Cal. App. Dep't Super. Ct. 2018).

[315] *Id.* (holding a consumer has an "economic injury" required for standing if they can "allege that he or she relied on a misrepresentation when purchasing the product, and that he or she would not have purchased the product but for the representation.").

[316] Smith v. Mellon Bank, 957 F.2d 856, 857–58 (11th Cir. 1992) (ruling that "blind reliance" on a statement describing insurance coverage alone was not reasonable and not intentionally misleading).

defendant knew, or should have known, their statement was false may prove to be quite challenging though. It is possible that the defendant could argue that, despite not adhering to sanctuary principals or lack of accreditation as a sanctuary, they nonetheless honestly regarded themselves as a sanctuary. Yet, certain facts may show that the pseudo-sanctuary operator had the requisite knowledge. For example, numerous severe AWA violations would tend to show that the facility is not a sanctuary. A facility that routinely cannot meet the legal minimum welfare requirements cannot, in good faith, hold itself out as a place where animals are protected from unscrupulous exhibitors—they themselves are the unscrupulous exhibitors from which the animals should be protected. Another telling piece of evidence would be if the sanctuary has changed its name. If the facility previously did not claim to be a sanctuary but rebranded to incorporate "sanctuary" in their name, did the facility also change its animal care practices? If a facility had a long-standing history as a zoo and did not have sanctuary qualities, but then changed its name to include "sanctuary" without incorporating sanctuary practices, this could be evidence that the owner knew the facility was not a sanctuary. Further, this could be evidence that the owner intended to deceive the public. Thus, if the facility only changed names for marketing reasons, that could show that the owner intended to induce more consumers to visit or donate.

C. Potential Defenses

This Part addresses some of the most prominent defenses in consumer protection claims: puffery, literal truth, and First Amendment protections.

Puffery is a popular defense to consumer protection claims. *Puffing* is making an exaggerated, hyperbolic, or fanciful statement that no reasonable consumer would ever rely on.[317] Puff statements are often opinion statements with no factual value or exaggerations that are not taken seriously. Similarly, vague statements can be considered puffing.[318] For example, when determining whether a statement is mere "puffing," the FTC considers whether the claim has actually misled

[317] PRIDGEN ET AL., *supra* note 127, § 10:9.
[318] CARTER & SHELDON, *supra* note 186, at 255–56.

consumers, excluding subjective statements or correctly articulated opinions.[319] The defendant would need to show that, when viewed in context, the claim is harmless and has no capacity to deceive a reasonable viewer.[320]

Puffery is an effective defense because, in effect, puffery negates the materiality requirement necessary to prove an actionable claim. If a statement is just puffing, it is a statement that cannot be reasonably relied on because the consumer should know it is ridiculous or hyperbolic. If the consumer could not reasonably rely on the statement, it could not be considered material to their purchasing decisions. Similarly, if a puff statement is expressing a subjective opinion without any truth value, it could not be considered false. Or if a statement is vague, it is unlikely to mislead the consumer because the statement would not be expressing any particular fact or opinion the consumer could rely upon.

The puffing defense goes hand-in-hand with claims that terms like *sanctuary* are too subjective to be actionable. Opponents to pseudo-sanctuary accountability may argue that claiming to be a rescue or sanctuary is just puffing because of how subjective the terms can be. However, I argue, that the term *sanctuary* is an objective term that consumers understand to mean certain base-line standards of operation. Though each sanctuary is different, they all share fundamental attributes of quality animal care, animal-first principles, and charitable purpose. Any subjectivity of sanctuary principles is in the details—the details many consumers would not find material to their decision.

The puffing defense is particularly vulnerable to the claims from consumers that choose to visit sanctuaries *because* they are sanctuaries. Claiming to be a sanctuary may be the most material aspect to this group's decision process. However, inspection records, a comprehensive list of all practices that the facility engages in, and IRS 990 forms are practically unavailable to the average consumer. These consumers, though interested in a very specific kind of animal exhibition, should not be expected to become private investigators. Rather, they should be able to rely on the statements made in advertisements, websites, and titles. If the facility calls itself a

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[319] PRIDGEN ET AL., *supra* note 127.
[320] CARTER & SHELDON, *supra* note 186, at 255.

sanctuary, that term in and of itself carries weight and expectations for consumers.

The strongest defense to a consumer protection claim may be that the speech is actually true and not misleading. If the statement is true and has no capacity to mislead, the consumer has enough information to decide under fair circumstances. Further, the First Amendment protects accurate, honest, and truthful commercial speech.

The First Amendment prohibits the government from "abridging the freedom of speech."[321] This protection applies to natural people and corporations alike.[322] When a corporation engages in speech regarding a commercial transaction, this is commercial speech.[323] Commercial speech includes advertisements,[324] political contributions,[325] label claims,[326] and other expressive conduct that is intended to influence, persuade, or induce some commercial activity.[327] Commercial speech is not an absolute right, and it is often subject to more regulation than speech by natural persons because of its commercial nature.[328] The *Central Hudson* case established a four-part test for analyzing whether government regulation of commercial speech is constitutional.[329] Under the *Central Hudson* analysis, the court must first determine whether the speech is protected.[330] Next, the government must prove that it has a substantial interest in controlling the speech.[331] Third, the government must show that the restriction

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[321] U.S. CONST. amend. I.
[322] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980).
[323] *Id.* at 561.
[324] *Id.* at 563.
[325] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 356 (2010) (reaffirming that the federal government's interest in preventing corruption and the appearance of corruption justifies limits on political campaign contributions).
[326] Mackenzie Battle & Cydnee Bence, *How Does the First Amendment Apply to Food and Supplement Labels?*, LABELS UNWRAPPED: ISSUE BRIEF (Ctr. for Agric. & Food Sys., South Roylaton, Vt.), 2021, 1, 1, https://labelsunwrapped.org/wp-content/uploads/2021/06/First-Amendment-Food-Labeling-Issue-r5.pdf.
[327] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561.
[328] *Id.* at 563.
[329] *Id.* at 566.
[330] *Id.*
[331] *Id.*

actually advances that substantial interest.[332] Finally, the government must show that the restriction is necessary to serve that substantial interest.[333]

The First Amendment is not a defense to a consumer protection action, because consumer protection laws target false and misleading speech. Corporations do not have a right to false or misleading speech or speech related to unlawful activities.[334] This is the basis of most consumer protection laws: corporations can be held liable for false or misleading speech because such speech is not protected by the Constitution.[335] Non-profit corporations are open to similar liability.[336] While the Constitution protects charitable solicitation, it does not protect fraudulent or deceptive solicitation.[337] For instance, where a charity misled donors by misrepresenting the percentage of donations that went to actual charitable activities, the Court found that those misrepresentations were not protected speech.[338] While a government cannot prohibit certain forms of charitable solicitation, it may enforce consumer protection laws against false or misleading commercial speech, even when the speech is not for profit.[339]

Therefore, speech that is actionable under a consumer protection claim fails the first prong of the *Central Hudson* test. Whether the speech is false or misleading is a different question than whether the government can prohibit or regulate that speech. In a consumer protection action, it may very well be the case that the speech at issue is *not* false or misleading. But in that case the law does not infringe on the corporation's right to make that statement.[340]

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[332] *Id.*
[333] *Id.*
[334] *Id.* at 563.
[335] *See Truth in Advertising*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/media-resources/truth-advertising (last visited May 15, 2022).
[336] Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003).
[337] *Id*.
[338] *Id.* at 624.
[339] *Id.* at 623–24.
[340] If, however, the government decided to regulate the term *sanctuary*, that government action would be subject to *Central Hudson* analysis. This Article does not go into this hypothetical, as the scope of this Article is on private litigation under the current state of the law. *See generally Central Hudson Gas & Elec. Corp.*, 447 U.S. at 557.

If a pseudo-sanctuary is not actually a sanctuary, claiming to be a sanctuary is not a protected activity under the First Amendment. As a commercial entity, including non-profits, an animal exhibition does not have the full suite of First Amendment protections afforded to natural persons. Accordingly, claiming to be a sanctuary is only protected under the First Amendment if that statement is actually true. For this reason, the First Amendment provides no shelter to pseudo-sanctuaries.

CONCLUSION

Consumer protection as a means of pseudo-sanctuary accountability seems initially promising. However, consumer protection is an incredibly broad area, and this Article can only scratch the surface. There are many more avenues within consumer protection that deserve exploration. Beyond applicability, there are larger questions of whether consumer protection can actually yield the best outcome.

There are other kinds of potentially actionable statements, such as those that falsely imply greater credibility. These statements deserve further attention because they can clearly be proven true or false. For example, using terms like *Animal Welfare Act Certified* or *USDA Certified* implies that the facility has a higher standard of care endorsed by the U.S. government. However, nearly all animal exhibitors are required to be licensed by the USDA under the AWA.[341] There is no separate certification to become AWA- or USDA-"certified." Yet the general public may believe that these facilities have a higher standard of care because they are "certified." There are also claims made by facilities that are plainly false, such as claiming on their ticket-purchasing webpage to prohibit cub-petting while promoting their cub-petting opportunities on social media.

This Article only explored a small segment of actions available to private individuals or sanctuaries. Nonetheless, charitable-funding claims also deserve more attention. Though these claims would rest on government actors, these claims are likely appealing to state actors. Even those that may have no ethical qualms with animal captivity—

[341] Animal Welfare Act, 7 U.S.C. § 2133.

pseudo-sanctuary or otherwise—recognize the immorality of charitable fraud. When people give money to a captive animal facility, they very likely expect the money will not be used for private gain, or for instance, wedding expenses and personal bankruptcy judgements.[342] These sorts of actions are more likely to have traction from state governments than those purely based on falsely claiming to be a sanctuary.

Finally, this Article did not sufficiently consider whether a consumer protection claim can actually yield a desirable outcome. While consumer protection laws have a range of remedies available and are partial to settlement, these remedies are mostly limited to dollars and cents. Certainly these judgements are valuable for restoring diverted donations to a genuine sanctuary. And, financial pressure may encourage pseudo-sanctuaries to surrender some animals to reputable sanctuaries or change their business name as part of a settlement. However, the effects of financial pressure may land on the animals the complainants sought to help—potentially endangering these animals further. Alternatively, if a plea for injunctive relief is successful, the facility would no longer be able to call itself a sanctuary. That is a success, but the name change may do very little for the animals kept captive. This does not even begin to account for the potential negative impacts of an unsuccessful claim. Though, with these considerations in mind, there is value in continuing to explore the role consumer protection can play in pseudo-sanctuary accountability.

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[342] Complaint for Temporary and Permanent Injunction, Civil Penalties, and Other Statutory Relief at 22–23, Florida v. Stearns Zoological Rescue & Rehab Ctr. Inc., No. 2017-CA-003015 (Fla. Cir. Ct. 2017), https://www.peta.org/wp-content/uploads/2021/06/FL-Ag-v-DCWT-fraud-complaint.pdf (alleging exhibitor used $9,681.96 in donations to finance a family wedding and tens of thousands of dollars used for personal bankruptcy payments).

OPPORTUNITIES FOR REFORM AND REIMAGINING IN CONSERVATION EASEMENT AND LAND USE LAW: A TO-DO LIST FOR SUSTAINABLE, PERPETUAL LAND CONSERVATION

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I. HISTORIC REFORMS AND SUPPORT ACHIEVED THROUGH ADAPTIVE LEGAL REGIMES

Over the last two decades in the mere fifty-year-old field of land conservation law, the land conservation community has instituted crucial supportive mechanisms and implemented new infrastructure to stabilize the perpetual duration of conservation easements and their holders. In reliance on proactive scholarship, the conservation community invoked crucial enforcement and defense mechanisms by creating a land trust community-wide insurance company (Terrafirma)

to protect itself, its land, and conservation easement holdings.[1] It also identified third-party enforcement options to support easement holders in the form of Attorneys General,[2] citizens,[3] and in a very rare instance in only one state—neighbors,[4] while also promoting pathways to third-party trespass enforcement through Terrafirma.[5] Further, the community emboldened language, understanding, recognition, policy, and legislation guiding legal regimes when land use involves amendment and termination of perpetual conservation easements;[6] and applied primacy of laws to the federal and state regimes for disposition

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[1] *See* Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 ENV'T Law. 441, 445 (2000) (providing a template, later utilized by Terrafirma Risk Retention Group, LLC for how organizations can support conservation easements to ensure their continuance as mechanisms for land preservation).

[2] *See* ME. STAT. tit. 33, § 478(1)(D) (2021) (enabling Maine's Attorney General to enforce conservation easement rights under the statute); CONN. GEN. STAT. §§ 47-42a, 47-42c (2021) (granting Connecticut's Attorney General, landowners, and easement holders the express right to enforce violations of encroachment); 34 R.I. GEN. LAWS § 34-39-3(d) (2020) (enabling Rhode Island's Attorney General, pursuant to their inherent authority, to bring an action to enforce the public interest in such easements); Jessica E. Jay, *Third-Party Enforcement of Conservation Easements*, 29 VT. L. REV. 757, 760–63 (2005) (discussing the potential for third-parties to enforce conservation easements under the current statutory and common law regimes).

[3] *See* citizen enforcement of conservation easements in: Massachusetts under MASS. GEN. LAWS ch. 12, § 8 (2020); Tennessee under TENN. CODE ANN. §§ 66-9-303(1)(C), 66-9-307(a)(3) (2021); Wyoming under WYO. STAT. ANN. § 34-1-203 (2021); Hicks v. Dowd, 157 P.3d 914, 919 n.3 (Wyo. 2007) (describing citizen enforcement of conservation easements under Wyoming common law and prior to statutory law); Jay, *Third-Party Enforcement of Conservation Easements*, supra note 2, at 763.

[4] *See* 765 ILL. COMP. STAT. 120/4(c) (2019) (granting landowners the right to enforce a conservation easement within 500 feet of their real property).

[5] *See* Jessica E. Jay, *Enforcing Perpetual Conservation Easements Against Third-Party Violators*, 32 UCLA J. ENV'T L. & POL'Y 80, 89 (2014) (describing several approaches for holding third parties responsible for their actions on an easement holder's land).

[6] *See* Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENV'T. L. REV. 1, 43–45 (2012) [hereinafter Jay, *When Perpetual Is Not Forever*].

in cases of perpetual land protection overlap or conflict.[7] Most recently, in the face of extensive abuse, the community has endeavored to bolster the legal framework supporting the federal tax incentive and its enforcement, while pushing back on Internal Revenue Service (IRS) overreach.[8] Standing on the shoulders of these accomplishments, it is imperative to look now to the practical, policy, and ethical impacts of perpetual land conservation, and to identify crucial tasks, goals, and stabilizing factors for the next half-century of protection.

II. THE TO-DO LIST

From the most urgent and obtainable in the short term to the most sea-changing and aspirational in the long term, presented here is a view of the immediate, ongoing, and future needs for reform or reimagining in land conservation law. These reforms and reimagining include bolstering and expanding conservation incentives in the face of extensive abuse, integrating private land protection within communities, adjusting land monetization and valuation approaches, unbundling land ownership notions, and re-democratizing and restoring land access and use. Such reforms and reimagining are intended to sustain and secure perpetual land conservation as a continuing, dynamic, and flexible source for critical resource management and protection at the local, state, federal, and global levels, while ensuring equitable, inclusive, diverse, and just land protection in the context of past, current, and future generations of land use and users.

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[7] *See* Jessica E. Jay, *Understanding When Perpetual Is Not Forever*: *An Update to the Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements, and Response to Ann Taylor Schwing*, 37 HARV. ENV'T L. REV. 247, 248, 261 (2013).

[8] *See* Jessica E. Jay, *Down the Rabbit Hole with the IRS' Challenge to Perpetual Conservation Easements, Part Two*, 51 ENV'T L. REP. 10239, 10258 (2021) [hereinafter Jay, *Part Two*]; Jessica E. Jay, *Down the Rabbit Hole with the IRS' Challenge to Perpetual Conservation Easements, Part One*, 51 ENV'T L. REP. 10136, 10161–62 (2021) [hereinafter Jay, *Part One*].

A. Immediate, Imminent, and Urgent Needs Within the Existing Legal Framework

1. Pass the Conservation Integrity Act to Immediately Curtail Abuse of the Conservation Easement Incentive

In June 2021, bipartisan lawmakers introduced the Charitable Conservation Easement Program Integrity Act in both the House and Senate[9] and incorporated its language into the House Ways and Means Committee markup of the $1.75 trillion budget Reconciliation Bill then being negotiated in both houses.[10] The Bill intends to add a new § 7 to Code 170(h)[11] to catch pass-through entities—usually in the form of limited liability companies (LLCs) or S corporations (S-corps)

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[9] Charitable Conservation Easement Program Integrity Act of 2021, S. 2256, 117th Cong. (2021); Charitable Conservation Easement Program Integrity Act of 2021, H.R. 4164, 117th Cong. (2021).

[10] Amendment to Infrastructure Investment and Jobs Act, H.R. 3684, § 138403(a)–(b) (Sept. 12, 2021) https://gop-waysandmeans.house.gov/wp-content/uploads/2021/09/AINS-.pdf.

[11] *See* Charitable Conservation Easement Program Integrity Act of 2021, H.R. 4164 117th Cong. § 2(a)(7) (2021), S. 2256, 117th Cong. (2021) (amending 26 U.S.C. § 170(h)) (emphasis added).

"Limitation on Deduction for Qualified Conservation Contributions made by Pass-through Entities.

(A) In General. A contribution by a partnership (whether directly or as a distributive share of a contribution of another partnership) shall not be treated as a qualified conservation contribution for purposes of this section if the amount of such contribution exceeds 2.5 times the sum of each partner's relevant basis in such partnership.

(B) Relevant Basis. For purposes of this paragraph . . . .

(C) Exception For Contributions Outside 3-Year Holding Period. Subparagraph (A) shall not apply to any contribution which is made at least 3 years after the latest of . . . .

(D) Exception For Family Partnerships. (i) In General. Subparagraph (A) shall not apply with respect to any contribution made by any partnership if substantially all of the partnership interests in such partnership are held, directly or indirectly, by an individual and members of the family of such individual. (ii) Members of the Family. For purposes of this subparagraph, the term "members of the family" means, with respect to any individual—(I) the spouse of such individual, and (II) any individual who bears a relationship to such individual which is described in subparagraphs (A) through (G) of section 152(d)(2)." *Id.*

and excluding family partnerships—that inflate the value of conservation easement contributions by over 2.5 times on land owned for under three years.[12] Such projects have already drained billions of dollars in tax-deduction claims through purported "conservation" gifts, with many future projects in the pipeline threatening further harm absent legislative intervention.

For purposes of this Article, it is important to note that such abuse is enabled by the tax deduction claimant's corporate structure. The claimants can receive pass-through benefits but also be sheltered by the structure of the S-corp or LLC entities hosting the land purchase by promoters, the investments in the entity in return for land ownership made by investors, and the flow-through of claimed tax deductions to those investors—either from a parent entity or their own individual subsidiary pass-through entity as the syndication. The promoter and investor-beneficiaries of such syndicated structure produce well-

[12] 26 U.S.C. § 170(h)(7) (2005). *Family* includes, for this rule:
"(A) A child or a descendant of a child.
(B) A brother, sister, stepbrother, or stepsister.
(C) The father or mother, or an ancestor of either.
(D) A stepfather or stepmother.
(E) A son or daughter of a brother or sister of the taxpayer.
(F) A brother or sister of the father or mother of the taxpayer.
(G) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.
(H) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 7703, of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household." 26 U.S.C. § 152(d)(2) (2018).

funded efforts to fight the IRS[13] and Department of Justice (DOJ)[14] enforcement actions by taking advantage of the inefficiencies and lack of coordination in IRS audit and DOJ litigation. They also vigorously oppose any proposed legislation intending to curtail abuse, particularly the Integrity Act.

To illustrate the disparity between the values at issue, all one must do is compare a legitimate conservation transaction using reduced values to generate a typical tax deduction, against a syndicated conservation transaction using grossly inflated values to claim an oversized deduction. For example: a non-inflated transaction on 4,000 acres of family-owned land, valued at $14 million, or $3,500 per acre at its highest and best use, might understandably create a reduction in value equal to the donated conservation easement's removal of development rights on the family-owned land. The development rights could realistically be valued at half the original land value, thereby creating a $7 million-valued conservation easement and deduction to be used by the family, even if held in a family limited partnership, to offset any of the partnership's income tax for the year of deduction and 15 following years.

By contrast, a $14 million "investment" or purchase by promoters of the same 4,000 acres of land at the same $3,500 per acre

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[13] *See IRS Increases Enforcement Action on Syndicated Conservation Easements*, IRS, https://www.irs.gov/newsroom/irs-increases-enforcement-action-on-syndicated-conservation-easements (last updated Aug. 30, 2021) (announcing increased enforcement by the IRS); *IRS Offers Settlement for Syndicated Conservation Easements; Letters Being Mailed to Certain Taxpayers With Pending Litigation*, IRS (May 25, 2021), https://www.irs.gov/newsroom/irs-offers-settlement-for-syndicated-conservation-easements-letters-being-mailed-to-certain-taxpayers-with-pending-litigation (announcing a settlement proposal for conservation easements); Josh Lynsen, *'It Would Help Us Significantly*,*'* DIRT (June 30, 2020), https://www.landtrustalliance.org/blog/it-would-help-us-significantly (stating that IRS legislation would help significantly with enforcement).

[14] *See* Complaint at 1–2, 12, United States v. Zak, (N.D. Ga. Dec. 18, 2018) (No. 1:18-cv-05774-AT), https://www.justice.gov/opa/press-release/file/1121451/download; *Atlanta Tax Professionals Plead Guilty to Promoting Syndicated Conservation Easement Tax Scheme Involving More Than $1.2 Billion in Fraudulent Charitable Deductions*, U.S. DEP'T OF JUST. (Dec. 21, 2020), https://www.justice.gov/usao-wdnc/pr/atlanta-tax-professionals-plead-guilty-promoting-syndicated-conservation-easement-tax.

is in a matter of days transformed through the syndication process to exponentially increase in value, now by placing 20 separate tracts of the original land in 20 separate LLCs. From there, promoters sell LLC interests to "investors" at a value of $80,000 per acre, generating $320,000,000 of sales value for the promoters. This amount is added back to the value of the property to be conserved, then taken in $400,000 per acre conservation easement tax deductions by LLCs on the twenty-acre parcels, totaling $1.4 billion in value of individual conservation easement tax deductions taken on the same property described above. The syndication process is, as the Senate Finance Committee stated, like putting a dollar into a vending machine and receiving two back, paid for courtesy of the United States' tax system, except in the case of the investors here, receiving six or seven dollars back for every dollar placed in their syndication vending machine.[15]

Because a taxpayer can take an income tax deduction for the *fair market value* of whatever asset they donate to charity, here in the form of a conservation easement, the promoters of syndicated transactions assert their conservation easements are imbued with fair market value that exponentially increases in value from the time of land purchase to the time of claiming conservation tax deductions. As in this example and in real-life instances, the fair market value is six or seven times the value paid for the land, generated within a matter of days from the purchase.[16]

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[15] S. FIN. COMM., 116TH CONG., REP ON SYNDICATED CONSERVATION-EASEMENT TRANSACTIONS, S. PRT. 116-44, at 24, 54, 59 (Comm. Print 2020), https://www.finance.senate.gov/download/syndicated-conservation-easement-transactions-print-116-44 (including specific examples of high return investor-payoff schemes).

[16] "Using round numbers TOT bought a 'bundle of rights' for a million dollars. Eighteen days later it took some of those rights out of the bundle and gave them to a land trust. It claimed for purpose of a charitable deduction that that part of the bundle was worth seven times what it had paid for the whole bundle." *See* Peter J. Reilly, *TOT Property Holdings Highlights Fundamental Flaw in Conservation Syndications*, FORBES (June 25, 2021), https://www.forbes.com/sites/peterjreilly/2021/06/25/tot-property-holdings-highlights-fundamental-flaw-in-conservation-syndications/?sh=5056fd22590a (describing TOT Prop. Holdings, L.L.C. v. Comm'r of Internal Revenue, WL 11880554, 3, 6 (T.C. Nov. 22, 2019)).

Treasury Regulations (Regulations) define *fair market value* as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[17] In other words, what a willing buyer would pay for an asset (any asset) if it were offered for sale in the marketplace. The Senate Finance Committee Report investigating syndicated easements in 2020[18] concluded that an inflated appraisal of land value before and after an conservation easement is placed is the very "engine of every syndicated conservation-easement transaction."[19] The business model of the syndicated transaction promoted by the structure of individual S-corps and LLCs hinges on this hyper-inflation of value after the purchase of land and before the grant of a conservation easement.

The motivation behind such overvaluation and resulting inflated tax deductions has proven virtually impossible to curtail between IRS and DOJ enforcement actions. Legislative intervention therefore is required to fix the rate of valuation at no more than 2.5 times the value of the land and ownership by pass-through entities (excluding family partnerships) to at least three years prior to donation of a conservation easement, in order to qualify for a conservation tax deduction. Passing the Integrity Act as a part of budget reconciliation or independently should remove significant motivation for promoters of and investors in syndicated transactions, making its passage paramount to stop abuse of the conservation tax deduction.

2. Establish Gatekeeping of the Conservation Easement Incentive Going Forward

As described above, the Integrity Act will greatly reduce the scope and scale of abusive syndicated conservation easement

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[17] Treas. Reg. § 20.2031-1(b) (2019) (defining valuation of property).
[18] S. PRT. 116-44, at I, 46.
[19] Reilly, *supra* note 16; *see TOT Prop. Holdings, L.L.C.*, WL 11880554 at 3–4, 11 (denying a deduction due to failing the perpetuity requirement by excluding after-built improvement from proceeds, and stating that commercial forestry is inconsistent with protection of conservation purposes); Jay, *Part One*, *supra* note 8, at 10137, 10162; Jay, *Part Two*, *supra* note 8, at 10257–58.

transactions.[20] If the Integrity Act is not reincorporated into the Budget Reconciliation Act, it should continue to be reintroduced independently or as a part of other bills until Congress passes it into law. Moreover, if the Integrity Act is passed, but abuse continues at the threshold of 2.5 times' increase to value with tacking of holding periods to avoid the three-year ownership requirement, federal, state, or local entities should bolster the conservation deduction by establishing a gatekeeping process to review eligibility of transactions, including easement holders, prior to their receiving conservation tax deductions.

Conservation tax deduction gatekeeping would entail pre-approval and review of a proposed conservation easement transaction for proper donor status, land ownership timeframe, valuation threshold, and easement holder qualification. If examining holder qualification proves too unwieldy a task, government entities could rely instead on the existing Land Trust Accreditation[21] process to ensure holder qualification.

The gatekeeping process could help stop syndication abuse either in the absence of or as a complement to the Integrity Act. Further, by evaluating conservation transactions prior to tax deduction allocation, the gatekeeping process inherently and efficiently redirects focus to the front-end eligibility of a transaction in order to prevent illegitimate deduction claims. Contrast this against the highly inefficient and scattershot process of back-end IRS enforcement after a deduction has already been claimed, in attempt to claw back the illegitimate deduction value. Gatekeeping therefore allows easement donors and holders to stop relying on the IRS to attempt to right wrongs after the fact.

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[20] Investing in a New Vision for the Environment and Surface Transportation in America Act, H.R. 3684, 117th Cong. § 1641 (2021) (a Senate review of the Bill, before enactment, containing aspects of the Integrity Act); Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (the enacted statute does not include aspects of the Integrity Act).

[21] LAND TR. ACCREDITATION COMM'N, ACCREDITATION REQUIREMENTS MANUAL 16, 18–21 (2021), https://www.landtrustaccreditation.org/storage/downloads/2021/requirements/2021_requirements_manual.pdf.

Even in the face of increasingly broad enforcement powers,[22] the IRS remains ill-equipped to oversee pre-qualifying characteristics of every conservation transaction and holder.[23] The pre-review and approval process instead could be undertaken by an administrative arm of an existing federal agency, such as the Treasury Department. Alternatively, it could be placed in an entirely new administrative entity, whose sole responsibility is to review eligibility for tax benefits based on the conservation transaction and its holder qualification. Colorado's newly created Division of Conservation, for example, pre-approves and certifies holders and conservation transactions prior to awarding state conservation tax credits.[24] Such review and pre-approval taken up by an existing or new federal entity could then ensure only legitimate conservation transactions with qualified holders receive federal conservation tax deductions.

Given the breadth of abuse on the national level for federal conservation tax deductions, it would make sense that such a pre-approving, authorizing entity exist at the federal level. However, such pre-approval could at the same time take place at the state or local level, with individual state or local pre-approval processes helping to prevent illegitimate conservation transactions from ever reaching the level of obtaining federal, state, or local tax benefits. Such state or local

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[22] *See* Jay, *Part One*, *supra* note 8, at 10136–37, 10147, 10150; Jay, *Part Two, supra* note 8, at 10243, 10249, 10258.

[23] *See* Transcript of Oral Argument at 2:50, Oakbrook Land Holdings v. Comm'r of Internal Revenue, 154 T.C. 180 (T.C. 2020) (No. 544–13) (noting the 6th Circuit Court of Appeals questioning the IRS about whether preapproval occurs on conservation transactions).

[24] *See* COLO. REV. STAT. § 24-1-122(2)(a) (2021) (transferring the powers of the Colorado public utilities commission to the department of regulatory agencies); *Id.* § 12-15-102 (2022) ("Creating a Division of Conservation within the Department of Regulatory Agencies will keep a firewall between professional evaluation and professional discipline, while creating a division to ensure this program allows landowners to exercise their private property rights while protecting taxpayers from the fraud and abuse that existed in the program prior to 2009 . . . Establishing the Division of Conservation to administer the conservation easement tax credit program will . . . allow the Division to continue to certify conservation easement holders to identify fraudulent or unqualified organizations and prevent them from holding conservation easements for which tax credits are claimed in the state.") *Id.* § 12-61-1101(d)–(e)(I).

focus is appropriate given that the legacy of abuse directly impacts that most local level of the ground itself, in the form of orphaned and neglected conservation easements with absentee holders, as shown by Colorado's experience.[25]

Instituting statewide or local municipal review of prospective land conservation transactions and holders that involve public dollars, subsidies, and benefits also makes sense. The states and municipalities are going to have to manage orphaned and neglected conservation easements, rogue land trusts, and resulting harm to public perception of conservation transactions. Integrating state or local pre-approval processes together with federal regulation may be best to stop abusive federal deductions altogether. Without federal regulation, for example, syndicators have avoided Colorado's pre-approval process by not claiming a state tax credit, using an out-of-state holder, and still claiming a federal tax deduction, as recently as 2020[26]

Further, considering the pre-approval processes already in place in Massachusetts, Nebraska, and Colorado as necessary components of perpetual conservation transactions there, these processes will naturally complement that approval which should occur at the federal level.[27] More localized review in addition to federal pre-

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[25] ERIK L. GLENN ET AL., HOUSE BILL 1264 WORKING GROUP FINAL REPORT WITH RECOMMENDATIONS 2 (2019), https://leg.colorado.gov/sites/default/files/images/hb19_1264_working_group_report_final_11.26.19.pdf (describing potential mechanisms to overcome Colorado's conservation easement conflicts while remediating past harms).

[26] See Clerk & Recorder, Eagle Cnty., Colo., Vail Valley Deed to Southern Conservation Trust, Reception #202025493 (Dec. 29, 2020) (on file with author) (recording a conservation easement deed in Eagle County, Colorado in 2020 for a syndicated conservation easement transaction, with the easement going to the Southern Conservation Trust located in Fayetteville, Georgia).

[27] Jay, *When Perpetual Is Not Forever*, supra note 6, at 44; MASS. GEN. LAWS ch. 184, §§ 31–33 (2021) (Massachusetts law requires all proposed conservation easements to be approved by the Massachusetts Executive Office of Energy and Environmental Affairs. Easements proposed to be held by charitable entities are further approved by the local governing body. Municipal and state officials approve every conservation easement before it can be recorded.); NEB. REV. STAT. ANN. § 76-2, 112(3) (LexisNexis 2021) (Nebraska requires government approval of proposed conservation easements prior to their acceptance "in order to minimize conflicts with land-use planning."); *see* COLO. REV. STAT. § 12-15-106(2)(a) (2022) (establishing a pre-approval process of easement transactions and easement holders for donors seeking a Colorado gross conservation tax credit).

approval not only better represent the public's interest, it demonstrates public support for specific perpetual land uses incorporated into individual perpetual conservation easements, forever, as discussed under Part B.1.

3. Remedy the Imbalance of Power Between the IRS, Conservation Easement-donating Landowners, and Conservation Easement-holding Land Trusts

The IRS occupies a unique position between the branches of government that elicits deference, authority, autonomy, and a lack of accountability.[28] By all but eluding administrative procedures, the IRS imposes its own interpretation of the Code and Regulations and its will over government and citizens, alike.[29] The disparate treatment of the IRS between the U.S. Tax Court and Federal District Court(s) furthers an inequity that must be resolved in favor of fair and equal treatment for all individuals and entities seeking recourse for conservation tax matters, regardless of forum.[30]

The straightforward framework of Internal Revenue Code §§ 170(h)(2)(C) and 170(h)(5)(A) for conservation transactions implemented and enforced by the IRS, however, creates just such a mechanism for fair and equal treatment by perpetuating conservation easements' purposes over time through the actions of easement holders.[31] Although previously distorted by the IRS in the audit and enforcement of legitimate conservation transactions, the Code and Regulations surrounding conservation transactions intend to afford deference to conservation easement holders to make determinations about impacts to protected conservation purposes over perpetuity.[32] This intent should be procedurally implemented to include burden of proof, legislative grace, standard of review, scope of authority, and deference.

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[28] *See* Jay, *Part Two*, *supra* note 8, at 10249, 10251, 10256.
[29] *Id.*
[30] *Id.*
[31] 26 U.S.C. §§ 170(h)(2)(C), 170(h)(5)(A) (1980).
[32] *See* Jay, *Part Two*, *supra* note 8, at 10242, 10245.

Specifically, these procedural tools should be imposed in favor of conservation easement oversight by trusted, vetted easement holders as follows:

(1) the IRS should bear the burden of proof and not receive legislative grace when disqualifying landowners and easement holders from a tax deduction benefit if they have submitted documentation showing their compliance with the law;
(2) courts should apply an ordinary rather than strict standard of review when scrutinizing IRS disallowances for conservation tax deductions, given that the conservation tax deduction is the result of public will and activism and not a default or accidental loophole;
(3) the IRS' scope of authority should be refocused on valuation first and foremost, and compliance with perpetual attributes and qualifying features second, to accomplish its role as envisioned and set out by the Code and Regulations;
(4) courts should accord deference to the language of the Code and Regulations and not the IRS, given the agency's propensity to misapply the intent, plain language, and letter of the law;
(5) any deference accorded by reviewing courts to opinions of the Tax Court under *Dobson* should be quashed in light of statutory law abolishing such deference[33];
(6) any limitation of precedent to the taxpayer's own circuit under *Golsen* ought to be discarded as unequal and inconsistent treatment under the law from circuit to circuit and between the U.S. Tax Court and Federal District Court(s); and
(7) if Congress or the Treasury Department were to institute a pre-approval process for taxpayers seeking legitimate conservation tax deductions prior to the issuance of such a deduction, this would free up valuable time and resources for the IRS to pursue syndicated conservation transactions.[34]

Without such reforms, the balance of power, law, and equity will continue to tip decidedly in favor of the IRS—an agency admittedly already overwhelmed, underfunded, and understaffed by

[33] *See* Dobson v. Comm'r of Internal Revenue, 320 U.S. 489 (1943).
[34] *See* Jay, *Part Two*, *supra* note 8, at 10242, 10245.

the process of attempting to enforce inflated conservation tax deductions against syndicators, which continue to drain billions of dollars from the Treasury. Such reforms would level the scales for valid conservation transactions and their donors, provide clarity for the public, lawmakers, and the IRS as to distinctions between legitimate and illegitimate transactions, and inspire authentic, future conservation transactions—perhaps even those based on new, emerging conservation purposes.

4. Update and Expand 26 U.S.C. § 170(h) and 26 C.F.R. § 1.170A-14 Definitions of Conservation Purposes to Reflect New Public Benefits

It has been 42 years since the passage of Code § 170(h) in 1980 providing for a conservation contribution tax deduction, and 36 years since the drafting of attendant Treasury Regulation § 1.170A-14 in 1986.[35] Times have changed, public interests have changed, and conservation values and purposes have changed. It would be appropriate to update this powerful tax incentive to reflect new conservation goals and values to approximate the public benefits we, the public, would like to see rewarded, including but not limited to:

(1) expanding the definition of public recreation and education at Code § 170(h)(4)(A)(i) and Regulation § 1.170A-14(d)(2) to include interconnecting trail corridors, open spaces for recreation, and pocket parks in urban areas for ready access for all to clean air, water, and green spaces for physical and mental health[36];
(2) expanding common uses apart from conservation value of recreation and education at Code § 170(h)(4)(A)(i) and Regulation § 1.170A-14(d)(2) to include commons and community gardens, greenhouses, farms, food security, and green burial areas[37];

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[35] 26 U.S.C. § 170(h); Treas. Regs. § 1.170A-14 (1986).
[36] 26 U.S.C. § 170(h)(4)(A)(i); *see* Treas. Regs. § 1.170A-14(d)(2) (defining *recreation* and *education* for general public).
[37] 26 U.S.C. § 170(h)(4)(A)(i); *see* Treas. Regs. § 1.170A-14(d)(2) (stating conservation purposes would include a hiking trail for public use or preserving water area for public boating or fishing).

(3) including air quality and water quality as affirmative components of healthy wildlife habitat and healthy human habitat at Code § 170(h)(4)(A)(ii) and Regulation § 1.170A-14(d)(3)[38];
(4) recognizing integration with larger landscapes and other private landowner protections at Code § 170(h)(4)(A)(iii) and Regulation § 1.170A-14(d)(4) to create a fabric of interconnected protection for human and wildlife habitat, sustainable ecosystems, and climate resiliency[39];
(5) affirmatively adding agricultural and forestry working lands as qualifying open space uses beyond the definition that currently includes "farmland and forest land" at Code § 170(h)(4)(A)(iii) and Regulation § 1.170A-14(d)(4)[40];
(6) integrating renewable energy resources or generation into working landscapes under the open space definition at Code § 170(h)(4)(A)(iii) and Regulation § 1.170A-14(d)(4) to end reliance on fossil fuels[41];
(7) including elements of climate change, carbon sequestration, roots-down grasslands, and standing forests under the open space definition at Code § 170(h)(4)(A)(iii) and Regulation § 1.170A-14(d)(4)[42];
(8) recognizing and defining redevelopment of the already-built environment into a new section of the Code and Regulation to reflect community and public good and use by including essential, human life-sustaining needs such as food, shelter, and health;
(9) recognizing and defining undevelopment or restoration in a new section of the Code and Regulation so as to return built

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[38] 26 U.S.C. § 170(h)(4)(A)(ii); *see* Treas. Regs. § 1.170A-14(d)(3)(ii) (defining *significant habits or ecosystems*).
[39] 26 U.S.C. § 170(h)(4)(A)(iii); *see* Treas. Regs. § 1.170A-14(d)(4)(i) (defining *preservation of open space*).
[40] 26 U.S.C. § 170(h)(4)(A)(iii); Treas. Regs. § 1.170A-14(d)(4)(i).
[41] 26 U.S.C. § 170(h)(4)(A)(iii); Treas. Regs. § 1.170A-14(d)(4)(i).
[42] Mark Anderson, *Saving the Future for Biodiversity: Finding and Protecting the Most Climate-Resilient Places—and the Paths Species Will Take to Get There*, THE NATURE CONSERVANCY (Oct. 6, 2020), https://www.nature.org/en-us/what-we-do/our-insights/perspectives/saving-future-stage-biodiversity-mark-anderson/.

or brownfield environments to habitat or open spaces, clean air, land, and water; and

(10) recognizing and defining conservation protection, purpose, and value into a new section of the Code and Regulation to enable grants of land or cultural conservation easements back to Indigenous people and to heirs of previously enslaved people.[43]

These expanded and new conservation value and purpose definitions will help to encourage landowners to privately address previously unforeseen or undefined conservation challenges and will also address societal harms by encouraging the return of taken lands and delivering lands promised. Such conservation challenges to be addressed privately by individual landowners if Code § 170(h) conservation values are expanded could include: climate change,

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[43] Unless and until we can ensure land return to Indigenous people through government acts such as the National Bison Range Restoration Act, we can incentivize private landowners to revert land ownership to Indigenous people for a tax deduction. Such acts could be recognized as land conservation if granted as a fee simple transfer or as protected by a conservation easement, with the land transfer as its conservation purpose. The same is true of seeing through the promises of 40 acres and a mule to freed enslaved persons made in General Sherman's proclamation Special Field Orders No. 15, on January 16, 1865. If not by government acts or action, this could be accomplished by incentivizing private landowners to gain a tax deduction for the grant of land to the descendants of formerly enslaved persons as land conservation through fee simple transfer or as protected by a conservation easement, with the transfer as its conservation purpose. Valuation for purposes of a tax deduction might need to be adjusted if no limitations on use are made through the transfer or an alternative valuation used in lieu of traditional Code § 170(h) valuation. *See* Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 12, 134 Stat. 1182, 3029 (2020) (The National Bison Range Restoration Act—originally drafted by the Confederated Salish and Kootenai Tribes in 2016—was incorporated into the Montana Water Rights Protection Act (S. 3019), introduced in the Senate on December 11, 2019 and amended in December 2020 as the Montana Water Rights Protection Act, which was then incorporated into the Consolidated Appropriations Act of 2021 (H.R. 133), passed by the House and Senate on December 21, 2020, and signed into law on December 27, 2020, becoming Pub. L. 116-260.) *Public Law: Restoring Bison Range to Tribal Ownership*, BISON RANGE RESTORATION, https://bisonrange.org/public-law/ (last visited May 18, 2022); 2 WILLIAM T. SHERMAN, MEMOIRS OF GEN. W. T. SHERMAN 250–51 (Charles L. Webster & Co. eds., 4th ed. 1981); 26 U.S.C. § 170(h) (1980).

collaborative common uses and connections, food and shelter, and restoration and reversion of the built and unbuilt environment. The same conservation challenges might also be addressed publicly, by tax-exempt, non-profit land trusts, if operations can be expanded and missions deepened under Code § 501(c)(3).[44]

5. Permit Expansion of Land Trust Qualifying Acts and Operation Under Code § 501(c)(3) to Operate to Deepen Mission Within Organized Tax Exemption

In tandem with the expansion of conservation purpose definitions described in Part 4 above, this Article suggests expanding and supporting such purposes as attendant qualifying acts under Code § 501(c)(3) to achieve both human and environmental goals under the mantle of land conservation as a charitable act.[45] Additionally, this Article suggests specifying and broadening the charitable acts permitted under Code § 501(c)(3) for conservation organizations, both to expressly recognize land conservation as a charitable act and to acknowledge expanded conservation purposes. This would provide clarity to the donors of conservation easements, as well as to the non-profit holders of those conservation easements, of the requisite qualifying acts under the Code and Regulations for tax benefits.

The expanded charitable acts and exempt purposes under Code § 501(c)(3) should match and complement the expanded conservation values and purposes under Code § 170(h) described in Part 4. This includes: dedicating land to common or community uses for access to clean air, water, and green spaces; life-sustaining needs such as food and shelter; and death-accommodating needs such as green burial. Other examples include permitting buildings and improvements to be used for workforce and affordable housing (or broader community uses), together with both redevelopment of the built environment for

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[44] Plus, add all the recommended reforms to the language of § 170(h), including amending Code and Regulation provisions to ensure flexibility and durability for perpetuity and to stabilize and bolster the tax incentive. *See* Jay, *When Perpetual Is Not Forever*, *supra* note 6, at 11, 13–14, 23; Jay, *Part Two*, *supra* note 8, at 10239, 10243.

[45] 26 U.S.C. § 501(c)(3) (2018); *see* Treas. Regs. § 1.501(c)(3)-1(d)(2) (2021) (defining *charitable*).

other public benefits such as food and shelter, and undevelopment of the built environment to stabilize against climate change and return land to its original or a new natural state. Additionally, the Code could expressly allow for grants of land back to Indigenous people and to heirs of enslaved persons using land conservation processes.

Further, this Article recommends and underscores the need to use Code § 501(c)(2) for land trust land improvement and ownership when leasing for workforce housing, agricultural production, community gardens, community centers, food and housing shelters, and in directing land ownership back to Indigenous populations and heirs of enslaved persons, with all the benefits of this tax-exempt categorization.[46]

This broadening of uses allowed under charitable conservation acts for nonprofit tax-exempt organizations will allow land trusts to deepen their missions to provide support and stability through changing political regimes, all while continuing to operate within a defined land-protection rubric of perpetual land conservation. Further,

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[46] 26 U.S.C. § 501(c)(2) (2018); *see* Treas. Regs. § 1.501(c)(2)-1(a) (2021) (describing the benefits of corporations holding title to property for exempt organizations); Julian Agyeman & Kofi Boone, *Land Loss Has Plagued Black American Since Emancipation–Is It Time to Look Again at 'Black Commons' and Collective Ownership?*, CONVERSATION (June 18, 2020), https://theconversation.com/land-loss-has-plagued-black-america-since-emancipation-is-it-time-to-look-again-at-black-commons-and-collective-ownership-140514 (describing the concept of the *black commons*—sharing resources including land—as a means for redressing the historic deprivation of land that Black Americans have faced). Further, moving at the "speed of trust" (mission of First Light organization https://firstlightlearningjourney.net/resources/reparations-and-rematriation-of-land/) in rematriating land with indigenous peoples or tribes will require changes not only to the Code and Regulation to rebuild such trust and processes, but also likely to the land ownership structure implemented for indigenous persons and tribes. Tribes, however, although treated as states for some purposes under the Code, are not necessarily allowed to own land given to them, and must instead, with no hint of irony, rely on the U.S. federal government to hold such land for them "in trust". 26 U.S.C. §7871 (2018) (Indian tribal governments treated as States for certain purposes); 25 U.S.C §2201(1) (2019) ("Indian tribe" or "tribe" means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust); 5 U.S.C. §§5101 *et seq.*(2019) (1934 Indian Reorganization Act whereby Secretary of the Interior may accept trust lands on behalf of tribes to be held in trust by the United State).

it will be important to consider similar actions on the part of government entity conservation holders, provided they are required to possess the same oversight, scrutiny, and qualifications as non-profit, tax-exempt land trusts.

6. Equalize Government Conservation Easement Holder Regulation and Oversight

Currently, Code § 170(h)(3)(A) and Regulation § 1.170A-14(c) place government entities on equal footing with charitable conservation easement holders under Code § 501(c)(3). Tax-exempt easement holders such as land trusts, however, are tightly regulated under Code § 501(c)(3) and Regulation § 1.1501(c)(3). These tax-exempt easement holders must be organized and operated to further their exempt purpose and create public benefits, without impermissibly benefiting members of the public or insiders of their organization through acts not in furtherance of their exempt purpose.[47] Moreover, many land trusts seek recognition of national accreditation through the Land Trust Accreditation Commission, which blends requirements of tax-exempt nonprofits with Land Trust Standards and Practices issued by the Land Trust Alliance. Such accreditation adds several more layers of oversight and qualification to land trust behavior in holding conservation easements.[48]

By contrast, apart from the definition of a qualifying recipient of conservation easements made exclusively for public purposes as to or for the use of a state, possession of the United States, any political subdivision thereof, the United States, or the District of Columbia, there is little to no oversight or qualification surrounding government holders of conservation easements.[49] The one exception is certain state

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[47] 26 U.S.C. § 501(c)(3) (2018); Treas. Regs. § 1.501(c)(3)-1(d)(1)(ii) (2021).

[48] *Requirements Manual*, LAND TR. ACCREDITATION COMM'N, https://www.landtrustaccreditation.org/help-and-resources/requirements-manual (last visited May 20, 2022); *see Adopt Land Trust Standards and Practices*, LAND TR. ALL., https://www.landtrustalliance.org/topics/land-trust-standards-and-practices/adopt-land-trust-standards-and-practices (last visited May 20, 2022) (explaining what adopting Land Trust Standards and Practices means).

[49] 26 U.S.C. § 170(h)(3) (2021); 26 U.S.C. § 170(c)(1) (2021). The requirement that

constitutions prohibiting state or local governments from affording special insider benefits in the nature of private inurement or impermissible private benefits to members of the public.[50]

Government conservation easement holders should have equal evaluation and review under the laws, regulations, and standards to that of nonprofit holders. Government easement holders should not be able to reject the will of the public or conserving landowners, for example, through exercise of home rule, patriarchal revision, or release of conservation protections, for political whims, self-serving insider benefits, or external special interests.

Government conservation easement holders should be held to the same standards as Code § 501(c)(3) tax-exempt nonprofit holders—prevented from acts without public benefits outside their exempt purpose and from creating impermissible *private benefits* or *private inurement*. This could be accomplished by requiring Code § 170(h)(3) government entities qualified to hold perpetual conservation easements made exclusively for public purposes under Code § 170(c)(1) to adhere to the same standards of public benefit required by Code § 501(c)(3) *exempt purposes*. Further, such government entities seeking to hold perpetual conservation easements could be required to reach qualified status by adopting Land Trust Standards and Practices to guide their actions over perpetuity, and to seek Land Trust Accreditation to show compliance with Standards and Practices and Code § 501(c)(3) requirements for public benefit.[51]

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conservation easement gifts to government entities be made exclusively for public purposes under Code § 170(c)(1) appears to be juxtaposed against those made to private individuals for private purposes, with no other guiding language: "Contributions to needy individuals are not deductible because individuals are not qualifying organizations under IRC 170." 26 U.S.C. § 170(c)(1) (2021); INTERN. REV. SERV., U.S. DEP'T OF THE TREAS., E. DEDUCTIONS OF CONTRIBUTIONS TO IRC 501(C)(3) AND OTHER EXEMPT ORGANIZATIONS, 1985 EO CPE TEXT, (1985), https://www.irs.gov/pub/irs-tege/eotopice85.pdf.

[50] Jay, *When Perpetual Is Not Forever*, *supra* note 6, at 60; COLO. CONST. art. 11, § 2 (amended 1974) (explaining private benefit would contravene the state's constitution, which bars private benefit by government in much the same way that it limits tax-exempt organizations); 26 U.S.C. § 501(c)(3); *see* Treas. Regs. § 1.1501(c)(3)-1(c)(2) (2021) (excluding organizations as operated exclusively for an exempt purpose if any earnings inure to private individuals or shareholders).

[51] 26 U.S.C. § 170(h)(3).

The Accreditation process would need to be adapted for approval of government entities as holders of perpetual conservation easements qualifying for federal tax deductions. The process should emulate Colorado's process for certifying government holders of perpetual conservation easements qualifying for state tax credits.[52] Placing government holders on the same footing as qualified nonprofit land trusts would ensure appropriate consideration for requests to modify, release, or terminate easements that might otherwise be considered in the context of political motivations and whims, insider benefits, and private interests, which for government entities can exist both in the private land conservation context, as well as in the more public land use processes and context.

B. Ongoing and Responsive Needs with Adaptation to Legal Framework

1. Balance and Integrate Land Use and Conservation Decision-Making

It is the ongoing subject of debate whether private conservation easements should be integrated into formal, public land use processes. Put differently, there is a question whether the State—meaning government of any level—should be involved in regulating or overseeing private land conservation decisions and transactions. When private citizens are making choices regarding their land that span perpetuity and are purported to provide significant public benefits, there arguably could be owed some form of check-in with or notice to the public. A public notice or comment period for private conservation decisions could be appropriate, if only to remove the cloak of privacy and in some cases, secrecy from such decisions. Further, transparency and the opportunity for the public to weigh in on (without vetoing) prospective conservation projects could create more balanced community development, and conservation with more obvious and obtainable public outcomes.

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[52] *See* 4 COLO. CODE REGS. § 752-1 (2019) (establishing minimum requirements for organizations holding conservation easements).

On the other hand, public representatives can be the subject of pressure by special interests, and political bodies can be influenced by ephemeral or time-specific interests that may work against the greater public good. Taking these pressures into consideration, the process could intentionally incorporate the public itself to provide input or even vote on prospective projects being considered by government representatives or public entities. For example, in Denver, Colorado on Election Day 2021, the citizens voted not to transform the use of a public golf course under perpetual conservation easement to more developed infrastructure—such as affordable housing—in essence terminating the easement, without public approval.[53]

A process involving the public in a discourse of private conservation decision-making would not have to be a micro-integration of or granular approach to public approval. In Massachusetts, for example, landowners seeking to grant conservation easements receive approval from the local conservation commission, town select board, and ultimately, the state secretary of energy and environmental affairs.[54] In contrast to this multi-tiered approval process, there could be some lesser form of interaction between and integration of the private will with the public interest whereby local communities and their constituents could in some manner potentially review and comment on proposed conservation projects.

Further, in the ongoing struggle between the state and private ownership controlling private land-conservation decisions, the state could assert a more proactive role on behalf of the public in preventing abuse of the tax incentives that form the motivation for perpetual land protection. As previously discussed, such local or state attention is urgently needed to respond to federal deduction abuse in the short term, but could also potentially correct past wrongs in historic land use decisions. These past wrongs include pushing indigenous populations onto reservations, failing to fulfill emancipation promises, redlining,

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[53] Joe Rubino, *Denver Ballot Measures 301 and 302: Voters Favor Open Space Over Development at Park Hill Golf Course*, DENVER POST: POLITICS (Nov. 4, 2021), https://www.denverpost.com/2021/11/02/denver-election-results-2021-ordinance-301-302-park-hill-golf-course/.

[54] MASS. GEN. LAWS ch. 184, §§ 31–33 (2022).

and agricultural land divestiture from Black and Indigenous people and other communities of color.[55]

Colorado, in response to abuse of its own conservation tax incentive, now gatekeeps private decision-making around land conservation without prioritizing applications, conservation values, or public and private benefits.[56] These local processes—either independently or as a complement to a federal gatekeeping process—may help to either prevent such abuse from happening or to address such abuse that has already occurred. As discussed under Part 2, at least three states already implement their own form of gatekeeping or pre-approval in private perpetual conservation grants. For example, as discussed, Massachusetts reviews each proposed conservation easement on a town-by-town basis, starting with each town's conservation commission.[57] Nebraska requires government approval of proposed conservation easements prior to their acceptance "in order to minimize conflicts with land use planning."[58] And, Colorado has a pre-approval process of easement transactions and easement holders when donors are seeking a Colorado gross conservation tax credit.[59]

The legacy of conservation-easement programs undermined by orphaned and neglected conservation easements, held by rogue or absentee land trusts—while still on perpetually protected land—will

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[55] *See* Dorceta E. Taylor, *The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses*, 43 AM. BEHAV. SCIENTIST 508, 514, 534 (2000), https://www.researchgate.net/publication/237644402_The_Rise_of_the_Environmental_Justice_Paradigm_Injustice_Framing_and_the_Social_Construction_of_Environmental_Discourses; Dorceta E. Taylor, *The Evolution of Environmental Justice Activism, Research, and Scholarship*, 13 J. NAT'L ASS'N ENV'T PRO. 280, 282, 285 (2011), https://www.cambridge.org/core/journals/environmental-practice/article/abs/introduction-the-evolution-of-environmental-justice-activism-research-and-scholarship/32C4E9DA3F1D2CF625450745B60D4779; Dorceta Taylor, *The Challenge of Diversity in the Environmental Movement*, NONPROFIT Q. MAG. (Oct. 14, 2021), https://nonprofitquarterly.org/thoughts-on-being-in-the-environment-while-black/ (describing past abuse to people of color and its impact on decreasing other people of color's desire to enjoy nature).

[56] COLO. REV. STAT. § 24-1-122(2)(l) (2021); *see* COLO. REV. STAT. § 12-15-106(2)(a) (2022) (listing purposes of conservation tax credit application process).

[57] MASS. GEN. LAWS ch. 184, §§ 31–33 (2022).

[58] NEB. REV. STAT. ANN. § 76-2, 112(3) (LexisNexis 2021).

[59] COLO. REV. STAT. § 12-15-106(2)(a) (2021).

continue to be a largely state and local problem. Massachusetts, Nebraska, and Colorado could prevent abuse on the front end of conservation processes and thereby benefit their conservation programs with legitimate, well-perceived perpetual conservation easements. Further, where abuse already exists, states involved in conservation easement approval could conceivably rely on existing infrastructure to address the consequences of abuse, by assisting with the merger of easement-holding organizations, receivership of orphaned easements, and other potential remedies for abusive transactions, as contemplated Colorado's model of regulation.[60]

The counterpoint to state or local review and approval of private land conservation decision-making is that such government involvement is unwanted, intrusive overreach. There may be a way, however, to create symbiosis and synchronicity between public approval and private land conservation decisions. We can look to the example of forest science evolution—findings that individual trees within forests do not in fact compete with one another for resources, they instead collaborate and cooperate.[61] Conservation easements evolved out of necessity due to meager land use options for private or public perpetual land protection, and have existed for years thereafter in most states without public involvement.

Review and approval of private conservation acts nonetheless has the potential to reincorporate public perspectives into private land decisions, and to represent the public will and common good in land protection on a landscape-scale, community-wide basis. To bridge the gap between private land use decisions and public approval processes in states or municipalities that do not already integrate public considerations of private decision-making will be transformative. Consider the land resource itself as shared—based on forest science—with public involvement in private land decisions not competitive or intrusive, but collaborative. And where private land conservation can benefit from public perspectives, so too can it benefit from the re-imagining of conservation qualities not as commodities of highest and

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[60] *See* GLENN ET AL., *supra* note 25, at 9–11, 14, 18.

[61] *Collaboration Triumphs Over Competition in the Forest*, CONSERVATION SENSE & NONSENSE (Aug. 1, 2021), https://milliontrees.me/2021/08/01/collaboration-triumphs-over-competition-in-the-forest/.

best use, but as interconnected, intrinsic characteristics worthy of discrete appropriations of public value.

2. Reimagine Land "Valuation" of Highest and Best Use of Land

One of the arguably inapposite approaches Code § 170(h) requires in valuing conservation easement gifts for tax deductions is considering the highest and best use of land before and after placing a conservation easement.[62] This form of valuation has the perverse result of under-valuing conservation-rich properties where there is no pressure for development to create a high "before" value or low "after" value attributed to those relinquished development rights. Agricultural, forested, working lands, and land with abundant water and wildlife habitat resources therefore may all suffer from geographic locations that do not bear any pressure for development. This is even though such conservation easements may be rich with conservation values worthy of protection. Because such "low-value" perpetual conservation easements do not yield high tax benefits, landowners are often unmotivated to grant them.

Colorado conservation stakeholders, in examining the best method and mechanism by which to return dollar value to those landowners granting conservation easements in return for valuable state conservation tax credits, have begun exploring alternate means of representing the public's benefit from perpetual conservation easement gifts other than land value, highest and best use, and pressure for development.[63] The stakeholders intend any such alternative to be in addition to, and not a replacement of, the current method of valuing land's highest and best use under the federal tax benefit structure.[64]

As an alternative, stakeholders have developed a Conservation Benefit Index to determine a property's conservation easement value based on protected conservation values and restrictiveness of conservation easement terms, as opposed to the development rights a

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[62] 26 U.S.C. § 170(h)(1); Treas. Regs. § 1.170A-14(h)(3)(ii) (2021).

[63] ANDREW SEIDL ET AL., COLO. STATE UNIV.: REG'L ECON. DEV. INST., ALTERNATIVE METHODS FOR SUBSTANTIATING PAYMENTS FOR CONSERVATION EASEMENTS IN COLORADO 2–4 (2020), https://redi.colostate.edu/wp-content/uploads/sites/50/2020/10/REDI-Report-Alt-Val-Easments-Oct-2020.pdf.

[64] *Id.*at 23.

landowner gives up under the traditional method.[65] The Index creates value or points that are added to the baseline or "before value" analysis of a property based on these alternative categories, including scenic qualities, agricultural use, wildlife habitat, retained water, public access, educational opportunities, and recreational access.[66] Using these added categories and the appropriate restriction on use to protect such conservation characteristics ensures a "value" for purposes of incenting perpetual land conservation and allocating valuable conservation tax credits within the state in areas where there is little to no pressure for development.[67]

Until another mechanism is found to encourage conservation behavior other than tax-based incentives, (such as cash-in-hand grants and payments discussed in subpart 3 below), Colorado will continue to rely on its transferrable state tax credit, which compensates landowners up to 90% of value for granting conservation easements. The tax credit program and State Division of Conservation will continue to review conservation easement grants and their holders for legitimacy and qualification while the conservation community seeks other ways to "value" and reward land conservation for such public benefits.[68] Further, as a complement to alternative means of valuation, Colorado, other states, and the federal government may eventually replace tax benefits with more direct means of paying conservation easement donors for the public benefits and conservation value of their gifts, perhaps even through novel dedication and distribution of public funds.

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[65] *Id.* at 16–18.
[66] *Id.* at 16–17.
[67] *Id.* at 2.
[68] *See id.*; Treas. Regs. § 1.170A-14(d)(iv)(A) (listing factors considered in evaluating public benefit); Treas. Regs. § 1.170A-1(h)(3)(i) (describing payments resulting in state or local tax credits); *see also Conservation Groups Will Assess Alternative Methods for Valuing Conservation Work*, KEEP IT COLORADO (Oct. 26, 2020), https://www.keepitco.org/news/2020/10/26/conservation-groups-will-assess-alternative-methods-for-valuing-conservation-work (explaining Colorado conservation groups' pilot testing for next generation valuation of land and distribution of state tax credit benefits).

3. Incorporate New Funding Mechanisms, Bonding, Sales, or Lottery Funds, as Direct Payments for Land Conservation

Equally transformative to the concept of seeking alternatives to valuing conservation gifts for tax incentives to support wholesale purchases of land (or sticks in the land ownership bundle) for their conservation value and public benefit, is that of dedicating and directing public dollars to specific individual users or landowners for less than fee or easement estates, for less than perpetual duration. A state, county, or municipality could choose to reimburse agricultural landowners or water rights owners for the value of their promises to protect their valuable resources, by attaching such resource or use to the public benefit directly in less than fee, less than easement, or less than perpetual grants.[69]

When land protection tools are flexible enough to include leasehold interests or less-than-perpetual duration to achieve long and short-term conservation goals, landowners of less traditionally valuable land with more conservation value are more likely to participate.[70] The Central Colorado Conservancy (CCC) has implemented just such a program with a less than fee, less than perpetuity conservation compensation process in response to landowners with valuable water rights and rich conservation habitat whose land values are not adequately compensated by Colorado's conservation tax credit valuation of highest and best development potential.[71]

The CCC's Community Conservation Connection program works with landowners who have individually agreed to set aside

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[69] SEIDL ET AL., *supra* note 63, at 2; *see also* ENVISION FOREST HEALTH COUNCIL, NEXT GENERATION COMMUNITY WILDFIRE PROTECTION PLAN 3, 6 (2020), https://envisionchaffeecounty.org/wp-content/uploads/2021/03/CWPP-Annual-Report_12MAR21_F.pdf.

[70] *See* Robert Gilman, *The Idea of Owning Land: An Old Notion Forged by the Sword Is Quietly Undergoing a Profound Transformation*, CONTEXT INST. https://www.context.org/iclib/ic08/gilman1/ (last visited May 20, 2022) (illustrating additional information and ongoing adaptations to the context of land ownership).

[71] *What We Do*, CENT. COLO. CONSERVATORY, https://www.centralcoloradoconservancy.org/what-we-do (last visited May 20, 2022).

4,000 acres in a five-year conservation program during which they are paid out of a Chaffee County tax fund dedicated to short-term conservation protection, not to develop their agricultural or water resources.[72] "Landowners, who must have at least 160 acres to qualify, agree to limit non-agricultural development and continue 'basic management practices,' including irrigation."[73]

Short-term leasing of conservation resources to ensure their protection converts traditional relinquishment of development rights in exchange for tax incentives to a direct cash payment for desired land protection outcomes. And is this not what people really want—cash itself, over a tax incentive? People are inspired to act by the money that is the product of the tax incentive, not the tax benefit itself in the form of tax savings on the federal level, or the sale of tax credits in certain states. If it were possible to skip the tax-incentive step completely and incentivize conservation behavior directly with money instead, more conservation might be accomplished more efficiently, while placing value directly in landowners' pockets.

Such direct-to-landowner payments for conserving land already exist in several creative conservation programs in Colorado and other states today. In Colorado, they include providing tax refunds directly to conserving landowners (in lieu of tax credit sales) under Colorado's tax credit program in years of state budget surplus; sales tax proceeds for conservation leases paid directly to landowners under Chaffee County's Community Conservation Connection program; and grants to landowners through land trusts under Great Outdoors Colorado's statewide lottery proceeds distribution, all of which landowners appreciate without directly engaging in the tax incentive process.[74]

Maintaining the tax incentive system while continuing to explore and expand opportunities for direct payments or refunds, however, would be prudent, given the many years' reliance on such

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[72] Jennifer Yachnin, *Could Biden Use Private Land to Reach 30x30 Goals?*, E&E NEWS (Feb. 17, 2021), https://subscriber.politicopro.com/article/eenews/2021/02/17/could-biden-use-private-land-to-reach-30x30-goals-005353?source=email.

[73] *Id.*

[74] *See* COLO. CONST. art. XXVII, § 1 (1993) (creating the Great Outdoors Colorado Program).

programs with unmitigated success for landowners with income to offset or credits to sell. Shedding all the inefficiencies and inequities of the tax deduction and tax credit systems by changing to refunds or direct payments will provide an appropriate segue to new compensation processes in the meantime. Moving from purely tax-based incentives to more direct payments or refunds will also address the numerous landowners excluded by tax incentives based solely on income to offset, and avoids the likely unintended consequence of maintaining land within wealthy, white ownership. Incorporating non-tax-based funding opportunities for land conservation would not only provide benefits to cash poor, land rich owners, but also provide the potential for broader, landscape scale, communitywide, common conservation gains, in contrast to perpetuating benefits solely directed to individual landowners.

C. Necessary Future Reforms, Rebuilding Legal Framework and Paradigms

1. Strike a Balance Between Private Land "Ownership," Tax Incentive Structure, and the Tragedy of the Commons to Promote Conservation Acts for the Greater Good

Moving from tax-based strategies to other forms of direct payments, refunds, and funding will undoubtably address some of the inequities created by a land conservation structure rooted in individually based tax incentives. Pairing such direct compensation mechanisms with a move from traditional land ownership structures that monetize land as currency, to a more collaborative sharing of land as a collective resource might have even more profound consequences and represent the most aspirational goal discussed herein. Because traditional land ownership and conservation tax incentives appear to have an unintended consequence of perpetuating wealthy (even including cash poor but land rich), principally white land ownership, we must look to new incentives as well as new forms of land

ownership, to increase opportunities for shared land uses, access, and benefits.[75]

Discarding land incentives that actively monetize land as a commodity will aid the process of more equitably distributing land uses and access among the greater population of its broader inhabitants, including for Indigenous groups, heirs of formerly enslaved persons, and people of color. If monetized land values and income tax offsets perpetuate a problem of haves and have-nots in land ownership, it is foreseeable that without proactive change, land will continue to be largely owned, transferred, and conserved by, among, and for the wealthy, white population. Without new inspiration such as expanded conservation values and deepening land trust missions under the Code and Regulations, such ownership will likely continue without consideration for original Indigenous land possession, emancipation promises, and continued disenfranchisement of heirs' property for descendants of enslaved persons, people of color, and Indigenous populations.[76]

Remembering that property ownership is not an inalienable human, American, or constitutional right—given that the Declaration of Independence underscores the pursuit of life, liberty, and *happiness*,

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[75] "Of all private U.S. agricultural land, Whites account for 96 percent of the owners, 97 percent of the value, and 98 percent of the acres." *See* Jess Gilbert et al., *Who Owns the Land? Agricultural Land Ownership by Race/Ethnicity*, 17 RURAL AM. 55, 55 (2002), https://www.ers.usda.gov/webdocs/publications/46984/19353_ra174h_1_.pdf?v=0; As for whether corporations own the lion's share of agricultural land, "[s]ome 2.6 million owners are individuals or families, and they own more than two-thirds of all farm acreage. Fewer than 32,500 non-family-held corporations own farmland, and they own less than 5 percent of all U.S. farmland." BUREAU OF THE CENSUS, U.S. DEP'T OF COM., STATISTICAL BRIEF: WHO OWNS AMERICA'S FARMLAND? 1–2 (1993), https://www2.census.gov/library/publications/1993/demographics/sb93-10.pdf.

[76] *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COM., *supra* note 75 (noting low levels of minority land ownership in the U.S.). Fractional distribution of landownership among heirs of indigenous and enslaved persons as a result of federal land policy represents problems for reassembly or uniting of such land ownership going forward. *See Other Resources*, INDIAN LAND TENURE FOUND., https://iltf.org/resources/other-resources/ (last visited June 8, 2022); CTR. FOR AGRIC. & FOOD SYS., VT. L. SCH., *Heirs' Property*, https://farmlandaccess.org/heirs-property/ (last visited June 8, 2022).

not property[77]—now seems to be the right time for re-democratization of land and its uses. By complementing a concept of land ownership with a concept of borrowing, leasing, sharing, accessing, or using land under certain requirements for public good and benefits—even if promoting individual use at the local level, such as new farmers as owners, users, or lessees, or Indigenous and tribal foraging and cultural use agreements—much could be gained in the way of land conservation for overall, common good.[78] Broadening conservation purposes and charitable acts under land conservation incentives discussed per Part 4 and Part 5 continue to draw land conservation incentives and motivation from tax structure, but also will have the added benefit of potentially returning land use, possession, and ownership to Indigenous peoples, and to the decedents of enslaved persons. Even adjusting incentives to more directed giving, leasing, or buying of land use rights for conservation resources while helping to detach from the tax incentive system still furthers a system where land ownership is currency.

Land ownership is a means to an end—it does not in and of itself accomplish anything for its owners, but its ownership provides currency that enables borrowing, collection of rents, assemblage and protection of wealth carrying on for generations, and has the potential to provide what we discern it is that people really want in the form of income, stability, food, shelter, and security. If there is another way to provide what it is that people want and need without relying on land ownership tax-based incentives, we could move the motivation around land ownership and conservation from tax-based to leasing and direct payments.

Land conservation does not require tax incentives to thrive, just because it has historically relied on that system. It might be possible to detangle the otherwise unrelated systems of tax incentives and land ownership for conservation results (somewhat like schools relying on

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[77] Carol V. Hamilton, *Why Did Jefferson Change "Property" in John Locke's Trinity, "Life, Liberty, and Property" to the "Pursuit of Happiness"?*, HIST. NEWS NETWORK (Jan. 27, 2008), https://historynewsnetwork.org/article/46460.

[78] Eric T. Freyfogle, *Owning the Land: Four Contemporary Narratives*, 13 J. LAND USE & ENV'T L. 279, 281, 284, 298 (1998).

local property taxes to thrive),[79] and begin transforming into a temporary ownership or sharing structure incentivized by direct cash payments.

We are unlikely to unbundle land ownership and land conservation from tax benefits in the short term, given the immense motivation such incentives currently provide landowners to perpetually conserve their land, and the terrific success such incentives have inspired in land conservation. Adjusting incrementally within the tax-incentive system to benefit emerging conservation purposes such as climate change, and to include under-recognized constituencies as beneficiaries such as the heirs of formerly enslaved persons, is a good start from which we can continue to evolve to other forms of inspiration. From there, we can move to alternate forms of valuation, and eventually, ostensibly to shared, leased, or borrowed land usage and ownership.

It would be wonderful to live in a time and place where decisions surrounding land's use are made for the fairness to and equity of everyone impacted by that land, not just the land's owner, where we can together strive to avoid the tragedy of the commons and of the anti-commons to reside in a place not of individually owned parcels gained by force and retained by broken promises, failed reparations, and continuing disenfranchisement, but of shared, borrowed, and loaned landscapes with resources perpetually protected for the greater good of us all.[80]

CONCLUSION: IMMEDIATE, ONGOING, AND FUTURE NEEDS ENVISIONED

Setting out checklists and frameworks for immediate, ongoing, and future goals helps us to formulate plans within existing legal regimes while recognizing the need for adaptation, adjustment, and

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[79] DAPHNE A. KENYON, LINCOLN INST. OF LAND POL'Y, THE PROPERTY TAX-SCHOOL FUNDING DILEMMA 38 (2007); CAMPBELL F. SCRIBNER, THE FIGHT FOR LOCAL CONTROL: SCHOOLS, SUBURBS, AND AMERICAN DEMOCRACY 125 (2016).

[80] *See* Michael Heller, *The Tragedy of the Anticommons*, WEALTH COMMONS, http://wealthofthecommons.org/essay/tragedy-anticommons (last visited May 20, 2022) (defining *anticommons* and their use in addressing resource scarcity and conservation).

possibly dismantling and rebuilding new frameworks around shifted legal paradigms. This process envisions a progression both over time and in land conservation and ownership mechanics.

In the short term, to protect land conservation as an institution and tool, we must address imminent and urgent needs within the existing legal framework by passing the Conservation Integrity Act to curtail abuse of the conservation easement incentive and establish gatekeeping of the conservation incentive going forward. We then must update and expand Code § 170(h) and Regulation § 1.170A-14 definitions of conservation purposes, promote and permit Code § 501(c)(3) land trusts to operate to deepen actions and missions, while also requiring equivalent government conservation easement holder qualification and oversight. Finally, in the short term, we must remedy unfairness to landowners and land trusts from the imbalance of power with the IRS in implementing and enforcing the current system of tax incentives. Implicit in these immediate goals is the use of current systems to incentivize behavior around social and environmental justice under the rubric of land conservation as an outgrowth of existing land ownership structures.

Moving forward to ongoing and responsive needs requiring adaptation to legal framework, we must balance land use and conservation integration, complement land "valuation" as highest and best use of land with new value mechanisms, and incorporate or adopt new funding opportunities such as community bonding or lottery funds.

Lastly, for necessary, immediate, ongoing and future needs and reforms, including potentially dismantling and rebuilding the legal framework and paradigm of land ownership and land conservation, we can and must strike a balance between private land "ownership," incentive structures, and the tragedy of the commons, to promote good acts in land conservation for the greater good of all.

In conclusion, reforms and reimagining of land, its conservation, and use include bolstering and expanding conservation incentives in the face of extensive abuse, integrating private land protection within communities, adjusting land monetization and valuation approaches, unbundling land ownership notions, and re-democratizing and restoring land access and use. Such reforms and reimagining are intended to sustain and secure perpetual land

conservation as a continuing, dynamic, and flexible source for critical resource management and protection at the local, state, federal, and global levels, while ensuring equitable, inclusive, diverse, and just land protection in the context of past, current, and future generations of land use and users.

PANDEMICS AND HOUSING INSECURITY: A BLUEPRINT FOR LAND USE LAW REFORM

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INTRODUCTION: FOUR PANDEMICS AND HOUSING INSECURITY

During its first century, land use law changed in response to serious, usually singular, challenges. First, it responded to the Great Depression, then World War II, then urban sprawl's threat to local economics and environments, then the challenge of developing sustainably in the face of emerging climate change.[1] As land use law's second century progresses, a quartet of "pandemics" pose unprecedented challenges. These pandemics are the worsening of climate change, the appearance of COVID-19 and its variants, the dawning realization of the tragedy of racial inequity, and the national housing crisis that causes housing insecurity for many. All of these catastrophes are worrisome threats to public health.

These pandemics have aroused widespread concern. In response, many in the nation are calling on local land use advocates and officials to reform land use law. This Article introduces these four pandemics and describes in detail what local governments are doing to combat one of them: housing insecurity. It reviews recent progress with traditional inclusionary zoning requirements, such as mandatory affordable housing; discusses the move toward greater density in single-family zoning; touches on the *housing first* approach to reducing homelessness through supportive housing; lists strategies being used to remediate distressed housing; and notes the importance of affordable housing as a necessary strategy for preventing lower-income household displacement caused by gentrification.

The lack of affordable housing exacerbates the detrimental effects of the other catastrophes. We are building most of our housing outside denser urban areas—increasing vehicle miles travelled for those seeking shelter—and on lands that sequester CO2, both of which worsen climate change.[2] We cannot prevent gentrification induced displacement of lower-income households without affordable housing

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[1] John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENV'T L. REV. 821, 829–32 (2006), https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1098&context=pelr.

[2] *Rethinking Urban Sprawl: Moving Towards Sustainable Cities*, OECD 6, 11 (June 2018), https://www.oecd.org/environment/tools-evaluation/Policy-Highlights-Rethinking-Urban-Sprawl.pdf.

needed to address racial inequity.[3] Placing most of our housing in *greenfields* increases the exodus of residents from cities in response to COVID-19 and its variants.[4]

The reciprocal impacts of these four pandemics are clear; local land use leaders should examine how mitigating one issue can ameliorate the others. The critical public health threat of these four pandemics is a central concern for local leaders—they are called upon to react quickly to issues that move slowly through the state and federal policy reform processes. Local engagement with these problems and local need for technical and financial support put positive pressure on officials at higher governmental levels to respond more quickly.

Even since 2020, we have seen an influx of state and local responses to the housing crisis. While efforts continue to require and incentivize new housing developments to include affordable housing, we have witnessed a sea change in our understanding of single-family zoning and focused on the potential to develop more dwelling units (for example, by allowing small-scale development of accessory dwelling units and multifamily residences in single-family zones).[5] Familiar tools such as infill development and adaptive reuse are also being employed to allow mixed-use development, including multifamily housing.[6] The increase in homelessness in many markets is fueling interest in supportive housing, in lieu of shelters, as a more

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[3] Sandra Feder, *Stanford Professor's Study Finds Gentrification Disproportionately Affects Minorities*, STAN.: NEWS (Dec. 1, 2020), https://news.stanford.edu/2020/12/01/gentrification-disproportionately-affects-minorities/.

[4] U.S. EPA, RESIDENTIAL CONSTRUCTION TRENDS IN AMERICA'S METROPOLITAN REGIONS: 2012 EDITION iii (2012), https://www.epa.gov/sites/default/files/2014-03/documents/residential_construction_trends.pdf.

[5] Robert Liberty, *3 Zoning Changes That Make Residential Neighborhoods More Affordable*, PLAN. MAG. (Feb. 1, 2021), https://www.planning.org/planning/2021/winter/3-zoning-changes-that-make-residential-neighborhoods-more-affordable/.

[6] OFF. OF SUSTAINABLE CMTYS., U.S. EPA, EPA 230-R-15-001, ATTRACTING INFILL DEVELOPMENT IN DISTRESSED COMMUNITIES: 30 STRATEGIES 1, 6 (2015), https://www.epa.gov/sites/default/files/2015-05/documents/fresno_final_report_042215_508_final.pdf.

effective solution.[7] These new strategies help address the tragedy of displacing lower-income households due to gentrification.

This Article is an early response emanating from the Land Use Law Center's Land Use, Human Health, and Equity Project that addresses four pandemics plaguing public health: COVID-19, housing insecurity, racial inequity, and climate change. Pandemics are commonly understood to refer to infectious diseases, but the Land Use, Human Health, and Equity Project uses the term to refer to catastrophes significantly affecting public health.[8]

This is not the first, nor is it the last, reference to a pandemic that is not explicitly disease-related; for example, headlines frequently refer to the "opioid epidemic." The widespread nature of the housing insecurity crisis, in combination with its harmful effects on public health, allow the use of "pandemic" as a descriptor. New York City declared racism a public health emergency in October 2021.[9] These pandemics are regarded and responded to locally because they are local hazards that pose extraordinary health risks.

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[7] *See Permanent Supportive Housing*, NAT'L. ALL. TO END HOMELESSNESS, https://endhomelessness.org/ending-homelessness/solutions/permanent-supportive-housing/ (last updated Mar. 2021) (arguing that "permanent supportive housing a permanent solution to homelessness").

[8] Dara Grennan, *What Is a Pandemic?*, JAMA NETWORK (Mar. 5, 2019) https://jamanetwork.com/journals/jama/fullarticle/2726986; *see, e.g.*, *WHO Characterizes COVID-19 as a Pandemic*, PAN AM. HEALTH ORG., https://www3.paho.org/hq/index.php?option=com_content&view=article&id=15756:who-characterizes-covid-19-as-a-pandemic&Itemid=1926&lang=en (last visited May 16, 2022); *'We Are Living in a Racism Pandemic,' Says APA President*, AM. PSYCH. ASS'N (May 29, 2020), https://www.apa.org/news/press/releases/2020/05/racism-pandemic; *Housing, a Crucial Determinant of Health*, GREENLAW: BLOG OF THE PACE ENV'T L. PROGRAMS, PACE UNIV. SCH. OF L. (Aug. 12, 2021), https://greenlaw.blogs.pace.edu/2021/08/12/housing-a-crucial-determinant-of-health/; Bruce Jennings, *The COVIDs of Our Climate*, CTR. FOR HUMS. & NATURE (Mar. 12, 2021), https://humansandnature.org/the-covids-of-our-climate/.

[9] Karen Zraick, *Racism Is Declared a Public Health Crisis in New York City*, N.Y. TIMES (Oct. 19, 2021), https://www.nytimes.com/2021/10/19/nyregion/nyc-racism-healthcare-system.html.

I. HOUSING INSECURITY AND SOCIAL DETERMINANTS OF HEALTH

Housing insecurity is a nationwide crisis. The United States Census Bureau estimates 29.8% of the over 122 million households in the United States are cost-burdened, spending 30% or more of their monthly income on housing.[10] Equaling over 36 million households, this is a problem a large portion of Americans face.[11] The limited supply of housing is contributing to this national problem. The available housing stock is dwindling, with the 2010s seeing the fewest houses built in the United States of any decade since the 1960s.[12] The National Association of Realtors estimates that the housing supply is 5.5 million units short of meeting long-term demand.[13] There are few housing units available to meet the growing needs of the United States' changing demographics. The Census Bureau projects that the United States population will increase by 65 million by 2050, further exacerbating the supply-and-demand imbalance.

In 2019, 46% of renters were cost-burdened and 24% were severely cost-burdened.[14] While this weighs on all, the burden falls

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[10] *See American Community Survey: S2503 Financial Characteristics*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=housing%20United%20States&tid=ACSST1Y2019.S2503 (last visited May 16, 2022) (aggregating percentages of households across all income categories which spent 30% or more of their monthly income on housing in 2019).

[11] *Id.*

[12] Jerusalem Demsas, *COVID-19 Caused a Recession. So Why Did the Housing Market Boom?*, VOX (Feb. 5, 2021), https://www.vox.com/22264268/covid-19-housing-insecurity-housing-prices-mortgage-rates-pandemic-zoning-supply-demand.

[13] KENNETH T. ROSEN ET AL., HOUSING IS CRITICAL INFRASTRUCTURE: SOCIAL AND ECONOMIC BENEFITS OF BUILDING MORE HOUSING iv (Rosen Consulting Grp. ed., June 2021), https://cdn.nar.realtor/sites/default/files/documents/Housing-is-Critical-Infrastructure-Social-and-Economic-Benefits-of-Building-More-Housing-6-15-2021.pdf.

[14] *2020 State of the Nation's Housing Report*, HABITAT FOR HUMANITY: COST OF HOME, https://www.habitat.org/costofhome/2020-state-nations-housing-report-lack-affordable-housing (last visited May 16, 2022).

more heavily on minority groups.[15] The National Low Income Housing Coalition estimates that "[t]hirty-eight percent of AIAN [American Indian or Alaska Native] renter households, 35% of black renter households, and 28% of Hispanic households have extremely low incomes, compared to 22% of white non-Hispanic households."[16] These disproportionate impacts of the housing crisis highlight the need for a greater supply of affordable housing.

The United States is in the midst of a significant demographic shift. In contrast to the mid-late twentieth century's nuclear family, one in four households today is a single-person household.[17] One in three adults has never married.[18] The birth rate is dropping.[19] All of these factors contribute to the increasing need for housing variety. The emphasis of historical zoning practices on single-family zones greatly limits the production of different types of housing.

Housing quality, stability, and affordability all play a substantial role in human health. Housing insecurity is "associated with increased adjusted odds of adverse health and material hardship compared with stable housing."[20] Poor-quality housing plays a substantial role in infectious diseases, chronic illnesses, injuries, poor

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[15] JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 2021, 1, 35 (Marcia Fernald ed., 2021), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2021.pdf.

[16] AURAND ET AL., NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 10 (2019), https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2019.pdf.

[17] David Brooks, *The Nuclear Family Was a Mistake*, ATLANTIC, Mar. 2020, https://www.theatlantic.com/magazine/archive/2020/03/the-nuclear-family-was-a-mistake/605536/; Samuel Stebbins, *Here Are the Cities Where the Most People Live Alone*, USA TODAY: MONEY (Nov. 2, 2018), https://www.usatoday.com/story/money/personalfinance/2018/11/02/cities-where-the-most-people-live-alone/38255689/.

[18] Stebbins, *supra* note 17.

[19] Sabrina Tavernise, *The U.S. Birthrate Has Dropped Again. The Pandemic May Be Accelerating the Decline*, N.Y. TIMES (May 5, 2021), https://www.nytimes.com/2021/05/05/us/us-birthrate-falls-covid.html.

[20] Megan Sandel et al., *Unstable Housing and Caregiver and Child Health in Renter Families*, 141 PEDIATRICS 1, 7 (2018).

nutrition, and mental disorders.[21] Experts typically examine healthy housing in quality, stability, and affordability categories.[22] Quality, for example, substantially impacts physical health.[23] Approximately 24 million housing units—4 million of which house children—contain significant amounts of lead-based paint.[24] Lead exposure can cause damage to organs and impair cognitive and socioemotional development.[25] It can also lead to lower IQ and test scores, and in severe cases, coma and death.[26] Additionally, poor housing quality is strongly and independently associated with asthma.[27] Instability, on the other hand, negatively impacts the emotional, behavioral, and academic success in children; in teens, it is related to increased risk of

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[21] James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758, 758–59 (2002).

[22] Lauren Taylor, *Housing and Health: An Overview of the Literature*, HEALTH AFFS. (June 7, 2018), https://www.healthaffairs.org/do/10.1377/hpb20180313.396577/full/ (adding neighborhood as a fourth pathway, where research suggests health correlates with broader access to public transport, grocery stores, green spaces, and safe spaces for exercise); Milwaukee Habitat for Humanity, *Housing as a Prescription for Children's Health – Dr. Megan Sandel*, YOUTUBE (May 8, 2019), https://www.youtube.com/watch?v=5TZtRhkfYtU.

[23] Taylor, *supra* note 22 (finding that poor housing safety and quality can lead to irreversible damage from lead poisoning, asthma, adverse cardiovascular events, infectious disease, and psychological distress); Milwaukee Habitat for Humanity, *supra* note 22 (citing research suggesting people who move multiple times, are behind on rent, or experience homelessness demonstrate greater levels of maternal depression, food insecurity, energy insecurity, health care trade-offs, and poor child health).

[24] JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *supra* note 15, at 35.

[25] *About Lead-Based Paint*, U.S. DEP'T OF HOUS. & URBAN DEV., https://www.hud.gov/program_offices/healthy_homes/healthyhomes/lead (last visited May 16, 2022).

[26] *See generally* Kim T. Ferguson et al., *The Physical Environment and Child Development: An International Review*, 48 INT'L J. PSYCH. 437, 437–68 (2013) (discussing various studies documenting a relationship between body lead level burdens and IQ reductions, which holds true even when controlling for other factors like social class); *see also Lead Poisoning*, WORLD HEALTH ORG. (Oct. 11, 2021), https://www.who.int/en/news-room/fact-sheets/detail/lead-poisoning-and-health (explaining that severe exposure to lead attacks the brain and the central nervous system, causing intellectual disability and behavioral disorders).

[27] Helen K. Hughes et al., *Pediatric Asthma Health Disparities: Race, Hardship, Housing, and Asthma in a National Survey*, 17 ACAD. PEDIATRICS 127, 128 (2017).

teen pregnancy, early drug use, and depression.[28] In adults, longer residence is associated with lower levels of depression.[29] Relatedly, affordability significantly impacts both physical and mental health. When households face high housing costs, they often make cuts to other budget areas, including child-enrichment activities, medical care and filling prescriptions, and food.[30] One survey even found that homeowners in default or foreclosure were 13 times more likely to suffer from serious psychological distress compared to homeowners with no housing strain.[31]

When a lack of affordable housing forces people to the street, they also face negative health impacts. Unhoused individuals face shorter life expectancies, higher rates of traumatic brain injuries, disproportionate risk of morbidity, and greater risk of physical and sexual violence.[32] Housing is a crucial determinant of health. "[H]ousing is the first rung on the ladder [of] economic

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[28] PAULA BRAVEMAN ET AL., ROBERT WOOD JOHNSON FOUND., EXPLORING THE SOCIAL DETERMINANTS OF HEALTH: HOUSING AND HEALTH 5 (2011), https://www.rwjf.org/content/dam/farm/reports/issue_briefs/2011/rwjf70451.

[29] *See id.* at 6 (reporting that adults who obtained housing in low-poverty areas experienced significant improvements in neighborhood satisfaction and lower rates of psychological distress and depression).

[30] *See* SANDRA J. NEWMAN & C. SCOTT HOLUPKA, MACARTHUR FOUND., AFFORDABLE HOUSING IS ASSOCIATED WITH GREATER SPENDING ON CHILD ENRICHMENT AND STRONGER COGNITIVE DEVELOPMENT 1–2 (July 2014), https://www.macfound.org/media/files/hhm_-_affordable_housing_-_stronger_cognitive_development.pdf (explaining that housing costs are inversely related to spending on child enrichment activities); Craig E. Pollack et al., *Housing Affordability and Health Among Homeowners and Renters*, 39 AM. J. PREVENTIVE MED. 515, 515–16, 519 (2010).

[31] Carolyn C. Cannuscio et al., *Housing Strain, Mortgage Foreclosure, and Health*, 60 NURSING OUTLOOK 134, 138 (2012).

[32] David L. Maness & Muneeza Khan, *Care of the Homeless: An Overview*, 89 AM. ACAD. FAM. PHYSICIANS 634, 634–36 (2014); Colette L. Auerswald et al., *Six-Year Mortality in a Street-Recruited Cohort of Homeless Youth in San Francisco, California*, PEERJ 8 (Apr. 14, 2016), https://peerj.com/articles/1909.pdf; Lisa Goodman et al., *No Safe Place: Sexual Assault in the Lives of Homeless Women*, VAWNET 1–3 (Sept. 2006), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SAHomelessness.pdf.

opportunity . . . ."[33] In youth, stable housing is related to higher educational attainment and greater test scores.[34] Housing near high-performing schools is 2.4 times more expensive than housing near low-performing schools, tying housing affordability into the educational success of residents.[35] Redlining has forced minority communities into less economically developed areas and compounded the health risks they face—housing affordability is therefore an important factor in determining the social, academic, and economic outcomes for those communities. While also improving the socioeconomic health of municipalities, affordable housing solutions counteract the effects of racial inequity on public health, educational attainment, and more.

II. TRADITIONAL AFFORDABLE HOUSING

The vocabulary of affordable housing, for the purpose of this Article, is as follows. *Affordable housing* refers to dwelling units that rent or sell for below-market prices.[36] The U.S. Department of Housing and Urban Development (HUD) defines affordable housing with reference to area median income (AMI) and focuses subsidy programs on housing for households earning at or below 80% of the AMI so the housing can be afforded using 30% or less of the household income.[37] *Exclusionary zoning* refers to restrictions in local land use laws that are unconstitutional because they prevent private developers from building the types of housing that can be made available at below-market prices.[38] The term generally is associated with judicial

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[33] Veronica Gaitán, *How Housing Can Determine Educational, Health, and Economic Outcomes*, HOUS. MATTERS (Sept. 19, 2018), https://housingmatters.urban.org/research (search "Veronica Gaitán"; then select "How Housing Can Determine Education, Health, and Economic Outcomes").
[34] *Id.*
[35] *Id.*
[36] Matthew Yglesias, *Everything You Need to Know About the Affordable Housing Debate*, VOX (May 11, 2015), https://www.vox.com/2014/4/10/18076868/affordable-housing-explained.
[37] *Understanding Affordable Housing*, E. BAY HOUS. ORGS., https://ebho.org/resources/what-is-affordable-housing/ (last visited May 16, 2022).
[38] Cecilia Rouse et al., *Exclusionary Zoning: Its Effect on Racial Discrimination in*

decisions in very few states requiring local governments to amend their zoning codes to require more types of buildings, such as multifamily structures.[39] *Inclusionary zoning* is defined as any effort taken by a municipality to amend land use laws to provide any type of housing that is affordable.[40] Exclusionary zoning decisions required defendant municipalities to adopt inclusionary zoning measures.[41]

Affordable housing is the crux of the housing insecurity crisis. There are not enough affordable units to meet the needs of the country's growing lower and middle classes, changing demographic groups, and expanding cost-burdened population. There are several land-use solutions to address affordable housing head-on.

A. Mandatory Affordable Housing

Mandatory affordable housing ordinances require private market residential developments to include a certain percentage of affordable units for low- and moderate-income households as a condition of approval.[42] For example, Burlington, Vermont passed an ordinance applicable to any development of five or more dwelling units.[43] Escalating with the price of the housing to be developed, projects must contain 15, 20, or 25% of the AMI.[44]

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the Housing Market, WHITE HOUSE: BLOG (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/.

[39] *See generally* John R. Nolon, *A Comparative Analysis of New Jersey's* Mount Laurel *Cases with the* Berenson *Cases in New York*, 4 PACE ENV'T L. REV. 3, 3–5, 7, 23 (1986).

[40] *HUD Archives: Glossary of Terms to Affordable Housing*, U.S. DEP'T OF HOUS. & URB. DEV., https://archives.hud.gov/local/nv/goodstories/2006-04-06glos.cfm (last visited May 16, 2022).

[41] Brian R. Lerman, *Mandatory Inclusionary Zoning—The Answer to Affordable Housing Problem*, 33 B.C. ENV'T AFFS. L. REV. 383, 387 (2006), https://center4affordablehousing.org/wp-content/uploads/2019/08/Mandatory-Inclusionary-Zoning-The-Answer-to-Affordable-Housing-P.pdf.

[42] *Mandatory Inclusionary Housing*, N.Y.C. COUNCIL, https://council.nyc.gov/land-use/plans/mih-zqa/mih/ (last visited May 16, 2022).

[43] BURLINGTON, VT., CODE OF ORDINANCES § 9.1.5 (2019).

[44] *Id.* § 9.1.8.

Inclusionary zoning ordinances can be intricate and raise constitutional questions about their validity. In response to a citywide affordable housing shortage, San Jose, California adopted an inclusionary zoning ordinance—with several requirements, options, and incentives—which was challenged in state court by a building industry group.[45] The affordable housing requirement applies to all residential developments within the City that create 20 or more dwelling units; the ordinance contains the following additional provisions:

- "[Fifteen] percent of the proposed on-site for-sale units in the development shall be made available at an 'affordable housing cost' to households earning no more than 120 percent of the area median income for Santa Clara County adjusted for household size."[46]
- The ordinance provides alternative compliance options. When an option is elected by the developer, "the inclusionary housing requirement increases to no less than 20 percent of the total units in the residential development."[47] The options available to the developer are:
  "(1) constructing off-site, affordable, for-sale units";
  "(2) paying an in-lieu fee based on the median sales price of a housing unit affordable to a moderate-income family";
  "(3) dedicating land equal in value to the applicable in-lieu fee"; or
  "(4) acquiring and rehabilitating a comparable number of inclusionary units that are affordable to low or very low income households."[48]
- The ordinance provides several incentives to build on-site, including:

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[45] *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 978, 1006 (Cal. 2015) (holding that requiring a developer to sell 15% of their for-sale units at affordable housing price was not a taking).
[46] *Id.* at 983.
[47] *Id.*
[48] *Id.*

> (1) an increase in the number of dwelling units allowed under the zoning bonus;
> (2) a reduction in the number of parking spaces required under other ordinances;
> (3) reduced minimum set-back requirements; and
> (4) assistance and monetary subsidies from the city government for the sale of the affordable housing units.[49]

The plaintiff builders' association charged that this mandatory, city-wide affordable housing requirement violated the takings clause of the California and federal constitutions and should be considered an exaction that requires analysis under the unconstitutional conditions doctrine.[50] The California Supreme Court disagreed. As the requirement offered developers two options, the court held that the provision was a valid land use regulation within the scope of a local government's police power.[51] The U.S. Supreme Court denied plaintiff's request to review the decision.[52]

B. Incentives for Affordable Housing

Some inclusionary zoning ordinances are not mandatory, but provide incentives to encourage developer buy-in. Mandatory approaches—like San Jose's—can encourage developers to provide more affordable, or less expensive units. These ordinance approaches include height, density, floor-area ratio, and parking bonuses, among others.[53] For example, in Pinellas County, Florida where 20% of units must be affordable to households at or below 60% of the AMI, numerous incentives are provided to developers, such as: expedited

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[49] *Id.* at 983–84.
[50] *Id.*at 978.
[51] *Id.* at 979.
[52] *Id.*, *cert. denied*, 577 U.S. 1179, 1179 (2016).
[53] Heidi Desch, *Whitefish Looks to Make Affordable Housing Program Voluntary*, WHITEFISH PILOT (June 23, 2021), https://whitefishpilot.com/news/2021/jun/23/whitefish-looks-make-affordable-housing-program-vo/ (providing an example of voluntary incentives for developers, including "a reduction in the minimum lot size, an increase in density, a reduction in minimum lot width and an increase in the maximum lot coverage").

permit processing, review fee relief, reduced parking requirements, housing permitted in commercial zones, donation of publicly owned land, identification of qualified renters or buyers, density bonuses, permitted accessory uses, reduced setback requirements, street design modifications, and zero lot lines.[54] These incentives are designed to make the more restrictive requirements financially palatable. Similarly, Chipley, Florida grants density bonuses of up to 25% when affordable units are included in housing developments.[55] The units must remain affordable for 30 years and have an annual rent at 33% of the AMI.[56]

C. Off-Site and Buy-Out Options

Off-site and buy-out options are used where affordable units in the development itself are impossible or impractical.[57] In Chapel Hill, North Carolina, developers may utilize a number of off-site and buy-out options in lieu of developing affordable units.[58] These options include land dedication, existing unit dedication, applicant-proposed alternatives, payment in lieu of affordable housing units, and more.[59] The city determines whether affordable housing goals are better achieved with these alternatives.[60]

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[54] PINELLAS CNTY. PLAN. DEP'T, AFFORDABLE HOUSING OFFERED THROUGH THE PINELLAS COUNTY LAND DEVELOPMENT CODE, https://www.pinellascounty.org/community/pdf/AffordableHousingGuide.pdf (last visited May 16, 2022).

[55] CHIPLEY, FLA., CODE OF ORDINANCES § 44-125(c)(1) (2021).

[56] *Id.*§§ 44-125(d)(2)(b), 44-125(d)(4)(a).

[57] *Build Affordable Housing in All Communities Across the Region*, THE FOURTH REGIONAL PLAN, http://fourthplan.org/action/affordable-housing-everywhere (last visited May 16, 2022).

[58] Chapel Hill, N.C., Ordinance Amending the Chapel Hill Land Use Management Ordinance to Establish Inclusionary Zoning Regulations for Residential Development §§ 1–2 (June 21, 2010), https://www.townofchapelhill.org/home/showpublisheddocument/6988/635485371912800000 (amending § 3.10.3(d) of the prior Chapel Hill Land Use Ordinance to provide alternatives for complying with the requirement that residential developers devote 15% of units in developments of five or more to be affordable for low- and moderate-income households).

[59] *Id.* § 2 (amending § 3.10.2(d) of the prior Chapel Hill Land Use Ordinance).

[60] *Id.* (amending § 3.10.3(b) of the prior Chapel Hill Land Use Ordinance).

III. OTHER AFFORDABLE HOUSING STRATEGIES

A. Flexible Large-Scale Multifamily Housing

The most straightforward of inclusionary zoning techniques is to zone more land for multifamily development and provide leeway to developers incorporating mixed-use, infill, or other creative designs. Flexible large-scale, multifamily housing is implemented to create greater multifamily housing stock. Portland, Oregon, for example, amended its zoning code to provide more density through expanded Floor Area Ratio (FAR) provisions, flexibility for the required number of units, bonuses for affordable housing development, and set more liberal development standards for formerly redlined neighborhoods.[61] It designates Neighborhood, Corridor, and Urban Center multifamily zones, allowing for different scales of multifamily development in each zone according to the context.[62]

B. Floating Zones

A *floating zone* is a district in the zoning code that "floats" above the existing zoning districts; it is not applied to any parcel upon creation.[63] The floating zone does not apply to a parcel until an application is made and approved. Once approved, the zoning map is updated, applying the floating zone to the parcel.[64] For example, New Rochelle, New York established a Planned Unit Development (PUD) floating zone that may apply to a parcel if it is located in both a designated higher density residential area and an urban renewal area.[65] This area may include residential, medical, and accessory uses.[66] The units must be affordable.[67] Once a parcel meets these criteria and the

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[61] PORTLAND, OR., ZONING CODE §§ 33.120.210–33.120.213 (2021).
[62] *See id.* §§ 33.120.030(A)–(E) (describing the characteristics of the various zones).
[63] Dorothy Ariail, *Property Topics and Concepts*, AM. PLAN. ASS'N (2007), https://www.planning.org/divisions/planningandlaw/propertytopics.htm.
[64] *Id.*
[65] NEW ROCHELLE, N.Y., ZONING CODE art. X, § 331-80(B) (2022).
[66] *Id.* §§ 331-80(E)(1)–(2).
[67] *Id.* § 331-80(E)(6).

floating zone is approved, the parcel is now officially in the PUD zone.[68]

C. Overlay Zones

An *overlay zone* is a district that may be applied to preexisting districts and impose additional restrictions or requirements.[69] The requirements can reflect conservation, development, or affordability goals, among other things.[70] Denver, Colorado, for example, enacted an affordable housing bonus overlay zone to encourage affordable development within a certain area.[71] In Denver, roughly one in three households are cost-burdened and one in five are severely cost-burdened.[72] The city estimates that 99,722 affordable units are needed to meet the affordable housing demand.[73] In response, Denver created an overlay zone that allows for a bonus of up to double the height when affordable units are provided.[74]

D. Infill Development

Infill development refers to developing on vacant or underused land in areas that have already been developed to a fair extent.[75] A broader definition refers to any development within cities that provide

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[68] *Id.* §§ 331-80(F)–(G).
[69] CTR. FOR LAND USE EDUC., PLANNING IMPLEMENTATION TOOLS: OVERLAY ZONING 1 (2005), https://www.uwsp.edu/cnr-ap/clue/documents/planimplementation/overlay_zoning.pdf.
[70] *Id.*
[71] CITY OF DENVER, AFFORDABLE HOUSING ZONING INCENTIVE 16 (Mar. 18, 2020), https://wp-denverite.s3.amazonaws.com/wp-content/uploads/sites/4/2020/08/Affordable_Housing_Zoning_Incentive_Background_Report.pdf.
[72] *Id.* at 11.
[73] *Id.*
[74] *Id.* at 16.
[75] Tyler Adams, *Encourage Infill Development*, SUSTAINABLE DEV. CODE: CHAPTER 3.2 DEV. DENSITIES (Jonathan Rosenbloom & Christopher Duerksen eds.), https://sustainablecitycode.org/brief/encourage-infill-development-2/ (last visited May. 16, 2022).

most of the infrastructure that new development needs.[76] Using the more focused definition for this Article, we identified land use law reform that provides much more flexible zoning provisions to allow and incentivize developing vacant or underused land.[77] By pursuing infill development, a municipality may increase housing stock and provide needed missing middle housing options.

Tacoma, Washington launched the Residential Infill Pilot Program 2.0 to address housing through infill development.[78] The program allows Planned Infill housing in single-family zoning districts, two-family or townhouse development, small-scale multifamily development, and cottage housing across five council districts.[79] Montpelier, Vermont amended its zoning code to create a mixed-use residential district to promote infill while also maintaining community character.[80] This technique allows for much of the zoning code, and therefore community, to remain the same while certain aspects are changed to promote missing middle development.[81] The city targets affordable housing as a major factor in this development.[82] Similarly, the Bellingham, Washington city code includes a chapter to implement goals related to infill development.[83] This infill development is permitted in all zones except single-family.[84] It sets

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[76] *Id.*

[77] *See* CITY OF TACOMA, RESIDENTIAL INFILL PILOT PROGRAM 2.0 1 (Dec. 2020), https://www.cityoftacoma.org/UserFiles/Servers/Server_6/File/cms/Planning/Residential%20Infill%20Pilot%20Program/Handbook%202020.pdf.

[78] *Id.*; TACOMA, WASH., LAND USE REGUL. CODE § 13.05.060 (Jan. 2022), https://www.cityoftacoma.org/UserFiles/Servers/Server_6/File/cms/cityclerk/Files/MunicipalCode/Title13-LandUseRegulatoryCode.pdf.

[79] CITY OF TACOMA, *supra* note 77.

[80] MONTPELIER VT., UNIFIED DEV. REGULS. § 2107.A (Feb. 24, 2021).

[81] *See Missing Middle Housing*, MISSING MIDDLE HOUS., https://missingmiddlehousing.com (last visited May 16, 2022) (defining missing middle housing as "a range of house-scale buildings with multiple units—compatible in scale and form with detached single-family homes—located in a walkable neighborhood").

[82] MONTPELIER, VT., UNIFIED DEV. REGULS. § 3401.A.

[83] BELLINGHAM, WASH., MUN. CODE § 20.28.010 (2021).

[84] *Id.* § 20.28.020.

flexible site size, setback, parking, and open space requirements for each type of multifamily development.[85]

Infill can also benefit the environment by "helping to protect lands . . . and reducing greenhouse gas emissions."[86] This is particularly true with the more expansive definition of infill, as that which takes place in more highly developed cities thereby responding to market demands that otherwise would be fulfilled in suburban and more remote greenfields.[87]

E. Adaptive Reuse

Finding new uses for underutilized buildings through adaptive reuse[88] can help:

- Remove blighted properties and the accompanying crime from communities,
- Preserve natural resources and the environment
- Pursue historic preservation, and
- Protect important intangibles like the community's sense of place.[89]

While older buildings, underutilized structures, and vacant lots can be detrimental, they can also provide opportunity for creative re-

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[85] *Id*. § 20.28.050.

[86] U.S. EPA, SMART GROWTH AND ECONOMIC SUCCESS: INVESTING IN INFILL DEVELOPMENT 1 (2014), https://www.epa.gov/sites/default/files/2014-06/documents/developer-infill-paper-508b.pdf.

[87] *Infill Development*, MUN. RSCH. & SERVS. CTR. OF WASH. (MRSC) (Jan. 6, 2022), https://mrsc.org/home/explore-topics/planning/development-types-and-land-uses/infill-development-completing-the-community-fabric.aspx.

[88] Sophie F. Cantell, The Adaptive Reuse of Historic Industrial Buildings: Regulation Barriers, Best Practices and Case Studies 2 (May 2005) (M.A. thesis, Virginia Polytechnic Institute and State University) (on file with the Virginia Polytechnic Institute and State University).

[89] Jonathan Cote, Recycling America: Adaptive Reuse in the 21st Century 1 (2013) (white paper, Duke Law School) (on file with Duke Law School), https://law.duke.edu/sites/default/files/clinics/cec/boudreau.pdf.

imagining of spaces.[90] "Reuse strengthens a community feel by positively linking a city's past to its future, and offering cheap and robust infrastructure to emerging needs, which can spark wholesome renewal processes."[91] Adaptive reuse can be a tool to promote affordable housing.[92]

Municipalities should consider amending their zoning ordinances to allow for more adaptive reuse in their towns and communities.[93] A strong adaptive reuse ordinance (ARO) was enacted in Santa Ana, California.[94] The ordinance allows for the adaptive reuse of nonresidential buildings to residential units in four designated "project incentive area[s]," if the building was either "constructed in accordance with building and zoning codes in effect prior to July 1, 1974" or "has been determined to be a historically significant building."[95] One noteworthy development resulting from the ordinance is the Santa Ana Arts Collective, a former bank which has been converted into affordable artist housing containing "58 studios and

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[90] *See* Stefanie Waldek, *Explore 10 of the Coolest Adaptive Reuse Projects Across America*, ARCHITECTURAL DIG. (May 27, 2020), https://www.architecturaldigest.com/story/michel-arnaud-adaptive-reuse-projects (providing photographic examples of creative reimagining of spaces); Jennifer B. Lagdameo, *9 Inspirational Examples of Adaptive Reuse*, DWELL (Feb. 20, 2020), https://www.dwell.com/article/adaptive-reuse-architecture-b383e4b5 (displaying creative ways in which adaptive reuse can transform buildings and outdoor spaces).

[91] Matteo Robligio, *The Adaptive Reuse Toolkit: How Cities Can Turn Their Industrial Legacy into Infrastructure for Innovation and Growth*, GERMAN MARSHALL FUND U.S., no. 38 (2016) 1, 5, https://www.gmfus.org/sites/default/files/Robiglio_AdaptiveReuseToolkit_Sept16_complete.pdf.

[92] Peter S. Reinhart, *Op-Ed: Adaptive Reuse Can Help Towns with Affordable Housing, Property Taxes*, NJ SPOTLIGHT NEWS (Oct. 16, 2014), https://www.njspotlightnews.org/2014/10/14-10-15-op-ed-adaptive-reuse-can-help-municipalities-with-affordable-housing-property-taxes/.

[93] *See Municipal Corner Planning Toolbox: Adaptive Reuse*, CHESTER CNTY. PLAN. COMM'N, https://www.chescoplanning.org/MuniCorner/eTools/02-AdaptiveReuse.cfm (last visited May 16, 2022) (providing an example of a zoning ordinance allowing for adaptive reuse).

[94] SANTA ANA, CAL., ZONING ORDINANCES § 41-1650(2021).

[95] *Id.* § 41-1651(b).

one-, two-, and three-bedroom apartments in the existing building."[96] St. Petersburg, Florida adopted a similar ARO.[97] Los Angeles is considered one of the preeminent adaptive reuse examples, especially downtown Los Angeles where over 14,000 residential units have been created by converting historic and underutilized buildings.[98] Recent initiatives have been proposed in Los Angeles to expand the scope of adaptive reuse and promote housing affordability.[99]

Adaptive reuse is often considered environmentally sustainable. It can help foster community density and fight urban sprawl, and some older buildings are built with seasoned materials that are often better quality and not even available today.[100] One report found that "[b]uilding reuse almost always yields fewer environmental impacts than new construction when comparing buildings of similar size and functionality," and "that it takes 10 to 80 years for a new building that is 30 percent more efficient than an average-performing existing building to overcome, through efficient operations, the

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[96] Tatiana Walk-Morris, *How Adaptive Reuse Can Help Solve the Housing Crisis*, AM. PLAN. ASS'N (May 1, 2021), https://www.planning.org/planning/2021/spring/how-adaptive-reuse-can-help-solve-the-housing-crisis/.

[97] *See* ST. PETERSBURG, FLA., LAND DEV. REGULS. § 16.30.020.2 (2022) (denoting common purpose and features in the St. Petersburg ordinance to the Santa Ana ordinance).

[98] PRESERVATION GREEN LAB, NAT'L TRUST FOR HIST. PRES., UNTAPPED POTENTIAL: STRATEGIES FOR REVITALIZATION AND REUSE 35 (2017), https://ohp.parks.ca.gov/pages/1054/files/Untapped%20Potential%20Green%20Lab%20ULI.pdf.

[99] *The Adaptive Reuse of Commercial Space as Housing in California*, POL'Y DEV. & RSCH. EDGE (Mar. 7, 2022), https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-030822.html.

[100] Ennis Davis, *Ten Benefits of Adaptive Reuse*, MODERN CITIES (July 9, 2019), https://www.moderncities.com/article/2019-jul-ten-benefits-of-adaptive-reuse; Sara B. McLaughlin, Large Scale Adaptive Re-Use: An Alternative to Big-Box Sprawl 73–74, 93 (Jan. 2008) (M.S. thesis, University of Pennsylvania) (on file at https://repository.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1112&context=hp_theses); Jackie Craven, *Giving Old Buildings New Life Through Adaptive Reuse*, THOUGHTCO. (Aug. 29, 2019), https://www.thoughtco.com/adaptive-reuse-repurposing-old-buildings-178242.

negative climate change impacts related to the construction process."[101]

The potential for reuse to fight housing insecurity was explored as a necessary public health resource during the COVID-19 crisis. California, Oregon, Vermont, and Hennepin County, Minnesota—which includes Minneapolis—all took steps to house unhoused individuals in rehabilitated hotels, motels, and other structures that could quickly be converted into non-congregate housing and eventually permanent housing.[102] California had great success with these conversions, starting with Project Roomkey which allowed the use of federal funds to acquire hotel rooms to provide non-congregate shelter for unhoused people to prevent the spread of COVID-19.[103] The success of Roomkey prompted the creation of Homekey, which followed a similar template but was broadened towards creating permanent housing.[104] Homekey allocated $846 million, combining federal and state funds, to allow for the purchase and conversion of hotels and other structures into supportive and affordable housing.[105]

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[101] PRESERVATION GREEN LAB, NAT'L TRUST FOR HIST. PRES., THE GREENEST BUILDING: QUANTIFYING THE ENVIRONMENTAL VALUE OF BUILDING REUSE vi, viii (2011).

[102] *Project Roomkey/Housing and Homelessness COVID Response,* CAL. DEP'T OF SOC. SERVS., https://www.cdss.ca.gov/inforesources/cdss-programs/housing-programs/project-roomkey (last visited May 16, 2022); MARY TINGERTHAL, NAT'L ALL. TO END HOMELESSNESS, PROJECT TURNKEY: OREGON'S STATEWIDE HOTELS-TO-HOUSING INITIATIVE 1 (2021); MARY TINGERTHAL, NAT'L ALL. TO END HOMELESSNESS, VERMONT HOUSING & CONSERVATION BOARD CORONAVIRUS RELIEF FUND: VERMONT'S STATEWIDE INITIATIVE 1 (2021); *COVID-19 Community Incentives*, HENNEPIN CNTY. MINN., https://www.hennepin.us/residents/emergencies/covid-19 (last visited May 16, 2022); *It Works: Converting Motels and Hotels into Affordable Housing*, NAT'L HOUS. CONF. (June 17, 2021), https://nhc.org/event/it-works-converting-motels-and-hotels-into-affordable-housing/; *How it Works: Financing and Servicing of Motel and Hotel Conversions (Part II)*, NAT'L HOUS. CONF. (July 21, 2021), https://nhc.org/event/how-it-works-financing-and-servicing-of-motel-and-hotel-conversions-part-ii/.

[103] *Project Roomkey/Housing and Homelessness COVID Response*, *supra* note 102.

[104] *Background*, CA.GOV: HOMEKEY, https://homekey.hcd.ca.gov/content/background (last visited May 18, 2022).

[105] MARY TINGERTHAL, NAT'L ALL. TO END HOMELESSNESS, HOMEKEY: CALIFORNIA'S STATEWIDE HOTELS-TO-HOUSING INITIATIVE 1 (2021).

Between July and December of 2020, California was able to "create more than 6,000 housing units in 94 separate properties, 5,000 of which are destined to become permanent housing units."[106] In addition to the speed, the average cost of Homekey conversions was $129,254 per unit, compared to "the typical cost per unit to develop new housing in California rang[ing] from roughly $380,000–$570,000."[107] One of the keys to Homekey's success was a provision in the statute which allowed Homekey projects as-of-right in whatever zone the purchased property sat in without further review.[108]

IV. REFORMING SINGLE-FAMILY ZONING

A. Missing Middle

Missing Middle Housing is a range of mid-cost, multi-family units that provide housing for a variety of income levels.[109] The zones in which missing middle is implemented permits two-, three-, and four-family housing and smaller-scale multifamily buildings to provide the variety of housing choices called for by the country's changing demographics.[110] It is a "range of house-scale buildings with multiple units—compatible in scale and form with detached single-family

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[106] *Id.*

[107] CAL. DEP'T OF HOUS. & CMTY. DEV., HOMEKEY: A JOURNEY HOME 8 (Apr. 1, 2021), https://www.hcd.ca.gov/policy-research/plans-reports/docs/hcd100_homekeyreport_v18.pdf.

[108] *See* LAND USE L. CTR., PACE UNIV. SCH. OF L., BEGINNER'S GUIDE TO LAND USE LAW 6, 42 (defining *as-of-right* as those which "are permitted as the principal and primary uses of land"), https://law.pace.edu/sites/default/files/LULC/LandUsePrimer.pdf; Anne Olson, *Old Tools to Fight Housing Insecurity: Adaptive Reuse and Infill Development*, GREENLAW: BLOG OF THE PACE ENV'T L. PROGRAMS, PACE UNIV. SCH. OF L. (Aug. 25, 2021), https://greenlaw.blogs.pace.edu/2021/08/25/old-tools-to-fight-housing-insecurity-adaptive-reuse-and-infill-development/.

[109] *What Is Missing Middle Housing?*, MISSING MIDDLE HOUS., https://missingmiddlehousing.com/about (last visited May 18, 2022).

[110] *Id.*

homes—located in a walkable neighborhood."[111] These units provide housing for young professionals, seniors, and low-to-moderate income individuals.[112] Missing Middle Housing may include duplexes, triplexes, townhomes, tiny homes, small-apartment buildings, and more.[113] Missing Middle Housing addresses the disproportionate effects of the housing insecurity crisis on minority communities while also combating economic disparities between traditional single- and multi-family zones.

One method of creating Missing Middle Housing is to amend current zoning codes to allow mixed-use or Planned Unit Development (PUD) while maintaining single-family zones. Both Auburn, Maine and North Brunswick, New Jersey, have recently amended their zoning codes to allow for PUD to encourage creation of a diverse housing stock, including duplex, triplex, townhouse, and garden-apartment housing.[114] PUDs are overlay districts that often allow mixed-use in an otherwise single-use zone, including residential and commercial units permitted as-of-right.[115] Montpelier, Vermont, also amended its zoning code to create a mixed-use residential district to promote infill development while also maintaining community character.[116] This will allow much of the zoning code, and therefore community, to remain the same while certain aspects are amended to promote Missing Middle Housing development.

Another zoning method to alleviate housing pressures and promote Missing Middle Housing development is to eliminate single-family zones altogether. In Berkeley, California, the zoning code was amended to eliminate all single-family zones and replace them with

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[111] *One House at a Time Project*, WOODSTOCK CMTY. TR. VT., https://www.woodstockcommunitytrust.com/onehouseatatime#:~:text=Missing%20Middle%20Housing%20is%20a,located%20in%20a%20walkable%20neighborhood (last visited May 18, 2022).

[112] MISSING MIDDLE HOUS., *supra* note 109.

[113] *Id.*

[114] AUBURN, ME., CODE OF ORDINANCES § 60-359 (2017); NORTH BRUNSWICK, N.J., NORTH BRUNSWICK TWP. ORDINANCE art. XX, § 205-82 (amended 1985).

[115] S. BURLINGTON PLAN. & ZONING, CITY OF S. BURLINGTON, S. BURLINGTON PUD STRATEGIES: PHASE I PROJECT REPORT 7 (2016).

[116] MONTPELIER, VT., UNIFIED DEV. REGUL. § 2107 (Jan. 3, 2018) (effective Mar. 18, 2021).

multi-family zones, allowing for development of duplexes, triplexes, and fourplexes to alleviate the city's housing strain.[117] Similarly, Accessory Dwelling Units (ADUs) and duplexes are permitted as-of-right in all residential zones in Olympia, Washington, while cottage houses, triplexes, fourplexes, and townhouses are permitted as-of-right in most residential zones.[118] Both of these jurisdictions have successfully updated their zoning codes and exemplify the steps municipalities can take to address the affordable housing pandemic.

Oregon enacted similar legislation in 2019. The Oregon legislature enacted Oregon House Bill 2001 (HB 2001) to create more diverse and affordable housing options.[119] In Oregon, more than 25% of households are single-person, and housing options must grow to reflect that.[120] HB 2001 requires all residential districts in medium-sized cities to allow for duplex housing and all large cities to allow for duplexes, triplexes, fourplexes, cottage clusters, and townhouses.[121] Oregon sets minimum standards for each housing type in order to ensure the diverse affordability goals are being met.[122] The Bill also provides $3.5 million to local governments to improve infrastructure to create these housing options.[123]

Redbrook in Plymouth, Massachusetts "has a variety of housing types in a 1,000+ unit development project with 10% of units designated as affordable."[124] There are single-family, condominium,

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[117] Supriya Yelimeli, *Berkeley Votes for Historic Housing Change: An End to Single-Family Zoning*, BERKELEYSIDE (Mar. 25, 2021), https://www.berkeleyside.org/2021/03/25/berkeley-single-family-zoning-city-council-general-plan-change.

[118] OLYMPIA, WASH., UNIFIED DEV. CODE art. II, §§ 18.04.040–18.04.060 (2022).

[119] *See* H.B. 2001, 80th Gen. Assemb., Reg. Sess. (Or. 2019) (setting benchmarks to address affordability through data-driven zoning and planning).

[120] *Household Types in Portland, Oregon*, STATISTICAL ATLAS, https://statisticalatlas.com/place/Oregon/Portland/Household-Types (last visited May 18, 2022).

[121] H.B. 2001 § 2.

[122] *Id.* §§ 3, 5.

[123] *Id.* § 15.

[124] *Redbrook: Gaining Ground Information Database*, PACE L. SCH.: LAND USE L. CTR. FOR SUSTANIABLE DEV., https://appsrv.pace.edu/GainingGround/?do=viewFullResource&resID=RR84A082421082814 (last visited May 18, 2022).

townhome, twin home, cottage, and apartment-housing options.[125] "Redbrook is zoned for mixed-use to provide residents with a walkable space in which they may live, work, and recreate," with a conservation area of more than 400 acres inside.[126]

Prairie Queen in Papillon, Nebraska "has no single-family housing and instead has apartments, fourplexes, townhouses, carriage houses, and retail and commercial space."[127] "The neighborhood is walkable and provides opportunities for a variety of income levels. Developments within the neighborhood must have at least two uses."[128]

B. Accessory Dwelling Units

ADUs are units that are incidental and subordinate to a principal dwelling on a lot.[129] They are above-garage apartments, basement units, house additions with a separate kitchen and bathroom, and more.[130] ADUs provide additional income to the homeowner and increase housing stock within the municipalities in which they are located.[131] They provide more affordable housing, aid communities with infill and transit-oriented development, are better for the environment, seamlessly complement neighborhood character, and

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[125] *Id.*
[126] *Id.*
[127] *Gaining Ground Information Database: Prairie Queen Development*, PACE L. SCH.: LAND USE L. CTR. FOR SUSTANIABLE DEV., https://appsrv.pace.edu/GainingGround/?do=viewFullResource&resID=9PDC7082421084729 (last visited May 18, 2022).
[128] *Id.*
[129] *See* OFF. OF POL'Y DEV. & RSCH., U.S. DEP'T OF HOUS. & HUM. DEV., ACCESSORY DWELLING UNITS: CASE STUDY A-1 (June 2008) (quoting TOWN OF LEXINGTON, MASS., ZONING BYLAW OF THE TOWN OF LEXINGTON, MASS., art. V, § 135-19 (amended 2005)) (defining *accessory apartments* as "a second dwelling subordinate in size to the principal dwelling unit on an owner-occupied lot").
[130] *Id.* at 1, C-1 (quoting PORTLAND, OR. ZONING CODE, § 33.205.30 (2021)) (outlining requirements for accessory dwelling units).
[131] Michael Andersen, *A Portland ADU Program Pairs Lower-Wealth Homeowners and Low-Income Tenants*, SIGHTLINE INST. (Dec. 13, 2019), https://www.sightline.org/2019/12/13/a-portland-adu-program-pairs-lower-wealth-homeowners-and-low-income-tenants/.

provide a variety of housing options for differing ages and needs.[132] Local land-use laws that allow ADUs open the vast single-family-zoned urban landscape to additional housing development.[133] In many communities, however, neighborhood opposition has poisoned the promise of the ADU solution by raising concerns that have the potential to limit what kinds of ADUs might be permissible.

Not In My Backyard, or NIMBYism, discourages new development, including ADUs, to protect existing neighborhood character.[134] Many of NIMBY's proponents—often middle- and upper-class households—see affordable housing development as bringing an undesirable change into the community and argue that this change will depress property values and increase crime, litter, and violence in the neighborhood.[135] The result of NIMBY opposition to ADU development limits the embrace of ADUs as a response to the need for affordable residences in safe neighborhoods.

Where NIMBY provides the political opposition, *poison pills* provide the legal means to prevent affordable-housing development.

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[132] Martin John Brown, *Do ADU's Provide Affordable Housing*?, ACCESSORY DWELLINGS (Aug. 7, 2014), https://accessorydwellings.org/2014/08/07/do-adus-provide-affordable-housing/; Shumaker, Loop & Kendrick, LLP, *Client Alert: Accessory Dwelling Units- An Up-and-Coming, Yet Well Known, Housing Option*, JDSUPRA (Dec. 9, 2020), https://www.jdsupra.com/legalnews/client-alert-accessory-dwelling-units-15489/; Martin J. Brown, *Are ADUs Green Housing?*, ACCESSORY DWELLINGS (July 9, 2014), https://accessorydwellings.org/2014/07/09/are-adus-green-housing/; Jessica Hanlon, *Accessory Dwelling Units in Historic Districts: A Denver Case Study*, NAT'L TR. FOR HIST. PRES.: PRES. LEADERSHIP F. (Oct. 18, 2018), https://forum.savingplaces.org/blogs/special-contributor/2018/10/18/accessory-dwelling-units-in-historic-districts; AARP, *ADUs Are Good for People and Places*, *in* AARP, THE ABCS OF ADUS 4 (2d. ed. 2021).

[133] *See* Martin, *Accessory Dwelling Units: What They Are and Why People Build Them*, ACCESSORY DWELLINGS, https://accessorydwellings.org/what-adus-are-and-why-people-build-them/ (last visited May 18, 2022) (explaining the ability of ADUs to house family members or rent out for additional income).

[134] *NIMBY*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/NIMBY (last visited May 19, 2022).

[135] *See NIMBY (Not in My Backyard)*, HOMELESS HUB: ACCOMODATIONS & SUPPORTS, https://www.homelesshub.ca/solutions/affordable-housing/nimby-not-my-backyard (last visited May 19, 2022) (describing NIMBY as a phenomenon of opposition to affordable or transitional housing in neighborhoods that assume certain characteristics of the new population).

Municipalities are incorporating ADU barriers in the zoning code to appease these NIMBY groups and are significantly limiting the expansion of affordable housing within their districts.[136] These barriers are called *poison pills*.[137] Planners began referring to ADU restrictions as poison pills to showcase how the regulations can "effectively kill" ADU developments.[138] There are many types of poison pills used to prevent and limit ADU construction. The most common poison pills, with examples, include:

- Owner occupancy requirements: SeaTac, Washington, requires the primary residence or ADU to be occupied by the homeowner in order to build and rent out an ADU.[139] The city allows ADUs to maximize the use of existing housing stock, improve cost efficiency of existing infrastructure, increase opportunities for homeowners, and provide housing options for a wide range of incomes and statuses—yet imposes these restrictions to limit overall development.[140] Biddeford, Maine, requires the owner of the primary dwelling unit and ADU reside in one of the units, but does not specify the requisite time period.[141]
- Maximum size requirements: Most ADUs cannot exceed 800 square feet.[142] The code also sets maximum occupancy, height, design, and parking requirements.[143] The ADU may not exceed 900 square feet or 35% of the primary-dwelling-unit

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[136] Rocio Sanchez-Moyano & Carol Galante, *Small Houses, Big Impact: Accessory Dwelling Units in Underutilized Neighborhoods*, UC BERKELEY TERNER CTR. FOR HOUS. INNOVATION: RSCH. & POL'Y (Aug. 3, 2016), https://ternercenter.berkeley.edu/research-and-policy/small-houses-big-impact-making-the-case-for-accessory-dwelling-units-in-und/.

[137] Alan Naditz, *The ADU Equation*, GREEN BUILDER (June 18, 2019), https://www.greenbuildermedia.com/blog/the-adu-equation.

[138] *Id.*

[139] SEATAC, WASH., ZONING CODE § 15.465.100(D)(2) (2015).

[140] *Id.* § 15.465.100(A).

[141] BIDDEFORD, ME., ZONING ORDINANCE, CITY OF BIDDEFORD, ME. part III, art. VI § 78(D) (2017).

[142] SEATAC, WASH., ZONING CODE § 15.465.100(F).

[143] *Id.* §§ 15.465.100(G)–(J).

size.[144] Biddeford sets moderately strict requirements for stairways, balconies, parking, entrances, exterior materials, lot orientation, and number of occupants.[145]

- Off-street parking requirements: In addition to preexisting parking for the primary unit, SeaTac, Washington, additionally requires two off-street parking spaces for ADUs over 600 square feet.[146]
- Occupant restrictions: In West Hartford, Connecticut, only domestic employees or guests of the primary-residence owner were permitted to reside in the ADU.[147] West Hartford passed a new ADU ordinance, setting size, material, and parking requirements.[148] The restrictive occupancy requirements were removed.[149]
- Age and disability requirements: ADUs in Fairfax County, Virginia, are only permitted in single-family detached zones where approved by the Board of Zoning Appeals.[150] If one of the residents of the ADU is more than 55 years old or has a disability, the occupant must provide additional documentation.[151] The city addressed proposed changes to the plan to remove the age and disability requirements, which were approved July 1, 2021.[152]
- Restrictions on the number of occupants. Newton, Massachusetts, sets a maximum number of residents per

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[144] BIDDEFORD, ME., ZONING ORDINANCE, CITY OF BIDDEFORD, ME. part III, art. 6 § 78(C)(1)(g).
[145] *Id.* §§ 78(C)–(D).
[146] SEATAC, WASH., ZONING CODE § 15.465.100(J).
[147] Ronni Newton, *West Hartford Town Council Approves Accessory Dwelling Units for All Single-Family Zones*, WE-HA.COM (Jan. 13, 2021), https://we-ha.com/west-hartford-town-council-approves-accessory-dwelling-units-for-all-single-family-zones/.
[148] *See* WEST HARTFORD, CONN., CODE part 2, § 177-23.1 (2021).
[149] Newton, *supra* note 147.
[150] FAIRFAX, VA., ZONING ORDINANCE art. 4, § 4102.7.B (2021).
[151] *Id.* art. 8, §§ 8101.3.E(1)(d)–(e).
[152] *Accessory Living Units (ALUs): Frequently Asked Questions*, FAIRFAX CNTY. ZMOD, https://www.fairfaxcounty.gov/planning-development/sites/planning-development/files/assets/documents/zmod/adopted-alu-faqs.pdf (last visited May 19, 2022).

principal dwelling unit; this unit does not change with the construction of an ADU.[153]

- As-of-right designations. Raleigh, North Carolina, previously prohibited ADUs from being permitted as-of-right in residential zones, significantly limiting ADU development.[154] Raleigh amended its code and now permits one ADU as-of-right on residential lots.[155]

To eliminate some of these poison pills, municipalities such as Raleigh, North Carolina, have recently reduced ADU restrictions to address the affordable housing crisis.[156] Raleigh had previously restricted ADU construction to one specific overlay zone, did not allow ADUs as-of-right in any residential zone, and required residents to petition their neighbors for approval when seeking to develop ADUs on their property.[157] Now, Raleigh allows ADUs as-of-right in all residential zones without any significant restriction on their construction or subsequent use.[158] This promotes affordable housing and encourages diversity in both housing stock and occupancy.

Seattle, Washington, recently enacted zoning legislation that removes significant barriers to ADU development to address the city's housing crisis.[159] The new code removes off-street parking and owner-occupancy requirements while also streamlining the approval process

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[153] NEWTON, MASS., ZONING ORDINANCE ch. 30, § 6.7.1(c)(4) (2017).
[154] Leigh Tauss, *You Finally Have the Right to Build an ADU in Raleigh*, INDY WEEK (July 7, 2020), https://indyweek.com/news/wake/you-can-finally-build-an-adu-in-raleigh/.
[155] *Permitting an Accessory Dwelling Unit (ADU)*, CITY OF RALEIGH, (Dec. 15, 2021), https://raleighnc.gov/business/content/PlanDev/Articles/Zoning/AccessoryDwellingUnits.html.
[156] Tauss, *supra* note 154.
[157] *Id.*
[158] *Id.*
[159] Kamaria Hightower, *Mayor Durkan Signs Legislation To Create Path for More In-Law Apartments and Backyard Cottages by Reducing Regulatory Barriers, Also Signs Executive Order To Do More To Address Financial and Permitting Barriers*, SEATTLE.GOV (July 9, 2019), https://durkan.seattle.gov/2019/07/mayor-durkan-signs-legislation-to-create-path-for-more-in-law-apartments-and-backyard-cottages-by-reducing-regulatory-barriers-also-signs-executive-order-to-do-more-to-address-financial-and-permittin/.

for ADU development.[160] Seattle also created a user-friendly website to simplify the process for its residents by connecting homeowners considering ADUs to designers and builders, and it even addresses the high cost of ADU development through access to low-interest financing.[161] Techniques such as this will provide much needed momentum in the ADU process, effectively addressing the housing-insecurity pandemic.

On a larger scale, states such as Connecticut and Oregon have enacted statewide bills to encourage ADU development within their borders. Connecticut recently passed a bill that promotes ADU development.[162] This bill legalizes ADUs in the state and removes off-street parking requirements.[163] It allows ADUs as-of-right on all properties that contain at least one single-family home.[164] This bill also prohibits municipalities from implementing several restrictions on ADU development, including minimum-age and occupant-relationship requirements.[165] Oregon also recently passed HB 2001, addressing ADU creation.[166] The state now requires cities with populations greater than 2,500 or counties with populations greater than 15,000 to allow ADUs in all single-family zones.[167]

V. SUPPORTIVE HOUSING

Supportive Housing provides affordable-housing options and services for homeless, disabled, addicted, senior, and other

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[160] *Id.*
[161] *Id.*
[162] *See* 2021 Conn. Acts 29 (Reg. Sess.) (codified as amended in scattered sections of CONN. GEN. STAT. § 8).
[163] *Id.* §§ 6(6)(D)–(E) (codified as amended in CONN. GEN. STAT. § 8-2).
[164] *Id.* § 6(1).
[165] *Id.* § 6(6).
[166] *Housing Choices (House Bill 2001)*, OREGON.GOV: URB. PLAN., DEP'T OF LAND CONSERVATION & DEV., https://www.oregon.gov/lcd/UP/Pages/Housing-Choices.aspx (last visited May 19, 2022).
[167] *Id.*; OR. DEP'T OF LAND CONSERVATION & DEV., GUIDANCE ON IMPLEMENTING THE ACCESSORY DWELLING UNITS (ADU) REQUIREMENT 2 (2019), https://www.oregon.gov/lcd/Publications/ADU_Guidance_updatedSept2019.pdf.

populations.[168] Supportive Housing residences are owned and operated by nonprofits and tenants pay roughly a third of their monthly income on rent.[169] This addresses homelessness while providing needed services to historically underrepresented and less-fortunate populations.[170] Additionally, this reduces the burden on homeless shelters, hospitals, psychiatric centers, and jails by providing an alternative with much-needed built-in support for populations that might need it.[171] Supportive Housing can be temporary or permanent. Permanent Supportive Housing is created with the intention of tenants staying more than 24 months and includes vocational- and educational-counseling services.[172]

There are three main types of Supportive Housing: *purpose-built* or *single-site housing*, *scattered-site housing*, and *unit set-asides*.[173] *Purpose-built* or *single-site housing* is apartment-building-style housing units with on-site support services.[174] *Scattered-site housing*, on the other hand, consists of privately-leased apartments in which staff may visit and provide support services.[175] Similarly, *unit set-asides* are privately-owned affordable units that owners set aside for supportive purposes and partner with support services for tenants.[176]

Important characteristics of Supportive Housing revolve around the principles of rehabilitation and support. To begin, services must be permanent and affordable.[177] Tenants should have the same

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[168] *What Is Supportive Housing?*, SUPPORTIVE HOUS. NETWORK OF N.Y., https://shnny.org/supportive-housing/what-is-supportive-housing/ (last visited Apr. 24, 2022).
[169] *Id.*
[170] *Supportive Housing*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Aug. 15, 2018), https://www.usich.gov/solutions/housing/supportive-housing/.
[171] *Id.*
[172] *Connect with Permanent Supportive Housing*, N.Y. OFF. OF ADDICTION SERV. & SUPPORTS, https://oasas.ny.gov/recovery/connect-permanent-supportive-housing (last visited Apr. 24, 2022).
[173] U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 170.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] EHREN DOHLER ET AL., SUPPORTIVE HOUSING HELPS VULNERABLE PEOPLE LIVE AND THRIVE IN THE COMMUNITY 2 (2016).

rights as traditional renters and should not pay more than 30% of their income on rent, essentially requiring that they not be cost-burdened. They should have access to public transportation, public works, grocery stores, and all other amenities granted to traditional renters.

The provided services should be housing-oriented and aim at keeping tenants housed, while also addressing larger issues. These should include physical and mental health, substance abuse, and more, while also providing access to professionals to assist in these areas. The services should be voluntary but highly encouraged.

A. New York City's Supportive Housing Program

New York City has a Supportive Housing Initiative called the NYC 15/15 Initiative (the Initiative), through which the city has a goal of developing 15,000 units of supportive housing over the course of 15 years.[178] One of the main purposes of the Initiative is to provide "affordable housing with supportive services, including both mental and physical healthcare access, connection to alcohol and substance abuse programs, and other social services" to "New Yorkers struggling with mental illness, homelessness, and substance use."[179] Another main purpose of the initiative is to "reduce usage of homeless shelters, hospitals, mental health institutions, and jails/prisons."[180] Prior to creating the Initiative, previous initiatives involving NYC had succeeded in developing approximately 14,000 units of supportive housing.[181] At the beginning of the Initiative, Mayor De Blasio "assembled a Task Force of 28 experts . . . to assess the current state of existing supportive housing programs in the city and formulate innovative solutions and recommendations for the future."[182] The Task

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[178] *New York City 15/15 Supportive Housing Initiative*, N.Y.C. HUM. RES. ADMIN., https://www1.nyc.gov/site/hra/help/15-15-initiative.page (last visited Apr. 24, 2022).
[179] SUPPORTIVE HOUSING TASK FORCE, N.Y.C. HUM. RES. ADMIN., NYC 15/15 INITIATIVE 3 (2016).
[180] *Id.*
[181] *Id.*
[182] *Id.* at 4.

Force collected and analyzed data regarding the City's homeless populations staying in shelters and living on the streets.[183]

The City's Department of Health and Mental Hygiene coordinated with residents of existing supportive housing to get feedback on their experiences living in supportive housing.[184] The City then used this data to formulate a plan for the Initiative. Based on its findings, the Task Force developed a set of recommendations to be used in deciding which facets of the population to target and how to use available resources. These recommendations were grouped under four main topics: (1) data and evaluation; (2) referrals; (3) service models; and (4) streamlining development.[185] Recommendations included:

- using a vulnerability index to assess which individuals or families exhibited a greater need;
- identifying which individuals and families requiring services provided by multiple systems of care;
- having healthcare professionals conduct mental-health evaluations of supportive-housing applicants;
- "[c]reat[ing] a standardized assessment tool that matches tenants to appropriate housing options;"
- developing an assessment to determine which individuals would be most successful in a scattered-site housing program; and developing a process that allows individuals to shift between supportive-housing programs based on their changing needs; and
- developing incentives for landlords to participate in scattered-site supportive housing.[186]

New York City is currently working with several providers to meet the goals of the Initiative.[187]

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[183] *Id.*
[184] *Id.*
[185] N.Y.C. HUM. RES. ADMIN., *New York City 15/15 Supportive Housing Initiative*, *supra* note 178.
[186] SUPPORTIVE HOUSING TASK FORCE, *supra* note 179, at 7–9.
[187] N.Y.C. HUM. RES. ADMIN., *New York City 15/15 Supportive Housing Initiative*, *supra* note 178.

VI. DISTRESSED PROPERTY REMEDIATION

Distressed Property includes substandard, unsafe, vacant, abandoned, and blighted properties.[188] Generally, there are a few legal tools local governments can use to enact or enforce remediation laws. Municipal Home Rule Laws provide local governments with the inherent power, under their police power, to protect the public, health, and welfare.[189] Protecting the public from nuisances, including distressed properties, is part of that power. Beyond that, many states provide local governments with template Uniform Building Codes.[190] They typically codify common-law nuisance principles. There are additional mechanisms like foreclosure and maintenance laws that add to local governments' power.[191] By enacting or enforcing local laws to remediate distressed properties, local governments can take meaningful steps towards improving equity and health, decreasing housing insecurity, and supporting climate equity.

A. Enforce Existing Housing or Property Maintenance Codes

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[188] Anne Olson & Gabriella Mickel, *Remediating Distressed Properties To Improve Public Health*, GREENLAW: BLOG OF THE PACE ENV'T L. PROGRAMS, PACE UNIV. SCH. OF L. (July 29, 2021), https://greenlaw.blogs.pace.edu/2021/07/29/remediating-distressed-properties-to-improve-public-health/?sbe-followsubs=true; *see also* Jessica Bacher & Meg B. Williams, *A Local Government's Strategic Approach to Distressed Property Remediation*, 46 THE URB. LAW. 877, 877 (2014).

[189] *Purpose of Home Rule*, ILL. MUN. LEAGUE, https://iml.org/homerule (last visited Apr. 24, 2022); *see, e.g.*, ILL. CONST. art. VII, § 6(a) (stating "a home rule unit may exercise any power and perform any function . . . including . . . the power to regulate for the protection of the public health, safety, morals and welfare.").

[190] *See Uniform Building Code Explained*, DOITYOURSELF (Dec. 12, 2009), https://www.doityourself.com/stry/uniform-building-code-explained ("Uniform Building Code[s] [are] a systematic body of rules that have been enacted to ensure that all buildings within a certain area maintain the safety and health standards to safeguard the lives of users and their neighbors from hazardous building.").

[191] *See* Bacher & Williams, *supra* note 188, at 882, 891.

In Philadelphia, Pennsylvania, all vacant properties must be maintained in a safe and sanitary state.[192] Entryways must be in good repair and secured rather than boarded.[193] Failure to maintain the premises in an adequate state will prompt the City Building Department to declare the building unsafe and serve notice to the owner.[194] If the owner cannot comply immediately, they must submit the steps they will take to comply within ten days of notice.[195] The Department will impose penalties for continued noncompliance, and may correct the property's conditions itself and collect costs from the owner.[196]

B. Regulate Vacant and Substandard Properties

Municipalities seek to address the safety of vacant, substandard, or distressed properties by regulating their maintenance.[197] Thus, the common goal of regulating such properties is mandating property owners to secure their premises. However, municipalities may vary in their approaches to establishing consequences for chronically vacant property. Typically, owners are required to secure, insure, register, and post contact information on their property within a set time after vacancy.[198] Often, the request for such action is served to the owner by a city official.[199] In instances where the owner does not secure the property, the city often does so itself and may charge the owner for costs of boarding up windows and

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[192] PHILA, PA., CODE tit. 4, § PM-301.3 (2021); *City of Philadelphia Property Maintenance Code: Gaining Ground Information Database*, LAND USE L. CTR., PACE UNIV. SCH. OF L., https://appsrv.pace.edu/GainingGround/?do=viewFullResource&resID=8RNED041517024325 (last visited Apr. 25, 2022).
[193] PHILA, PA., CODE tit. 4, § PM-301.3.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] OFF. OF POL'Y DEV. & RSCH., U.S. DEP'T OF HOUS. & URB. DEV., *Vacant and Abandoned Properties: Turning Liabilities Into Assets*, HUD USER (2014), https://www.huduser.gov/portal/periodicals/em/winter14/highlight1.html [hereinafter *Vacant and Abandoned Properties*].
[198] *Id.* at 8.
[199] *Id.* at 9.

doors.[200] Thus, costs of these regulations to the owner deter vacancy beforehand and increase the cost of continued vacancy due to registration fees.[201] In instances where the owner does not comply for extended periods, or the property is severely deteriorated, some municipalities may demolish structures on the property.[202]

C. Abating Public Nuisances in Buildings

Municipalities typically address public nuisances in buildings by first notifying the property owners of the substandard conditions of their property.[203] Notices from municipal officials detail the repair or demolition steps necessary and may also outline appeals processes.[204] Municipalities differ, however, in what they do when owners do not address a notice that their property is a nuisance. In Newark, New Jersey, a property that does not abate its nuisance in the prescribed time may be appointed a custodian who then directs city funds for repair.[205] In Hartford, Connecticut, property owners are given a specified time period to abate their property after notice is served.[206] If an owner does not comply, they are fined $250 for each day they go over the prescribed time frame.[207] In Toledo, Ohio, noncompliant owners may even be subject to criminal misdemeanor charges if their properties are

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[200] *Id.* at 7.
[201] *Id.* at 8.
[202] *Id.* at 7.
[203] *See Building and Property Nuisances*, MUN. RSCH. SERVS CTR. OF WASH. (MRSC), https://mrsc.org/Home/Explore-Topics/Legal/Regulation/Nuisances-Regulation-and-Abatement/Building-Nuisances.aspx#attractive (showing the Washington State statute Ch. 35.80 RCW that requires notifying property owners of the condition of their property) (last visited Apr. 25, 2022).
[204] *Id.*
[205] BOROUGH OF EAST NEWARK, N.J., MUN. CODE § 18-2.4 (2007).
[206] Conn. Gen. Stat. § 19a-206 (2012).
[207] *Id.*

particularly dangerous.[208] However, some municipalities, such as Hartford, may provide assistance to, and refrain from pursuing charges against, owners who successfully repair their properties.[209] There, the property-value assessment for taxes will not reflect the enhanced post-rehabilitation value for the first five years after application.[210]

D. Taking Title to Distressed Buildings

In some municipalities, the local government may attempt to take title of distressed buildings that come to the government via tax liens and seek to redevelop, renovate, or demolish them.[211] Often the mayor or a designated official may seek to condemn, take possession of, or take title to abandoned properties. In Washington D.C., if the fair-market value of a condemned property is determined to be less than the cost of public charges, taxes, and other assessments regarding the abandoned property, the District is entitled to judgment for the difference of the sum of those charges and the estimated value of the property.[212] The municipality would then appoint a party to take title and manage the property.[213]

E. Disposing of Title to Acquired Properties

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[208] *City of Toledo Starts Process of Declaring Greenbelt Place Apartments a Public Nuisance*, WTOL11, https://www.wtol.com/article/news/local/greenbelt-place-apartments-declared-public-nuisance-by-city-toledo/512-c8d550e7-bb90-4dbd-aa37-ee524f6ecbe7 (last updated Oct. 7, 2021).

[209] Conn. Gen. Stat. § 19(a)-343 (2013); *Single Family Housing Repair Loans & Grants in Connecticut*, U.S. DEP'T OF AGRIC. RURAL DEV., https://www.rd.usda.gov/programs-services/single-family-housing-programs/single-family-housing-repair-loans-grants/ct (last visited Apr. 25, 2022).

[210] Conn. Gen. Stat. §§ 12-65c–12-65e (2012) (describing the potential to defer property valuations for rehabilitated properties, which occur in five-year cycles).

[211] *Vacant and Abandoned Properties*, *supra* note 197.

[212] ALAN MALLACH, NAT'L HOUS. INST., MAYORS' RESOURCE GUIDE ON VACANT AND ABANDONED PROPERTIES 4 (2006).

[213] *Id.* at 6.

St. Louis, Missouri, leverages a non-profit strategy for distressed property remediation.[214] Local governments can transfer temporary or permanent possession of vacant and problem properties to non-profit organizations through tax foreclosure or receivership.[215] They can also give owners the option to transfer their properties voluntarily, helping to prevent the same properties from repeatedly cycling through tax-foreclosure sales under different owners.[216] The St. Louis Development Corporation (SLDC) is a not-for-profit corporation with a Land Reutilization Authority (LRA) subsidiary group. Real-property owners in St. Louis have the option to convey title by warranty deed to the LRA if the property is free of any encumbrances or liens.[217] The LRA then manages, maintains, markets, and sells the properties in its possession.[218]

VII. ANTI-DISPLACEMENT

Gentrification is a common term used to refer to the socioeconomic change a community undergoes when wealthier people and businesses move to an area, often displacing current inhabitants.[219] Alone, this socioeconomic shift is a powerful aid in community development. Displacement, however, hurts the low-income—often minority residents—that inhabit the areas being gentrified, creating a substantial hurdle in affordable housing development. Displaced peoples are more likely to have negative health outcomes, including more exposure to pollutants and negative mental-health effects, while also reducing access to transportation, healthy food, and more.[220] The

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[214] *About the St. Louis Dev. Corp. (SLDC)*, STLOUIS-MO.GOV, https://www.stlouis-mo.gov/government/departments/sldc/about-SLDC.cfm (last visited Apr. 25, 2022).
[215] Olson & Mickel, *supra* note 188.
[216] *Id.*
[217] *Id.*; STLOUIS-MO.GOV *supra* note 214.
[218] Olson & Mickel, *supra* note 188.
[219] JASON RICHARDSON ET AL., SHIFTING NEIGHBORHOODS: GENTRIFICATION AND CULTURAL DISPLACEMENT IN AMERICAN CITIES 1 (2019), https://ncrc.org/gentrification/.
[220] *Health Effects of Gentrification*, CDC, https://www.cdc.gov/healthyplaces/healthtopics/gentrification.htm (last visited Apr. 25, 2022).

above strategies aimed at providing affordable housing also create solutions to displacement.

Community engagement is an important tool in fighting displacement. By garnering support from local residents, community groups may raise awareness and get the attention of city officials. For example, in Austin, Texas, residents in the Guadalupe Neighborhood established the Guadalupe Neighborhood Development Commission (GNDC) to strategically purchase distressed properties in the area to support long-term efforts of preventing displacement.[221] The GNDC also created a community land trust, which will provide affordable units to those placed on a waitlist.[222] In response to the GNDC's efforts, the city established an Anti-Displacement Task Force and hired a Displacement Enforcement Officer, the first of its kind in the city.[223] Similarly, North and Northeast Portland, Oregon, has received $100 million to counteract displacement pressures caused by the development of a shopping center.[224] These neighborhoods have lost nearly 8,000 Black residents since 2000, which in 2013 prompted public protests against the development and gained monetary support from the city.[225]

Local governments may also enact zoning changes with the intention of reducing displacement. Dallas, Texas, and Seattle, Washington, for example, created a Neighborhood Stabilization Overlay District, which restricts building height to promote preservation of affordable houses.[226]

Municipalities can also enact Right-to-Purchase programs. In Washington, D.C., tenants have the right of first refusal if their apartment complexes will be sold.[227] This program provides financial support mechanisms, technical assistance, and capacity-building

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[221] HEATHER K. WAY, UPROOTED PROJECT AT THE UNIV. OF TEX. AT AUSTIN, TEXAS ANTI-DISPLACEMENT TOOLKIT 85 (2019).
[222] *Id.*
[223] *City of Austin Hires First Community Displacement Prevention Officer*, AUSTINTEXAS.GOV (Apr. 14, 2021), http://www.austintexas.gov/news/city-austin-hires-first-community-displacement-prevention-officer.
[224] WAY, *supra* note 221, at 40, 87.
[225] *Id.* at 87.
[226] *Id.* at 67–68.
[227] *Id.* at 19–20, 83.

within tenant groups.[228] Organizations such as ROC USA are similarly establishing funding programs to assist mobile-home residents in purchasing their homes.[229]

No-Net-Loss Policies are also being enacted to incorporate anti-displacement into the planning process. In California, Governor Gavin Newsom enacted a statewide bill requiring its regional housing need allocation be met for all income levels throughout the entire planning process.[230] Additionally, municipalities may not reduce density levels in any new development without first evaluating its compatibility with the Regional Housing Needs Allocation.[231]

Anti-displacement is a significant issue in the midst of the increasingly disparate socioeconomic upheaval in which we are currently involved. In addition to the above strategies to combat housing insecurity, there are many solutions in the anti-displacement toolkit.

CONCLUSION

The housing-insecurity crisis is pervasive throughout the United States, and municipalities are taking action. With almost 30% of American households cost-burdened, there is increasing pressure to do so.[232] Through traditional strategies such as mandatory-affordable housing, voluntary-affordable housing, off-site and buy-out options, flexible large-scale multi-family housing, floating zones, overlay zones, and infill development, municipalities can get significant traction for creating affordable housing. Larger-scale zoning strategies, such as zoning for Missing Middle Housing or allowing Accessory Dwelling Units as-of-right, provides for broader change and provides a new opportunity for a substantial increase in housing stock.

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[228] *Id.* at 20.
[229] *Id.*
[230] Memorandum from Zachary Olmstead, Deputy Dir., Ca. Dep't of Hous. and Cmty. Dev., Div. of Hous. Pol'y Dev., to Planning Directors and Interested Parties 1 (Oct. 2, 2019) (on file with Department of Housing and Community Development), https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/sb-166-final.pdf.
[231] *Id.*
[232] HABITAT FOR HUMANITY, s*upra* note 14.

Supportive housing for disadvantaged groups can provide housing for those that are especially vulnerable to housing insecurity. Stemming displacement due to gentrification depends on more expansive affordable-housing provisions.

With the last decade providing the lowest number of housing units built since the 1960s and substantial increases in population projected, this is a crisis that must be addressed using every tool in the land use toolbox.[233] When combined with the four pandemics of climate change, the shifting demographics of the twenty-first century, racial inequity, and COVID-19, it is clear that these strategies must be emulated wherever possible. It is also clear that many communities are affected by more than one of the pandemics, and these communities must learn how they interrelate and how to address them comprehensively.

Environmentally-friendly goals for affordable housing can be achieved through adaptive reuse and distressed property remediation. Affordable housing can address climate-change mitigation. Boston requires city-funded projects to meet higher construction standards as part of an initiative to reduce greenhouse-gas emissions. The city's Zero Emissions Building Standards follow the city's announced $34 million in funding for 14 affordable housing projects. The goal with these affordable housing developments is to create efficient, low-carbon, low-energy, well-designed buildings and power them with renewable energy sources. Portland has adopted and combined several strategies that address several threats. The city's "right to return" policy was adopted to allow displaced tenants to move back to their neighborhoods. Poison pills were removed from the code to make Missing Middle Housing more effective. Distressed properties are required to be rehabilitated, removed, or destroyed. Portland implemented green design standards for trees, green infrastructure, and more. Complete streets are also used to improve accessible transportation systems.

As municipal leaders have in the past, today they are using these integrated and effective recipes for protecting public health from its several challenges. Portland and Boston are instinctively reacting to on-the-ground, in-your-face, perturbations and responding in kind.

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[233] Demsas, *supra* note 12.

These innovative actors, along with many of their peers, are providing needed strategies that serve as models for others to adapt to their unique and critical challenges.

PROSPECTS FOR A UNIFIED APPROACH TO HOUSING AFFORDABILITY, HOUSING EQUITY, AND CLIMATE CHANGE

Stephen R. Miller*

INTRODUCTION

Housing law and policy is undergoing tremendous change. The question remains, however, whether any of the new policies proposed thus far will have a significant impact on the production of housing units. It also remains to be seen whether any new units built will be the right type, and in the right place, to meet the country's housing needs.

This Article investigates how these questions play out in light of conflicting policy goals of housing advocates, all of which are dependent on incentivizing private market developers to build the kinds of homes the advocates desire.[1] In Part I, the Article provides

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[1] The parameters here were guided, in part, by the focus of the Vermont Law Review's symposium for which this Article was written. Symposium, *Balancing Corporate & Activist Interests: Clean Energy, Wildlife Protection, and Land Use*

background on the housing market, as well as a review of literature on the effects of zoning on production, equity, and environmental concerns. Part II defines three types of housing advocates operating today: the *affordability activists*, which are primarily concerned with increasing housing affordability; the *equity activists,* which are concerned with providing homes in areas that assist with de-concentrating poverty and its ill effects; and the *environmental activities*, which today focus increasingly on reducing climate change effects through land use planning. While these activists have overlapping goals, they are often at odds on policy prescriptions, which this Article analyzes. Part III of the Article investigates how the dissonance between the housing activists can be resolved by considering development through the lens of the entity that is charged with building housing: the private developer subject to real-life market demands. This section investigates the viability of several policy prescriptions for housing through the lens of a developer's realistic ability to produce the desired housing.

I. BACKGROUND

Addressing affordability, equity, and climate in housing policy simultaneously is of paramount importance to the twenty-first century but doing so is a complex enterprise. It helps to start with some basic facts about the underlying housing problems the activists are trying to address.

Demand and supply play a foundational role. Demand for housing begins with population. The latest U.S. Census projections for population growth estimate an additional 52 million residents in the country by 2050.[2] Domestic in-migration also affects regional demand. For instance, as a region, the American South had the fastest migration in the country in 2018 (a net gain of 512,000 persons) and has had

Reform, VT. L. REV., https://lawreview.vermontlaw.edu/2021-symposium/ (last visited May 18, 2022).

[2] *2017 National Population Projections Tables: Main Series*, U.S. CENSUS BUREAU (Sept. 2018), https://www.census.gov/data/tables/2017/demo/popproj/2017-summary-tables.html (*see Table 1. Projected Population Size and Births, Deaths, and Migration*).

significant net in-migration gains every year since 1981.[3] In mid-sized communities, such as Boise or Nashville, in-migration numbers that are modest by big-city standards have significant effects because of the region's smaller size.[4] That population growth means that the housing affordability and environmental crises that exist now with regard to housing will only get worse unless there is dramatic change in housing-production and land-use patterns.

The supply side is dominated by housing starts. One of the biggest issues is that the United States simply stopped building housing at the rate it used to do so after the Great Recession of the 2000s.[5] As a recent HUD study noted, and as illustrated in Figure 1:

> New housing construction essentially stopped from 2009 to 2011 and has only barely kept pace with population growth since then. Housing permits averaged slightly more than one million annually over the past 10 years, compared with more than 1.5 million permits per year during the previous decade. The drop-off in new housing construction has kept upward pressure on house prices and rents. The shortfall in number of units produced since 2008 is estimated at 3 to 5 million. [6]

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[3] Kristin Kerns & L. Slagan Locklear, *Three New Census Bureau Products Show Domestic Migration at Regional, State, and County Levels*, U.S. CENSUS BUREAU (Apr. 29, 2019), https://www.census.gov/library/stories/2019/04/moves-from-south-west-dominate-recent-migration-flows.html.

[4] *See* Conor Sen, *Why Invest in Cities? There's Always Another Boise*, BLOOMBERG: OP. (Apr. 18, 2018), https://www.bloomberg.com/opinion/articles/2018-04-18/growing-midsize-cities-like-boise-could-replace-urban-future (describing how in-migration is making smaller cities the next big metropolises).

[5] *See* Asha Bharadwaj & Charles S. Gascon, *Slowing U.S. Housing Sector Still Shaped by Great Recession*, FED. RSRV. BANK OF ST. LOUIS (Apr. 8, 2019), https://www.stlouisfed.org/publications/regional-economist/first-quarter-2019/slowing-us-housing-sector (analyzing the rapid growth of the housing market following the Great Recession).

[6] U.S. DEP'T. OF HOUSING & URBAN DEV., *New Housing in High-Productivity Metropolitan Areas: Encouraging Production* 11 (June 2021), https://www.huduser.gov/portal/sites/default/files/pdf/New-Housing-Production-Report.pdf (citing Don Layton, *The Extraordinary and Unexpected Pandemic Increase in House Prices: Causes and Implications*, HARV. JOINT CTR. FOR HOUS. STUDIES (Jan. 7, 2021), https://www.jchs.harvard.edu/blog/extraordinary-and-unexpected-pandemic-increase-house-prices-causes-and-implications).

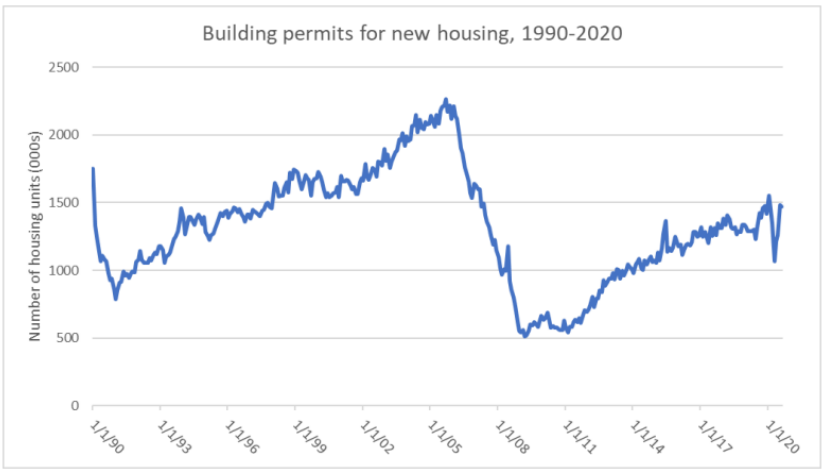

Figure 1

The dramatic decrease in housing production at a time of significant population growth is an obvious problem—one felt more acutely in those parts of the country where production has faltered, population has grown, or both have occurred. For instance, California's rate of housing production is among the largest in the country. However, in the years from 2005 to 2014, when compared to population growth in that same time, California's ratio of housing starts to population added is just near 60% of the housing produced per capita in that time period in New York.[7]

[7] U.S. DEP'T. OF HOUSING & URBAN DEV., *supra* note 6, at 13.

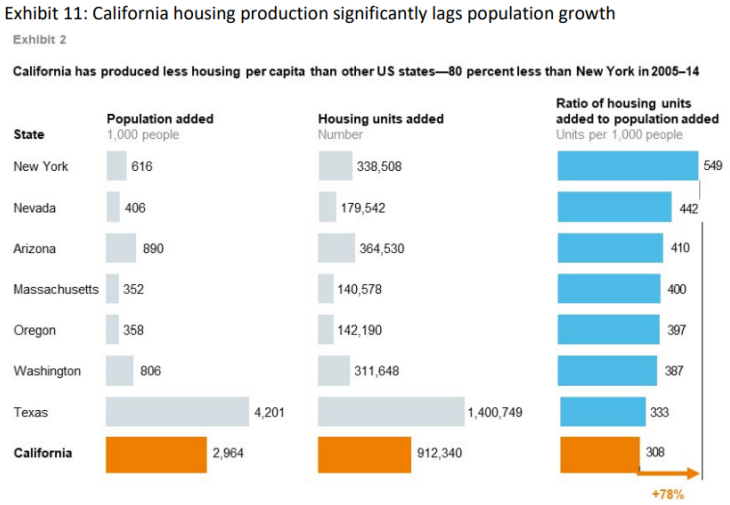

Figure 2

Another issue is where all of this new housing will—or should—go. Some metropolitan regions will experience this population growth more than others. Unless there is dramatic change in land-use patterns, the majority of the tens of millions of new residents and their millions of new houses will end up in the suburbs or *exurbs*.[8] Consider that a 2012 study by the EPA found that in the 209 metropolitan regions examined, only 21% of all new homes were built in previously developed—or infill—areas.[9] Even if the infill percentage were to double, or even triple, over the coming decades, a large percentage of growth will be in suburbs and exurbs on the far fringes of the metropolitan regions of today.

As affordability has worsened, there has been considerable investigation of what caused the mismatch between production and housing needs, as well as the segregated nature of such housing. Several recent studies by planning professors provide some answers.

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[8] *See* Conor Dougherty & Ben Casselman, *House Hunters Are Leaving the City, and Builders Can't Keep Up*, N.Y. TIMES (May 29, 2021), https://www.nytimes.com/2021/05/29/business/economy/new-home-building-suburbs.html (describing *exurbs* as areas of development beyond suburbs that are expanding urban sprawl).

[9] *Residential Construction Trends in America's Metropolitan Regions: 2012 Edition*, U.S. EPA, (Sept. 1, 2020), https://archive.epa.gov/epa/smartgrowth/residential-construction-trends-americas-metropolitan-regions-2012-edition.html.

One useful study by planning professors Michael C. Lens and Paavo Monkkonen addressed income segregation and yielded three findings. [10] First, the authors found that density restrictions were not statistically associated with higher levels of segregation of low-income households.[11] Counterintuitively, the study found that density restrictions—such as large-lot zoning or single-family districts—directly lead to the concentration of affluence, not poverty.[12] This challenges the assumption that density isolates the poor. Instead, it appears to insulate the rich.

The study's second major finding looked at levels of income segregation relative to the complexity of a local government's land-use processes and the community involvement therein. The study found that income segregation was higher in metropolitan areas where local governments were considered to be more involved in the process of residential development and where there are more factors pressuring local governments to control growth.[13] In particular, the study found that where cities have more oversight mechanisms for development, there is a stronger association with segregation, as well as a more inelastic housing supply and higher housing prices at both the metropolitan and local level.[14] The study also found that forceful land-use regulation overall was not necessarily associated with segregation, even if it was associated with higher housing prices.[15] As the study's authors note, "[a] metropolitan area with many regulations on residential development can exhibit low levels of segregation."[16]

On the other hand, the study found that where there was more activity at the state level in residential development and growth management, there was also less income segregation.[17] This would indicate that state involvement in land-use decision-making could assist in ameliorating local segregationist tendencies.

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[10] Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6 (2016).
[11] *Id.* at 11.
[12] *Id.*
[13] *Id.* at 12.
[14] *Id.* at 19.
[15] *See id.* (finding that local zoning and project approval are connected to higher housing prices and income segregation while state political involvement decreases segregation).
[16] *Id.* at 11.
[17] *Id.*

Finally, the study found that Metropolitan Statistical Areas (MSAs) "with central cities that regulate land use in a more restrictive manner relative to the surrounding suburbs have higher levels of income segregation."[18] This indicated that the regulatory effects of the central city play as important a role in income segregation as those of the suburban communities.

Another recent article by planning professors Rolf Pendall, Lydia Lo, and Jake Wegmann examined zoning changes in U.S. metropolitan areas from 2003 to 2019.[19] The study found that compared with smaller jurisdictions, places with higher populations were less likely to adopt or retain anti-density regulations and more likely to adopt and retain pro-density measures. [20] Compared with cities, counties more often adopted and retained anti-density regulations.[21] Counties also tended not to adopt pro-density zoning if they did not allow it already, and they were more likely than cities to abandon it if they already had it.[22] "Places with high housing occupancy rates (i.e., low vacancy) dropped anti-density measures." [23]

The study's authors noted two trends. "In the first trend, high-density zoning became more common and low-density zoning less so in the most constrained housing markets." [24] The survey found "many places that have both upzoned and adopted other constructive growth management innovations. Beyond allowing high-density housing, these communities adopt inclusionary zoning programs, spend money on affordable housing, and ensure adequate public services to accommodate growth." [25] In addition, the study notes:

> [M]any jurisdictions have zoning ordinances that allow high-density development but precious few neighborhoods zoned for apartments. If state and federal officials want local governments to upzone to

[18] *Id.* at 12.
[19] Rolf Pendall et al., *Shifts Toward the Extremes: Zoning Change in Major U.S. Metropolitan Areas from 2003 to 2019*, 88 J. AM. PLAN. ASS'N. 55, 55–66 (2022).
[20] Lens & Monkkonen*, supra* note 10.
[21] *See id.* at 11.
[22] Pendall et al., *supra* note 19.
[23] *Id.* at 61.
[24] *Id.* at 64.
[25] *Id.*

> meet housing demand, they will need to go beyond exhortations about loosening zoning and make serious commitments both to regulations that support apartment development and adequate infrastructure to serve high density development. And even where zoning and infrastructure allow apartments, planners still often need information and support to ensure that pro-density policies are translated into new housing, especially affordable housing.
>
> In the second trend, weaker markets with high levels of Black–White segregation downzoned to LDOZ more often than they upzoned from LDOZ. We found no statistically significant associations at the jurisdiction level between racial composition and these regulatory changes. This absence of evidence is not, however, evidence of absence. Communities using exclusionary zoning have significantly lower percentages of Black and Latino residents than those with more accommodating zoning. The persistence of this correlation makes it all the more important that state and local governments take affirmative measures to undo exclusionary zoning.[26]

In evaluating these results, the authors concluded that "the growth management interpretation is stronger than the exclusionary interpretation for the adoption and retention of restrictive or permissive zoning from 2003 to 2019."[27]

II. ACTIVISTS' GOALS AND LIMITATIONS

The complexity in housing policy identified above is redoubled by activist interests' increasing inability to find common ground. This section looks at some of the reasons affordability activists, equity activists, and environmental activists disagree on solutions to housing.

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[26] *Id.*
[27] *Id.* at 61.

As will be described below, affordability activists tend to focus on the country's ever-increasing lack of affordable housing for both low- and middle-income families. Equity activists tend to focus on the present segregation by race and class that result from a century of racist land-use, mortgage, and housing policies. Environmental activists tend to focus on how post-World War II land-use patterns have resulted in suburban and exurban sprawl requiring a transportation system that worsens the country's greenhouse gas emissions. The priorities of each camp can be simplified as follows: affordability activists tend to simply want more housing built anywhere; equity activists want a mix of tenure and price by location with adequate transportation servicing those neighborhoods; and environmental activists want to contain sprawl to reduce emissions. In theory, all three activist groups would be serviced by more densely settled residential development patterns, such as transit-oriented development. [28] In practice, the three activist groups routinely splinter against each other, and the country's infill development patterns have seen no sharp increase for all the work from the three activist camps.[29]

The affordability activists are led by the Yes in My Back Yard, or *YIMBY*, movement.[30] Several factors make it unusual. In the past, there have been few, if any, pro-development community groups that were not funded or driven—expressly or implicitly—by the developer community. [31] These groups tend to espouse a "market urbanism" that focuses on reducing process and regulation, which they perceive as the limitations on housing growth.[32] The organization is also

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[28] *See* Paula A. Franzese, *An Inflection Point for Affordable Housing: The Promise of Inclusionary Mixed-Use Redevelopment*, 52 UIC J. MARSHALL L. REV. 581, 583 (2019) (discussing trends toward accessible, compact, and environmentally and economically friendly living spaces).

[29] *See* OFF. SUSTAINABLE CMTYS., U.S. EPA, ATTRACTING INFILL DEVELOPMENT IN DISTRESSED COMMUNITIES: 30 STRATEGIES 1 (2015) (suggesting ways local governments can encourage infill development).

[30] *See generally* Renee Tapp, *Introducing the YIMBYs: Renters, Housing, and Supply-Side Politics in Los Angeles*, 39 ENV'T. & PLAN. C: POL. SPACE 1511, 1512 (2021) (noting the work that activists associated with the YIMBY movement are doing to challenge the anti-housing climate).

[31] *See* Dwight Merriam, *The Great "Yes in My Back Yard" (YIMBY) Movement: Driven by the Gig Economy*, 29 J. AFFORD. HOUS. CMTY. DEV. L. 57, 58 (2020) (noting how most NIMBY challenges try to reduce development).

[32] *See* Michael Lewyn, *Zoning and Land Use Planning: Explaining Market*

decentralized,[33] and so there is no official YIMBY platform. A review of three YIMBY local sites, however, gives a sense of the overlapping policies and agendas supported by the groups.

The San Francisco YIMBY website states its platform as including the following:

- We believe in long-term planning. Once a citywide or neighborhood plan is made, the process for building should be streamlined, well-defined and predictable. It should not impose significant delays on or add significant costs to a project, nor should individual property owners or neighborhood associations have the power to hijack it.
- As-of-Right building: development plans approved at the departmental level if the project is within existing zoning.
- Mandate or incentivize cities to follow regional master plans and statewide housing policies or mandates.
- California Environmental Quality Act (CEQA) reform.
- Raise height limits.
- Form-based zoning.
- Mixed-use zoning.
- Complete streets. [34]

Urbanism, 46 REAL EST. L.J. 589, 596–97 (2018) (asserting that market urbanists believe that government intervention to limit new housing is detrimental to meeting demands for housing supply); *see generally* Michael Lewyn, *Zoning and Land Use Planning: YIMBY and COVID-19*, 49 REAL EST. L. J. 244, 244 n.1 (2021) (contrasting YIMBY groups advocating for less government restrictions on housing to alleviate rising costs as a result of the pandemic).

[33] *See generally* Lee A. Fennell, *Crowdsourcing Land Use*, 78 BROOK. L. REV. 385 (2013) (arguing that "crowdsourcing" land use input from local community members through social media and apps creates greater public participation in local land use planning).

[34] San Francisco YIMBY lists several planks of its platform, including Zoning and Planning Policy Descriptions, listed here. *SF YIMBY Platform*, SF YIMBY, https://www.sfyimby.org/platform (last visited May 18, 2022).

This list of policies is typical of other YIMBY platforms.[35]

Housing equity activists are seeking integrated housing options for low-income persons and persons of color. Although there is a long tradition of housing equity activists, two galvanizing threads run through the current movement. The first is a heightened recognition of the legacy of racial policies interwoven into almost all aspects of housing production. Richard Rothstein's *The Color of Law* is the textbook of this group,[36] which laid out in an accessible format the playbook for housing segregation in American cities over the last 150 years.[37] This awareness was also heightened by the racial reckoning that began after the death of George Floyd in Minneapolis, a city that itself had begun the process of recognizing the racial legacy planning had played in the city's development through the city's comprehensive planning process. [38]

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[35] *See* Adele Peters, *The Pro-Growth YIMBY Movement Is Growing*, FAST CO. (Jul. 11, 2016), https://www.fastcompany.com/3061595/the-pro-growth-yimby-movement-is-growing (interviewing residents about YIMBY platforms in their communities that have similar zoning goals).

[36] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (arguing that modern zoning regulations passed by local, state, and federal governments effectively segregated communities based on race and socioeconomic status).

[37] *See generally* John Mangin, *Ethnic Enclaves and the Zoning Game*, 36 YALE L. & POL'Y REV. 419, 432–64 (2018) (examining three ethnic groups in New York City—Hasidic Jews in Brooklyn, Chinese communities in Chinatown, and South Asian communities in Queens—and how they leveraged culture, tradition, and politics to advocate for new zoning rules); Ganesh Sitaraman et al., *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1767–68 (2021) (arguing that government regulation and subsequent deregulation of transportation, communications, trade created geographic inequality and proposing that better regulation of these areas could reverse systemic geographic inequality).

[38] *See Minneapolis 2040: The City's Comprehensive Plan*, MINNEAPOLIS CITY COUNCIL 19–22 (2019), https://minneapolis2040.com/media/1488/pdf_minneapolis2040.pdf (discussing the Minneapolis City Council's comprehensive plan to resolve discriminatory zoning and housing policies and create affordable, inclusive housing); *see also* Jeff Clare, *Because Housing Is What? Fundamental. California's RHNA System as a Tool for Equitable Housing Growth*, 46 ECOL. L.Q. 373, 393, 396 (2019) (examining California's Regional Housing Needs Assessment for racial disparities, concluding that RHNA policies resulted in higher requirements in lower-income areas, disproportionately burdening lower-income populations with meeting housing demands); Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 92 n.74, 116–21

Second, the housing equity movement has been invigorated by powerful research over the last decade examining the neighborhood effects of moving from areas of concentrated poverty to areas where such poverty is lessened. Highlights of this research include investigations of the Department of Housing and Urban Development (HUD) Moving to Opportunity demonstration project.[39] Although initial research found little value in such moves for adults in the studies, subsequent research by Raj Chetty and other economists uncovered substantial life-time benefits for children—especially young children—who accompanied parents on such moves out of concentrated poverty. [40] As the literature has evolved, increasing attention has been paid to the difficulties of making such a move to areas of less-concentrated poverty, which tend to be suburban and necessitate heightened access to transportation options.[41] Such moves also routinely take families out of their social networks, which often provide childcare in lower-income communities, and thus can exacerbate the complexity of making such a move.[42] Research on vouchers has also shown how these forces often lead to low-income individuals, who might choose to live anywhere in a metropolitan region, often staying in neighborhoods near the high-poverty

(2019) (evaluating the effects of increased land use regulation on inequality, concluding that there is a correlation between regulation and segregation, disproportionately impacting lower-income communities and communities of color).

[39] *See generally* Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21156, 2015), http://www.nber.org/papers/w21156 (assessing the HUD Moving to Opportunity experiment and its effects on young children and their development into adulthood, including socioeconomic status and housing environment).

[40] *Id.* at 4–6 (concluding that HUD Moving to Opportunity housing vouchers requiring low-income families with young children to move to lower-income neighborhoods reduces intergenerational poverty).

[41] *See* Anika S. Lemar, *Access to Justice Requires Access to Opportunity Infrastructure*, 27 J. AFFORDABLE HOUS. & CMTY. DEV. L. 487, 489 (2019) (noting the segregation between the wealthy suburbs and poorer urban areas); Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125, 2134, 2141 (2021) (illustrating how the federal highway system and underfunding of public transportation effectively segregated Black neighborhoods).

[42] EVA ROSEN, THE VOUCHER PROMISE: "SECTION 8" AND THE FATE OF AN AMERICAN NEIGHBORHOOD 20–21, 122–23 (Meagan Levinson & Jacqueline Delaney eds., 2020).

neighborhoods they originally sought to leave.[43] For these housing equity activists, the location of the housing options matter tremendously because variation in housing tenure (rented or owned) and housing stock (single-family or apartments), as well as transportation to and from such housing options, makes all the difference in whether mobility out of high-poverty neighborhoods is a viable possibility.[44]

The environmental activists address land-use policy through a variety of lenses, but one that has overtaken all others in importance is altering the land-use pattern to reduce greenhouse gas emissions. The importance of this could not have been stated more succinctly than in California's 2017 Scoping Plan, which is the state's policy guidebook for how it will meet its climate change goals.[45] The Scoping Plan notes, "Contributions from policies and programs, such as renewable energy and energy efficiency, are helping to achieve the near-term 2020 target, but longer-term targets cannot be achieved without land-use decisions that allow more efficient use and management of land and infrastructure."[46] In other words, if land-use policy cannot reduce greenhouse gas emissions, even California—with all of its

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[43] *Id.* at 20–21.

[44] *See, e.g.*, Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 522, 526 (2015) (bringing a disparate impact claim under the Fair Housing Act for federal tax credits funding low-income housing in impoverished areas).

[45] *See* Gregory L. Newmark & Peter M. Haas, *Income, Location Efficiency, and VMT: Affordable Housing as a Climate Strategy* 2–3 (Ctr. for Neighborhood Tech., Working Paper, 2015), https://chpc.net/wp-content/uploads/2016/05/CNT-Working-Paper-revised-2015-12-18.pdf (arguing that California's 2017 Scoping Plan is progressive in evaluating the relationship between housing and GHG emissions); *California TOD + GHG Analysis*, CTR. FOR NEIGHBORHOOD TECH., https://www.cnt.org/projects/california-tod-and-ghg-analysis (last visited May 18, 2022) (outlining the need for better access to public transportation for lower-income households to help California meet their 2017 Scoping Plan climate goals); *see generally* MARLON G. BOARNET ET AL., AFFORDABLE HOUSING IN TRANSIT-ORIENTED DEVELOPMENTS: IMPACTS ON DRIVING AND POLICY APPROACHES (Nat'l Ctr. for Sustainable Transp. & Univ. S. Cal. eds., 2015), https://dot.ca.gov/-/media/dot-media/programs/research-innovation-system-information/documents/f0016779-ca17-2983-finalreport.pdf (discussing California policies to expand affordable housing in areas with widely-accessible public transit and reduce emissions).

[46] CAL. AIR RES. BD., CALIFORNIA'S 2017 CLIMATE CHANGE SCOPING PLAN (Nov. 2017), https://ww2.arb.ca.gov/sites/default/files/classic/cc/scopingplan/scoping_plan_2017.pdf.

sophisticated policy interventions—cannot meet its climate goals. The primary effort of environmental activists in California is to reduce vehicle miles traveled (VMT), which essentially means land-use patterns that require less driving.[47] Ideally, that entails more densely settled environments, but it also means a better balance of jobs and homes and prioritizing alternative methods of transportation (such as public transportation, biking, and walking) for shorter trips.[48]

Despite this importance placed on land use in reducing VMT, there is reason to be skeptical that land-use policies can meet the climate demands. For over fifty years, land-use experts around the country have sought to reduce sprawl and thus reduce the kinds of infrastructural and transportation-related choices that have abetted a warming climate.[49] In a recent study of the literature on such local growth management policies, planning professor John D. Landis provided a sobering analysis of their success.[50] First, empirical studies found almost no difference in land-use patterns between cities that adopted local growth management policies and those similarly situated cities that did not do so.[51] For instance, one study compared the development pattern of Houston, which has no zoning, with Dallas, which adopted its first zoning ordinance in 1930.[52] The study found that the two cities had largely developed in a similar fashion despite Dallas's early zoning and Houston's lack of it.[53] Perhaps even more surprisingly, another study comparing development in metropolitan Portland—arguably the most regulated city in America—found almost no difference between Portland and other similarly-situated western

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[47] *Id.* at 35.
[48] *See id.* at 100 (discussing how sustainable land use decisions can reduce GHGs while creating green jobs and increasing mobility).
[49] *See generally* John D. Landis, *Fifty Years of Local Growth Management in America*, 145 PROGRESS PLANNING 1, 5 (Mar. 2021) (discussing the history of growth management programs and their benefits).
[50] See *id.* at 5 (finding that the relationship between the use of traditional land use regulations and current settlement patterns is tenuous).
[51] *See id.* (finding few differences in development patterns between stringently zoned and loosely zoned places).
[52] *Id.* (citing C. Berry, *Land Use Regulation and Residential Segregation: Does Zoning Matter?*, 3 AM. L. ECON. REV. 251, 251 (2001) (comparing development patterns in Houston and Dallas)).
[53] Landis, *supra* note 49, at 6.

cities.[54] A key takeaway from such studies, Landis notes, is that planning research indicates that "zoning tends to follow market preferences rather than lead them."[55] In other words, zoning does not actually plan future growth; instead, it locks in the development pattern that the market already sought for that area of land and operates to protect the investment against change.

The ineffectiveness of zoning to plan for growth was equally noted in local growth management programs. A review of suburban growth between 1982 and 1997 found that even where average densities declined less in metropolitan areas with active urban containment programs, most of the observable difference did not result from the growth management programs.[56] Instead, the difference resulted from "natural" constraints to development, "such as steep slopes," mountains, and oceans.[57] Put simply, growth management did not do much unless there was also a mountain in the way. More recently, another study of sprawl by Landis of the largest metropolitan areas "found no evidence that local regulatory regimes or growth management programs had any effect on sprawl patterns."[58]

For the environmental activist, the dissonance between the clarion call to reduce VMT in the California Scoping Plan and the empirical research indicating that the last half-century of local growth management has been almost universally unsuccessful could prove profoundly disheartening. But for environmental activists, the failure of past policies in light of the climactic need for action only redoubles the desire to ensure that housing policy achieves an environmental

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[54] *Id.* (citing Robert E. Lang & Steven P. Hornburg, *Planning Portland Style: Pitfalls and Possibilities*, 8 HOUS. POL'Y DEBATE, 1997, 1, 10 (discussing the regional growth management in Portland)); *see generally* Arthur C. Nelson, *Comparing States with and Without Growth Management Analysis Based on Indicators with Policy Implications*, 16 LAND USE POL'Y. 121 (1999) (comparing Portland's urban management to that of other U.S. cities).

[55] Landis, *supra* note 49, at 6; *see also* Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395, 396 (2021) (finding politics of local zoning force neighborhoods remain virtually unchanged).

[56] *See* Landis, *supra* note 49.

[57] *Id.* at 6 (citing WILLIAM FULTON ET AL., WHO SPRAWLS THE MOST? HOW GROWTH PATTERNS DIFFER ACROSS THE U.S. (2001)).

[58] *Id.*

objective that is imperative, though often overlooked, in the country's climate change solution.

These three activist camps could all agree in the abstract that, ideally, future housing development would be densely settled along transit accessible routes. In practice, there is considerable animus that has evolved between the activists at both the project level and the conceptual level.[59] Three examples of conflicts that arise are below:

- Affordability activists tend to disfavor environmental review and believe that it unnecessarily lengthens the project entitlement process. Environmental activists disagree, and often note that without such review, important environmental mitigations for projects would not occur.[60]
- Affordability activists tend to disfavor discretionary reviews, such as conditional-use permits, and seek more "by right" development. Equity and environmental housing activists often disagree and cite the importance of local community participation in the development process for environmental justice purposes. Equity activists have spent years trying to get more of a voice for low-income communities in the development process, which would largely be eliminated with the removal of discretionary reviews.[61]
- Equity activists, who often favor traditional affordable housing remedies such as inclusionary housing, Low-Income Housing Tax Credit (LIHTC)-backed affordable-housing units, and vouchers, are often dismayed by the YIMBY-affordability activists that pay little attention to such things. Affordability activists tend to argue that any housing is good and there is no

[59] *See generally* Rich Campbell, *State Housing Affordability Initiatives and Environmental Protection: Can They Work Together?*, 35 NAT. RES. & ENV'T 26, 26–30 (2021) (discussing nationwide conflicts between affordable housing, environmental justice, and environmental activists).

[60] *See* Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENV'T L.J. 21, 35, 39–40 (2018) (arguing that CEQA standards impose costly environmental reviews, contributing to rising housing prices in urban areas but encouraging cleanup work).

[61] *See* Hilary T. Jacobs & Benjamin Wilson, *Mapping the Movement: The Future of Identifying and Addressing Cumulative Impacts*, 51 ENV'T L. REP. 10688, 10689 (2021) (advocating for integrating environmental justice considerations into governmental decision-making for siting and permitting).

> need to regulate size or tenure. For instance, YIMBYs often argue that "filtering" is the most important housing policy, which suggests that even if the only thing built is high-income housing, the result will be that all prices will come down because there are only so many high-end homes that can be supported by the top of the market. A corollary to the filtering theory is that developers will follow a market saturated by high-end properties down to middle-income and low-income properties where money is still to be made. Given equity activists concern with the actual location of affordable units to reduce segregation and permit opportunity, tensions can arise.[62]

All the housing activists have a common enemy—at least in theory. They share disdain for the *NIMBY*, or "Not in My Back Yard," resident who comes out to project hearings to oppose density projects.[63] The literature of all three activists is littered with disparagement of these "homevoters" that only seek to protect their housing value or that invoke *community character* as a shibboleth to maintain a neighborhood without minorities.[64] These accusations, in turn, can set the activists against local populations that challenge the protectionist- and racist-label and, instead, imagine themselves—rightly or wrongly—as honest protectors of "the way we have always done things around here."[65]

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[62] *See* Campbell, *supra* note 59, at 27 (contrasting YIMBYs' and affordability advocates' support for "supply side" policies incentivizing developers to build affordable housing in lower-income areas from equity activists' concern for impacts of such policies on gentrification and racial segregation).

[63] *See* Grant Glovin, *Power and Democracy in Local Public Participation Law*, 51 URB. LAW. 43, 45, 58–60 (2021) (asserting that the public participation process in local land use planning allows NIMBY advocates, primarily in wealthier areas, to reject high-density development projects, despite available resources to mitigate the housing crisis).

[64] WILLIAM A FISCHEL, THE HOMEVOTER HYPOTHESIS ix (2001); *see* Anika S. Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. 1083, 1133–34, 1143 (2021) [hereinafter Lemar, *Overparticipation*] (arguing that "homevoters"—homeowners that argue for policies that protect housing value—dominate the public participation process of land use planning).

[65] *See* Lemar, *Overparticipation*, *supra* note 64, at 1108–10 (arguing that residents of traditionally white, wealthier neighborhoods are more inclined to advocate for

III. DEVELOPER-COGNIZANT SOLUTIONS

Given the importance of resolving housing issues for affordability, equity, and climate considerations, the rest of this Article is dedicated to thinking through how these activist objectives are limited—or potentially enhanced—by a consideration of developer objectives. Activists, like local governments, face a conundrum in trying to resolve land-use problems: all planning is useless unless there is a private developer willing to build according to the regulations imposed. That is because neither activists nor governments build substantial housing in this country. For that simple reason, thinking through how housing policy will work with an eye toward the developer-market participant that must give form to the regulation—or lack thereof—is vital. This is particularly true in light of the research, noted above, showing that zoning tends to follow the market rather than the other way around.[66] The past history indicates that very little land-use regulation—or lack thereof—guides the market. To achieve any of the policy objectives of the three housing activist camps considered here, the policies enacted will need to convince a developer—and considerable capital—to build the desired housing where it is needed and with an eye toward maximizing profit that any market lender will demand.

A. Eliminating Single-Family Districts

Perhaps the most obvious disconnect between activism and the reality of developer economics is the effort to eliminate *single-family districts*.[67] The single-family district has long been in the crosshairs of environmental activists but to little avail.[68] The single-family district

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exclusionary policies in the land use planning process, disproportionately impacting lower-income people of color).

[66] Landis, *supra* note 49, at 6.

[67] Christopher S. Elmendorf & Darien Shanske, *Auctioning the Upzone*, 70 CASE W. RES. L. REV. 513, 516 (2020) (discussing the tension between high demand for new apartments and condos and the reality that most metropolises remain exclusively zoned for single-family homes).

[68] *See* Emily Badger & Quoctrung Bui, *Cities Start To Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019),

became anathema to housing activists who saw it as the very embodiment of anti-market urbanism, routinely eating up over half of the land even within a metropolitan region's central city urban core.[69] Equity activists came to see the single-family district as the legacy of *Buchanan v. Warley*[70] and *Village of Euclid v. Ambler Realty Co*.[71] These early land use cases simultaneously gave credence to the single-family district while openly acknowledging the intent to avoid the arrival of apartment buildings, which routinely housed people of color at that time, as "nuisances."[72]

By the end of 2021, California and Oregon had largely eliminated the single-family district through statewide legislation, a move that was replicated in several cities across the country.[73] From the activist perspective, the move was momentous in light of the history of the single-family district, which had become the defining land-use form of the American city.[74]

From the developer's perspective, the importance of eliminating single-family zoning was not so evident. For instance, a study from the Terner Center at U.C. Berkeley found that just 5.4% of single-family lots in the state could realistically be expected to be redeveloped to a higher level of density, such as a duplex, triplex, or fourplex.[75] At most, that would account for just 700,000 new units in

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https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html ("Single-family zoning 'means that everything else is banned . . . Apartment buildings—banned. Senior housing—banned. Low-income housing, which is only multi-unit—banned. Student housing—banned.'").

[69] *See id.*

[70] *See* Oral Argument for Defendant in Error, Buchanan v. Warley, 245 U.S. 60, 66–68 (1917) (holding that a state may not rely on police powers to regulate sale of private property in residential districts based on race).

[71] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (upholding an ordinance restricting certain housing zones to single-family districts as constitutional because it bears a rational relationship to the health and safety of the community).

[72] *Id.* at 394–95.

[73] Sarah J. Adams-Schoen & Edward J. Sullivan, *Reforming Restrictive Residential Zoning: Lessons from an Early Adopter*, 30 J. AFFORDABLE HOUS. & CMTY. DEV. L. 161, 166–67 (2021).

[74] *See* SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 7 (2014) (noting the overwhelming influence of single-family zoning).

[75] *See* BEN METCALF ET AL., WILL ALLOWING DUPLEXES AND LOT SPLITS ON

California, which is less than 10% of the 7.5 million new single-family homes the state estimates that it needs just to stabilize its housing stock.[76] As developers begin to weigh options, some equity activists have also become more concerned. The single-family districts most likely to be redeveloped are those where land values are low relative to potential market growth.[77] Such neighborhoods are often urban neighborhoods or inner-ring suburbs that are thriving neighborhoods for people of color.[78] There is increasing concern that such neighborhoods might be the first—and maybe the only—neighborhoods that are turned from single-family use to higher levels of density.[79] Indeed, as the single-family unit loses its zoning-protected status, the single-family home might even begin to acquire a premium. The first single-family districts were not protected from more intense development by zoning but by restrictive covenants.[80] In today's suburban communities, it is routine for developers to already utilize such restrictive covenants to limit uses in the subdivision to single-family dwellings.[81] A recent study found that in some regions, such as the Mountain West, upwards of 86% of new home development was subject to restrictive covenants.[82] If the state, and the country, were serious about eliminating the single-family district, they would also

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PARCELS ZONED FOR SINGLE-FAMILY CREATE NEW HOMES?: ASSESSING THE VIABILITY OF NEW HOUSING SUPPLY UNDER CALIFORNIA'S SENATE BILL 9, 9 (2021); Manuela Tobias, *California's Housing Crisis: How Much Difference Will a Zoning Bill Make?*, CAPRADIO (Sept. 17, 2021), https://www.capradio.org/articles/2021/09/17/californias-housing-crisis-how-much-difference-will-a-zoning-bill-make/ (affirming SB 9's policy of allowing development of two duplexes, or four total units, on single-family lots without local approval).

[76] METCALF ET AL., *supra* note 75, at 8.

[77] *See id*. at 2 (asserting that SB 9 offers affordable housing in "higher-resourced, single-family" neighborhoods through new development, creating greater opportunities for attainable homeownership).

[78] *See* Cydnee V. Bence, *A House Is Not a Home: Learning from Our Mistakes To Prevent Unequitable Gentrification on a Local Level*, 44 VT. L. REV. 429, 431 (2019) (discussing low-income Black neighborhoods as targets for gentrification).

[79] *See id.*

[80] *See* Lawrence Berger, *Conflicts Between Zoning Ordinances and Restrictive Covenants: A Problem in Land Use Policy*, 43 NEB. L. REV. 449, 469 (1964).

[81] *See* Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 721 (2010) (discussing developers' work to create a private covenanted community preserving prior rules for use and building design).

[82] Wyatt Clarke & Matthew Freedman, *The Rise and Effects of Homeowners Associations*, 112 J. URB. ECON. 1, 9 (2019).

declare that the single-family dwelling covenant in restrictive covenants was against public policy and void.

The fact that the elimination of single-family districts might result in very little housing production is sobering because it is arguably the most high-profile win of the housing activists. It raises the question of whether a better approach might have been to target a class of undervalued parcels that still might exhibit a fine-grained penetration into urban neighborhoods. While some researchers have focused on the potential for sites of urban vacancy,[83] a larger-scale solution is suburban strip-mall retail. The COVID-19 pandemic, coupled with the rise of internet shopping over the last several decades, has left vast swaths of retail with reduced demand and lowered valuations.[84] Retail was also built along transit corridors, and much of it still receives considerable transit service relative to other locations in the single-family districts. From a developer perspective, incentives to develop former retail locations that exist along transit corridors seems a natural fit to achieve objectives of affordability, equity, and environmental activists. While some development schemes have emerged in this vein, the concept has not caught the public imagination. Perhaps the most notable proposal thus far is Peter Calthorpe's proposal to redevelop the El Camino Real suburban retail strip down the Bay Area peninsula, as well as other arterials in the five-county Bay Area region, to produce 1.2 million new dwelling units on existing retail land that is already interwoven into existing communities and along transit lines.[85]

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[83] Dan Wu & Sheila R. Foster, *From Smart Cities to Co-Cities: Emerging Legal and Policy Responses to Urban Vacancy*, 47 FORDHAM URB. L.J. 909, 910–11 (2020).
[84] *See* Rich Fox et al., *Redefining Value and Affordability in Retail's Next Normal*, MCKINSEY & CO. 1, 4 (June 15, 2020), https://www.mckinsey.com/industries/retail/our-insights/redefining-value-and-affordability-in-retails-next-normal.
[85] Robert Steuteville, *The Corridor Model for More Affordable Housing*, PUB. SQUARE: CONG. FOR NEW URBANISM J. (Sept. 15, 2020), https://www.cnu.org/publicsquare/2020/09/15/corridor-model-more-affordable-housing.

B. Accessory Dwelling Units

Accessory dwelling units (ADUs) have also become a popular solution to the affordability crisis.[86] An ADU is a second dwelling unit on a lot that otherwise permits just one single-family dwelling unit.[87] Typical ADU legislation, at both the state and local level, usually restricts the size of an ADU to 700 square feet.[88] Activists fighting for ADUs emphasized the ability to create additional housing stock within existing communities, which would also provide a rental tenure within otherwise owner-based neighborhoods.[89]

However, there is reason to believe that ADUs will also prove to be a less-than-effective means of producing housing.[90] The size of an ADU makes it desirable only for one or two individuals, which is smaller than the average household size.[91] Many ADUs are aboveground and inaccessible to those with disabilities unless some alteration is added to the structure.[92] Because the ADU must be sold

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[86] *See* Haisten Willis, *Accessory Dwellings Offer One Solution to the Affordable Housing Problem*, WASH. POST (Jan. 7, 2021), https://www.washingtonpost.com/realestate/accessory-dwellings-offer-one-solution-to-the-affordable-housing-problem/2021/01/07/b7e48918-0417-11eb-897d-3a6201d6643f_story.html (arguing that ADUs create affordable rentals to meet housing demands).

[87] *See* MASTER BUILDERS ASS'N, ACCESSORY DWELLING UNIT ORDINANCES 1 (2021), https://www.mbaks.com/docs/default-source/documents/advocacy/issue-briefs/adu-ordinances.pdf; Brian Martucci, *What Is an Accessory Dwelling Unit (Granny Flat) – ADU Costs & Benefits*, MONEY CRASHERS (Dec. 13, 2021), https://www.moneycrashers.com/accessory-dwelling-unit-granny-flat-costs/.

[88] *See* MASTER BUILDERS ASS'N, *supra* note 87, at 7 (documenting ADU regulations in Washington state).

[89] *See* Willis, *supra* note 86 (claiming ADUs mitigate housing demand without changing neighborhood structure); MASTER BUILDERS ASS'N, *supra* note 87, at 1 (arguing that ADUs utilize existing housing to provide further options).

[90] *See* Lauren Ashley Week, *Less Is Not More: The False Promise of Accessory Dwelling Units for San Francisco's Lowest-Income Communities*, 30 J. AFFORDABLE HOUS. & CMTY. DEV. L. 281, 285–86, 298–99 (2021) (weighing the benefits of incorporating ADUs into zoning ordinances in San Francisco and concluding that ADUs do not necessarily solve affordable housing availability issues in lower-income areas).

[91] *See* Martucci, *supra* note 87 (documenting that the majority of ADU renters are single individuals or couples).

[92] *See ADUs Are Good for People and Places*, AARP, https://www.aarp.org/livable-communities/housing/info-2019/adus-are-good-for-people-and-places.html (last visited May 18, 2022) (describing how ADUS are being built with accessible doorways, hallways, and bathrooms for those with disabilities).

with the existing principal use, the presence of an ADU increases the price of the principal use.[93] A persistent problem for housing policy is the ADU being used as a short-term rental, which generates more income than typical rental housing.[94]

Another approach localities could take would be to revisit their subdivision or lot-split codes to permit the ADU to become its own for-sale unit. If the local government wanted to limit the use to residential, as opposed to short-term rental, that could be a condition of approval in the lot-split application. Facilitating lot splits of ADUs from the principal use could facilitate the creation of doubling ownership units in urban areas. The split units—the ADU without the "accessory" designation—should yield two lower-priced units because the former principal use would have less land and thus, presumably, less land value. Such subdivisions or lot splits would need to be creative given the variety of ways that ADUs are built onto existing properties, but it is nothing not already perfected through existing methods of property division such as airspace parcels or the employment of a land surveyor.

C. Code Reform

Code reform of bulk—such as front- and side-yard setbacks, lot coverage requirements and height—has also become popular for housing activists seeking freedom from the constraints of *Euclidean zoning*.[95] While these efforts are commendable, it is unclear how much of a difference they will make in actual development. The limitations of Euclidean zoning were made abundantly clear as early as the

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[93] *See* Martucci, *supra* note 87 (arguing that the benefits of ADUs for homeowners include increase in property value).

[94] *See* AARP, *ADUs Are Good for People and Places*, *supra* note 92 (explaining how the market-rate rents for ADUs are slightly higher than typical housing options of the same size).

[95] *Euclidian zoning* refers to the practice of zoning towns into subsections based on desired use of the area, rather than mixing zoning types. *See generally We're Trying To Make Connecticut More Inclusive, by Design*, DESEGREGATE CONN., https://www.desegregatect.org/about (last visited May 18, 2022) (discussing Desegregate Connecticut, a housing activist group working to change land-use zoning polices to promote racial, economic, and climate justice).

1950s.[96] At that time, the "floating zone," which resembled the "planned unit development," became a popular tool to permit developments that could not otherwise be permitted under the Euclidean rules.[97] It wasn't long before, in most jurisdictions, most major projects were being approved almost exclusively with PUDs. The result was that there were really two codes: the Euclidean codes on the books and the negotiated code that the PUD permitted.[98] The lax approach to enforcing Euclidean codes was reinforced by the ready availability of the variance from area requirements and, in some states, also use requirements.[99] The development agreement, which brought contractual bargaining to the otherwise administrative and regulatory field of land-use planning, completed the large development's total divorce from the Euclidean code that purported to govern development in a city.[100] This was especially true in suburban and exurban communities. In urban environments, the release valve often came through the establishment of urban-renewal districts—or other special development districts—where the ordinary rules would not apply.[101] In many instances, these special redevelopment districts came to populate almost the entire city such that nothing of significance happened outside of them.[102]

A related movement, seeking to eliminate Euclideanism altogether, aims to move toward form-based codes.[103] Here again,

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[96] *See* Daniel R. Mandelker, *Legislation for Planned Unit Developments and Master-Planned Communities*, 40 URB. LAW. 419, 420, 428 n.31 (2008) (arguing that planned unit developments countered traditional Euclidean zoning and allowed local land-use planners to circumvent Euclidean requirements).

[97] *See id.* at 427–28 (discussing the new procedures allowed through PUDs and floating zones).

[98] *See* Daniel R. Mandelker, *New Perspectives on Planned Unit Developments*, 52 REAL PROP., TR. & EST. L.J. 229, 230–33 (2017) (documenting the rise of planned unit developments as an alternative to traditional zoning because of the availability of discretionary review in approving major projects).

[99] *See* David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 2 COLUM. J. ENV'T L. 279, 280–81 (2004) (discussing the "conventional wisdom" that zoning variance is "widely abused").

[100] *See* Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 593 (2011) (describing development agreements).

[101] Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 69 (2010).

[102] Jared F. Knight, *Is Tax Increment Financing Racist? Chicago's Racially Disparate TIF Spending*, 101 IOWA L. REV. 1681, 1685–86 (2016).

[103] Briffault, *supra* note 101, at 69.

there is much to commend the effort. However, it is worth noting the experience of several large cities that have experimented with such codes. Those cities have found that form-based codes do not necessarily eliminate discretionary approvals. For instance, in Denver, the move to form-based codes largely shifted discretion to the site-design approval stage.[104] As another example, form-based codes have not eliminated the potential for graft in securing development approvals. Cincinnati, which adopted one of the first form-based codes in the country, is currently embroiled in a development bribery scheme alleging that three of its city council members sought to sell their votes to developers.[105]

Other states, seeking to address the problems of race and equity that have been found in research at the local decision-making level, have sought to utilize state preemption of certain project approvals, especially around transit centers.[106] At the same time, many equity housing activists are concerned that doing so makes it harder for people of color to participate in the decision-making in their communities.[107] Rather than seeking to eliminate local participation in decision-making, such equity activists have sought racial-impact analyses.[108]

D. Subdivisions

Despite efforts to promote infill in the urban core, new development will almost certainly occur in suburban or *greenfield*

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[104] *See How Form-Based Codes Became Denver*, ARCHITECT (May 30, 2012), https://www.architectmagazine.com/technology/how-form-based-codes-became-denver_o (describing Denver's move to form-based codes).

[105] Jared Goffinet & Chris Riva, *P.G. Sittenfeld Claims Innocence, Plans to Fight Charges Until Very End*, FOX19 NOW (Sept. 7, 2021), https://www.fox19.com/2021/09/07/pg-sittenfeld-claims-innocence-plans-fight-charges-until-very-end/; Sittenfeld Indictment, U.S. v. Alexander Sittenfeld, No. 1:20-CR-0014 (S.D. Ohio filed Nov. 18, 2020); *Oakland YIMBY Housing Platform*, OAKLAND WIKI, https://localwiki.org/oakland/Oakland_YIMBY_housing_platform (last visited May 18, 2022).

[106] John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C.L. REV. 823, 825 (2019).

[107] *See* Lance Freeman, *Build Race Equity into Rezoning Decisions*, BROOKINGS (July 13, 2021), https://www.brookings.edu/blog/how-we-rise/2021/07/13/build-race-equity-into-rezoning-decisions/ (advocating for consistent racial equity analyses with every major land-use and zoning regulation).

[108] *Id.*

development.[109] For that reason, activists need to focus less on the urban core and more on how the panoply of suburban jurisdictions will develop. To address this future suburbanism, one option is to reevaluate statewide subdivision enabling statutes.

Such subdivision codes could achieve considerable value for the three activist groups while also working within expectations of the developer community. First, subdivision reform could require that any *plat* illustrate a commitment to a mix of tenures.[110] For instance, a suburban plat that has 100 lots could be required to dedicate twenty of those to rental properties. Alternatively, the plat could restrict a part of the development to an apartment building. Second, subdivision reform could require a commitment to a mix of lot sizes. Subdivisions routinely make all home lots the same—or approximately the same—size.[111] There is no reason that the state cannot restrict that. In particular, the state could require variation of lot sizes within the subdivision, varying the cost threshold to enter the subdivision. Third, subdivision regulation could require a commitment to a mix of housing size. Since 1973, average house size has increased by one-third, or 1,000 square feet.[112] This means that despite the recent run-up in housing prices, the price-per-square-foot of a new single home in the United States has remained largely constant over the last five decades when adjusted for inflation, as illustrated by Figure 3.[113]

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[109] *See* Jim Heid, *Greenfield Development Without Sprawl: The Role of Planned Communities*, URB. LAND INST. 5 (2004), http://europe.uli.org/wp-content/uploads/ULI-Documents/GreenfieldDev.ashx_.pdf (explaining how to make greenfield and urban infill development "smart").

[110] *See Platting Information*, FORT WORTH TEX., https://www.fortworthtexas.gov/departments/development-services/platting (last visited May 18, 2022) (discussing the diversity of plats and their appropriateness for various projects).

[111] Jon Healy & Matthew Ballinger, *What Just Happened with Single-Family Zoning in California?*, L.A. TIMES (Sept. 17, 2021), https://www.latimes.com/homeless-housing/story/2021-09-17/what-just-happened-with-single-family-zoning-in-california.

[112] Mark J. Perry, *New US Homes Today Are 1,000 Square Feet Larger Than in 1973 and Living Space per Person Has Nearly Doubled*, AM. ENTER. INST. (June 5, 2016), https://www.aei.org/carpe-diem/new-us-homes-today-are-1000-square-feet-larger-than-in-1973-and-living-space-per-person-has-nearly-doubled/; Joe Pinsker, *Why Are American Homes So Big?*, ATLANTIC (Sept. 12, 2019), https://www.theatlantic.com/family/archive/2019/09/american-houses-big/597811/.

[113] Andrew Latham, *Believe It or Not, Real Estate Affordability Hasn't Changed*

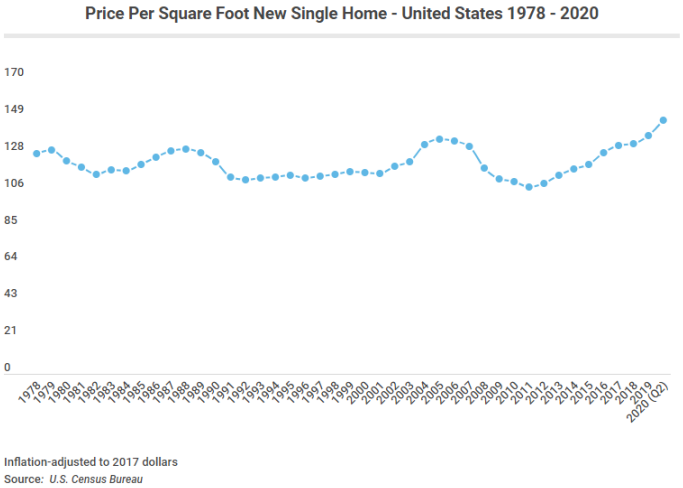

Figure 3

Subdivision statutes should also encourage rethinking traffic and transit throughout subdivisions in a manner that incentivizes density and alternative travel. A century ago, the radical design of the Radburn subdivision forced residents to leave their cars in common lots and walk through a neighborhood of connected paths to homes.[114] Subdivision regulations that prioritize street access take up a significant amount of land value.[115] By permitting subdivisions to have fewer roads, additional density—and equitable considerations in that density—could be sought and insisted upon.

Because subdivision is not a right but rather a privilege, states would be unlikely to face an unconstitutional conditions claim on such generally applicable subdivision provisions.[116] The result in such

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Much in 40 Years, SUPERMONEY (Sept. 22, 2020), https://www.supermoney.com/inflation-adjusted-home-prices/.

[114] Michael Fagence, *The Radburn Idea-1*, 2 BUILT ENV'T 467, 467 (1973).

[115] *See Model Land Development & Subdivision Regulations That Support Access Management for Florida Cities and Counties*, CTR. URB. TRANSP. RSCH. OF S. FLORIDA, https://www.cutr.usf.edu/wp-content/uploads/2021/03/Land_Regs.pdf (last visited May 18, 2022) (discouraging use of flag lots due to their consuming substantial space to give the property street access).

[116] *See, e.g.*, Associated Homebuilders, Inc. v. City of Walnut Creek, 4 Cal. 3d 630, 633 (1971) (assessing the constitutionality of requiring a subdivider to dedicate land

policies would also be that future suburban buildout would have within it a variation of tenure, lot size, and housing size that should produce market-based price variations and affordability at a fine-grained scale.

E. Greenfield Development

To the extent that *greenfield development* remains an option, it will continue to be the preferred development option of most developers. It is simply easier, and usually more profitable, to build at the periphery on land that is unlikely to have costly surprises from past uses (toxics, historical artifacts, etc.) that slow development. For that reason, greenfield development must stop being an option. Only once the spigot of easy land is turned off will developers begin to think in earnest about how to develop existing infrastructure at scale to meet housing needs. For many affordability activists, this is a non-starter; however, that is short-sighted. The long-term costs of continuing to sprawl are not only significant infrastructure charges, but an almost certain failure of the country to meet climate change goals in this century. That is a simply unacceptable future.

At the same time, it is almost impossible to imagine that existing local growth management tools can do what they must and prevent further growth. There are many culprits of this failure: decentralized local government, lack of knowledge among local officials, the failure to properly value agricultural land for the use value it provides, and more. The failure of such local growth management to make even the slightest dent in growth over the last half-century is humbling. For local government, however, it means acknowledging that the current procedural system—which replicates a planning body (usually 5–9 members) in addition to an elected body (usually another 5–9 members) across 39,000 local governments—is placing the future of affordability, equity, and environmental concerns of housing in the hands of an ever-shifting set of hundreds of thousands of

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or pay fees as a condition of the approval of a subdivision map); James C. Nicholas & Julian C. Juergensmeyer, *A Rational Nexus Approach to Workforce Housing Land Development Conditions*, 52 UIC J. MARSHALL L. REV. 647, 651 (2019) (discussing the "reasonableness" standard for constitutionally permissible development conditions).

individuals.[117] Most of these individuals have no training in local government, much less land-use or housing issues.[118] That is a procedural proposition that is never going to work effectively. At the same time, regionalism in the United States is a proposition deeply frozen in the ancient times of the 1970s for which no thaw is foreseen.[119] If regionalism is dead, then alternatives must emerge. The most likely short-term solution is to do the best possible with the existing local volunteers, which means utilizing trainings and resources provided by the state and other centers.

The importance of the task at hand means past efforts must be redoubled. It likely also means that local governments must do more than attempt to draw a line in the sand beyond which development cannot go.

F. Redefining the Development Industry

Given the past failures of such local growth management, this likely also means trying to change the culture of the development community itself. Local governments, and perhaps even federal or state governments, must begin training and incentivizing the development community in the tools of redevelopment, whether those lots be single-family transitioning to duplex or retail transitioning to six-story apartment buildings.

A more radical approach is to create a new category of developers and developer incentives. One approach is to utilize the example of regulated utilities but applied to market developers. In such an instance, a developer might receive some kind of guaranteed return on an affordable housing investment in exchange for preferential financing.[120] The government entity financing the project might even

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[117] *What Is a Regional Council, COG, or MPO?*, NAT'L ASS'N. OF REG'L COUNCILS, https://narc.org/about/what-is-a-cog-or-mpo/ (last visited May 18, 2022).
[118] *See generally* Kellen Zale, *Compensating City Councils*, 70 STAN. L. REV. 839, 885–86 (2018) (arguing that city councils and other local governing bodies tend to suffer from legislative under-compensation, decreasing legislative effectiveness).
[119] *See* Bruce Katz, *Editor's Overview*, BROOKINGS, https://www.brookings.edu/wp-content/uploads/2016/07/reflections_chapter.pdf (last visited May 18, 2022).
[120] This proposed approach would establish the same structural incentives for market developers that already exist for regulated utilities to create more accessible and

take any profit above a particular percentage that could be returned to a housing trust fund to provide funding for the next project, and perhaps the developer that generated the profit has first preference on that money in the fund. An example close to this is the Bay Area Housing Finance Authority the California Legislature recently created.[121] At this time, the authority is operating only pilot projects; however, its long-term outlook is promising for experimentation in housing finance as a way to incentivize housing growth that meets affordability, equity, and environmental considerations.

G. Federal Investment

There is a role for the federal government to play in housing affordability as well. [122] Some interesting options that were mentioned in Democratic platforms but which have not yet been put into place at this time, include the following.

Senator Michael Bennet proposed a Low Cost Housing Innovation Fund, which would be a $100 million national demonstration grant competition for home-builders to rethink housing to bring down the cost per square foot or total cost per unit by half or more.[123]

Beto O'Rourke proposed ARPA-Build, a new agency focused on breakthroughs in building, which he proposed to pair with zoning reform to address climate change and housing costs.[124]

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equitable programs. *See, e.g.*, *Supporting Low-Income Energy Efficiency: A Guide for Utility Regulators*, AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON. (Apr. 28, 2021), https://www.aceee.org/toolkit/2021/04/supporting-low-income-energy-efficiency-guide-utility-regulators.

[121] *Bay Area Housing Financing Authority (BAHFA)*, METRO. TRANSP. COMM'N, https://mtc.ca.gov/about-mtc/authorities/bay-area-housing-financing-authority-bahfa (last visited May 18, 2022).

[122] *See generally* Gabrielle Kolencik, *Harmony Between Man and His Environment: Reviewing the Trump Administration's Changes to the National Environmental Policy Act in the Context of Environmental Racism*, 9 JOULE: DUQ. ENERGY & ENV'T L.J. 1, 18–20 (2021) (documenting the Trump administration's dismantling of NEPA requirements and adverse impacts on communities of color).

[123] Stephen R. Miller, *Housing Policy Ideas from the 2020 Presidential Candidate Platforms*, (Dec. 10, 2020) (unpublished manuscript) (on file with the University of Idaho College of Law–Boise), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547833.

[124] *Id.*

Tom Steyer proposed that public housing should be made climate-smart, with increased weatherization and energy efficiency investments. He proposed $195 billion for clean affordable housing, urban parks, and greenspace.[125] He also proposed universal renter displacement climate disaster insurance, as well as $250 billion over 10 years in National Health Communities Climate Bonds to implement climate smart urban design.[126] He would also provide $650 billion in federal and private investment in rail and fleet purchases for local governments prioritizing integrated climate smart community planning. He also proposed incorporating climate models in permitting, insurance, construction, and renovation process to protect tenants from extreme weather, fire, and other climate-threats.

Raul Castro proposed requiring climate sensitivity and 'Carbon Scoring' in future planning and government projects that would ensure any government project contributes towards meeting climate goals and sets benchmarks to reduce carbon impact and mitigate climate change, including net-zero carbon emission targets for new federal housing construction.[127] He would make Community Development Block Grant Disaster Recovery Assistance a permanent program to help communities recover from natural disasters more effectively, and support long-term sustainable land use.[128]

Tom Inslee proposed to direct 40% of all green federal investments into front-line communities experiencing the greatest environmental burden, economic inequality, and climate change impacts.[129] These are but a few of the policy ideas that could be pursued by the present or future presidential administration.

CONCLUSION

By investigating the goals of the three major camps of housing activists—affordability, equity, and environmental—and evaluating them in light of market considerations under which developers operate to produce housing, this Article has argued for several new pathways

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[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*

in housing development. This Article has also sought to illustrate some of the most important aspects of developers' concerns. Meeting the demands of the current housing affordability crisis will require solutions like those noted here, and also evolving in significant additional research.[130] Other housing issues, such as homelessness and post-incarceration housing, also need solutions now. For those activists that continue to work diligently on all housing issues, a focus on the commercial viability of policies is essential to ensuring that housing for future generations is not only affordable and equitable but environmentally resilient as well.[131]

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[130] *See generally* Christopher S. Elmendorf et al., *Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework*, 47 ECOL. L.Q. 973, 976 (2020) (proposing that the Department of Housing could use California's planning framework to bring about substantial reductions in cost and time to build housing); *see also* Roderick M. Hills Jr. & David Schleicher, *Building Coalitions out of Thin Air: Transferable Development Rights and "Constituency Effects" in Land Use Law*, 12 J. LEGAL ANALYSIS 79, 82 (2020) (arguing transferable development rights programs can be used to counteract influential neighborhoods that oppose new development); Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CAL. L. REV. 1055, 1057 (2019) (navigating the new zoning reality and how land-use regulations can still be used to achieve affordability in this new reality); Andrea J. Boyack, *Responsible Devolution of Affordable Housing*, 46 FORDHAM URB. L.J. 1183, 1187 (2019) (reasoning that broader, federal-level involvement in the housing realm could create sustainable and equitable housing support).

[131] *See generally* C. Anthony Arnold, *Resilience Justice and Community-Based Green and Blue Infrastructure*, 45 WM. & MARY ENV'T. L. POL'Y. REV. 665, 668 (2021) (noting the continued struggle for public policies to "remedy unequal green and blue infrastructure in low-income neighborhoods").

ASSISTED SUICIDE: IS THERE A RIGHT TO DIE WITH DIGNITY, OR ONLY A DUTY TO LIVE IN PAIN?

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INTRODUCTION

Imagine, if you will, a world where medicine prolongs life beyond its natural span, keeping patients alive to suffer until their death. Day-by-day these patients experience more and more pain until finally death's embrace releases them from their perpetual state of agony. As dystopian as this sounds, patients denied the right to assisted suicide experience this every day.

In *Washington v. Glucksberg*, the right to assisted suicide was denied fundamental liberty interest status.[1] The Court claimed that protecting vulnerable patients justified denying assisted suicide as a fundamental right.[2] The Court in its decision was trying to achieve an ethical result; instead, the decision caused unknowable suffering in the lives of countless patients. This should not be surprising; as Lao-tzu famously said, "Try to make people happy, and you lay the groundwork for misery."[3]

This Note will compare the *Glucksberg* analysis with other fundamental rights cases. Part I of this Note will discuss fundamental rights jurisprudence and introduce the *Glucksberg* case. Part I also discusses some possible limitations on the right to assisted suicide. Then, Part II will compare the test used in *Glucksberg* to three other fundamental rights tests. First, Part II compares *Glucksberg* with the broad historic test. Second, Part II compares *Glucksberg* with the changing conscience of society test. Afterwards, Part II utilizes a variation of this test to argue that societal changes since *Glucksberg* justify overturning that precedent. Third, Part II compares *Glucksberg* with the penumbra of rights test. Finally, after arguing for the right to assisted suicide, Part III will propose a new fundamental rights test.

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[1] Washington v. Glucksberg, 521 U.S. 702, 728 (1997).
[2] *Id.* at 730–31.
[3] LAO-TZU, TAO TE CHING 58 (Stephen Mitchell trans., Harper & Row 1988).

I. BACKGROUND

A. Fundamental Rights Jurisprudence

The Due Process Clause of the Fourteenth Amendment is the legal apparatus that enshrines fundamental rights.[4] The Due Process Clause protects certain fundamental rights and liberties against government interference.[5] The Supreme Court has long held a right to be fundamental if it is "deeply rooted in this Nation's history and tradition,"[6] and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[7]

To determine whether a right is deeply rooted in the history and traditions of the United States, the Supreme Court must approach fundamental rights from an objective position.[8] This entails defining fundamental rights "not from drawing arbitrary lines but rather from careful 'respect for the teachings of history and solid recognition of the basic values that underlie our society.'"[9] In other words, fundamental rights are derived from history or the American conscience, without regard for the Justices' personal opinions.[10] The Court generally uses one of three tests to determine whether a right is fundamental.

First, there is the broad historic test, which looks at American history and traditions to justify an asserted right.[11] Under this test, if citizens were traditionally allowed to exercise an asserted right, that right will be ranked fundamental.[12] In *Loving v. Virginia*, for example,

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[4] *Glucksberg*, 521 U.S. at 719 (citing Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).
[5] *Id.* at 720 (citing Reno v. Flores, 507 U.S. 292, 301–02 (1993)).
[6] *Id.* at 721 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)).
[7] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).
[8] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not to mandate our own moral code.").
[9] *Moore*, 431 U.S. at 503 (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).
[10] *Casey*, 505 U.S. at 850.
[11] *See generally* Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 269–77 (1990) (granting the right to remove life-sustaining equipment, based on historical recognitions of the right to informed consent and the right to abstain from eating and drinking to sustain life); Loving v. Virginia, 388 U.S. 1, 12 (1967) (determining that the traditions of the United States justified the right to interracial marriage).
[12] *Loving*, 388 U.S. at 12.

interracial marriage was declared a fundamental right.[13] The Court reasoned that there was a right to marry embedded in the history and traditions of the United States.[14]

Loving acknowledged that the specific asserted right to interracial marriage had not at that point been widely practiced in the United States.[15] However, the analysis did not consider only the historical practice of interracial marriage. Instead, the analysis looked to the general history of marriage in the United States.[16] The Court saw marriage as a strong union between a man and woman, based on personal autonomy and love, and included interracial marriage in that tradition.[17]

Second, the changing conscience of society test looks to see if an asserted right is fundamentally grounded in the ever-changing American conscience.[18] *Obergefell v. Hodges* used this test to declare same-sex marriage a fundamental right.[19] Although prohibiting same-sex marriage had been the status quo, the conscience of America demanded change.[20]

> The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. . . . If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and groups could not invoke rights once denied.[21]

This test recognizes that the public's perception regarding fundamental rights is never stagnant. Cases concerning abortion, for example, have

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[13] *Id.*
[14] *See id.* (declaring marriage vital to a person's pursuit of happiness and essential to the idea of personal autonomy).
[15] *Id.* at 6–7.
[16] *Id.* at 12.
[17] *Id.*
[18] *See* Obergefell v. Hodges, 576 U.S. 644, 671–72 (2015) (recognizing that the public conscience is constantly changing, and fundamental rights analysis should reflect a changing society).
[19] *Id.* at 681.
[20] *Id.* at 675.
[21] *Id.* at 670–71.

been known to employ a variation of the changing conscience test. The Court in *Roe v. Wade* discussed why abortion used to be prohibited, and why those objections no longer held weight against abortion.[22] Two of the reasons for prohibiting abortions were Victorian discouragement of sexual conduct and the inherent dangers of abortions.[23] However, since these objections no longer justified prohibiting abortions, the Court saw this change in circumstance as reason to declare abortion a fundamental right.

Moreover, one can see another variation of this test in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *Casey* created a four-part test to overrule precedent: (1) has the precedent become unworkable; (2) would overturning cause inequity to those relying on the rule; (3) has the law become an anachronism; and (4) have facts changed to render the conclusion irrelevant.[24] This test is another way of looking to see how the public's conscience has changed since a prior ruling.

Third, the penumbra of rights test examines if an asserted right can be derived from some principal right protected by the Constitution.[25] For instance, the Court in *Griswold v. Connecticut* determined that the Bill of Rights guaranteed the right to privacy.[26] The decision derived the right to privacy from the First, Third, Fourth, Fifth, and Ninth amendments.[27] Prohibiting married couples from using contraceptives, the Court declared, was an infringement on the right to privacy.[28]

The penumbra of rights test ensures certain liberties are not wrongly prohibited. For example, any law that prohibits contraceptives invades upon personal privacy.[29] In the penumbra of rights cases, the Court has stated that rights would not be adequately guaranteed if

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[22] Roe v. Wade, 410 U.S. 113, 148 (1973).
[23] *Id.*
[24] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).
[25] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
[26] *Id.*
[27] *Id.* at 484.
[28] *Id.* at 485.
[29] *See id.* (granting married couples the fundamental right to use contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (extending the right to use contraceptives to non-married couples under the Equal Protection Clause).

certain activities were prohibited.[30] Various principal rights will only retain meaning if certain practices are ranked fundamental.[31]

B. Definitions

This Note argues for a broadly defined right to assisted suicide. The right argued for in this Note encompasses many ways to die by suicide; however, certain arguments throughout this Note are more narrowly tailored. Therefore, this section will clarify and define various terms that will be showcased throughout this Note.

Setting limitations on the right to die by suicide is outside the scope of this Note. Rather, this Note argues that each individual should be able to make the choice to die by suicide. This Note argues that individuals have a fundamental right to die by suicide, but this Note will not speculate on when and how that right should be administered.

This Note argues that every individual has the right to die. If one has the right to die then they also have the right to die by suicide. Of course, if one has the right to die by suicide then they should also possess the right to receive assistance in doing so. As used in this Note, the term *assisted suicide* refers to this general concept: assisted suicide is the right of each individual to receive professional assistance in dying by suicide in the most humane way possible.

Since this Note argues that individuals have a right to die—and therefore a right to die by assisted suicide—only the individual should have this control. As discussed above, this Note does not seek to speculate on limitations that should be imposed on the right to assisted suicide. One should not impose their own morality upon those who wish to die by suicide. It should only be the individual themselves who decides when death should come from assisted suicide.

Furthermore, since the decision to die by suicide is the individual's choice, it should be the individual who decides what amount of suffering justifies suicide. Some want to limit this right to only those who are terminally ill.[32] However, we should not speculate

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[30] *See Griswold*, 381 U.S. at 485–86 ("[F]orbidding the *use* of contraceptives . . . is repulsive to the notions of privacy surrounding the marriage relationship.").
[31] *Id.* at 485.
[32] *See Frequently Asked Questions*, DEATH WITH DIGNITY, https://deathwithdignity.org/resources/faqs/ (last visited May 20, 2022) (arguing that

on the amount of suffering any other individual is enduring. Some people have higher pain tolerances, different philosophical views towards death, and each person has differing levels of attachment to life. Thus, *suffering* in this Note refers generally to pain, discomfort, loss of dignity, and other sentiments that might cause an individual to desire death. At its core, the term *suffering* refers to any negative qualities that ultimately make an individual decide that death would be a better alternative.

In addition to not mandating a level of suffering, this Note also does not seek to speculate how assisted suicide should operate. Some would argue that assisted suicide should only be performed with the aid of a licensed physician who writes individuals a lethal prescription.[33] Conversely, this Note argues that individuals should have the right to receive assistance in any form from any professional.

It is not inconceivable that other professionals could provide the same prescriptions; for instance, a licensed psychiatrist or a social worker could be similarly trained to provide a lethal prescription.[34] It also seems plausible that other methods of dying could provide a

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terminally ill patients should be able to "voluntarily and legally request and receive a prescription medication from their physician to hasten their death in a peaceful, humane, and dignified manner."); *see generally* The Patient Choice and Control at the End of Life Act, 18 VT. STAT. ANN. BIRTHS, MARRIAGES, AND DEATHS §§ 5281, 5283 (2018); End of Life Option Act, CAL. HEALTH & SAFETY CODE §§ 443.1–443.2 (2016); Washington Death with Dignity Act, WASH. REV. CODE § 70.245.020 (2008); Oregon Death With Dignity Act, OR. REV. STAT. § 127.800 (1995).

[33] *See* Yvette Brazier, *What Are Euthanasia and Assisted Suicide?*, MED. NEWS TODAY (Dec. 17, 2018), https://www.medicalnewstoday.com/articles/182951 (defining assisted suicide specifically as the practice of a doctor assisting a patient in dying by suicide); David Levine, '*Death with Dignity' or 'Assisted Suicide'?*, GOVERNING (Dec. 18, 2013), https://www.governing.com/archive/gov-death-with-dignity-rhetoric.html (stating that both death with dignity and assisted suicide refer to the practice of doctors aiding a patient in dying).

[34] In addition to other professionals being capable of offering the same service, it is also worth noting that using other professionals can help alleviate medical ethics concerns. *See Physician-Assisted Suicide*, AM. MED. ASS'N, https://www.ama-assn.org/delivering-care/ethics/physician-assisted-suicide (last visited May 20, 2022) ("Physician-assisted suicide is fundamentally incompatible with the physician's role as healer . . . ."); Joseph G. Barsness et al., *US Medical and Surgical Society Position Statements on Physician-Assisted Suicide and Euthanasia: A Review*, 21 BMC MED. ETHICS 4 (2020) (reporting that at least five medical societies officially oppose assisted suicide with the justification that assisted suicide is contrary to a physician's role).

patient with a painless, efficient death.[35] This Note argues that individuals, if they have the right to die by suicide, also have the right to seek the professional guidance to die peacefully.

In contrast, parts of this Note will refer to the term *medical aid in dying* (MAID). MAID proponents assert that terminally ill individuals who die by lethal prescription are not dying by suicide; rather, these individuals are simply choosing the manner of their death.[36] Where the term MAID is used, it will be referring to when a terminally ill individual, likely to die within months, receives assistance from a physician to die by suicide. Certain arguments in this Note are narrower than the general right to assisted suicide and rely on the situation of the terminally ill. Therefore, where MAID is used instead of assisted suicide, it is a narrowly tailored argument referring specifically to the terminally ill. Similarly, where suffering is used in conjunction with the term MAID, that suffering will refer to the pain and anguish experienced by the terminally ill.

Though this Note argues for a broad right to receive assistance in dying by suicide, as discussed in the limitations section, no right is absolute.[37] The limitations section is meant to showcase possible limitations on assisted suicide if the right were granted fundamental status. That section is not meant to argue for specific limitations. Rather, the limitations section is meant to show that although this Note argues for a general right to assisted suicide, given the legal history of

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[35] *See* Joachim Frost, *Death by Self-Inflicted Asphyxia With Helium–First Case Reports from Norway and Review of the Literature*, 19 SCANDINAVIAN J. FORENSIC SCI. 52, 53 (2013), https://stolav.no/Laboratoriemedisin/Avdeling%20for%20klinisk%20farmakologi/AKF%20Publ%20Death%20by%20sself-inflicted%20asphyxia%20with%20helium%20nFrost%20J,%20Scand%20J%20Forensic%20Sci.pdf (reporting that helium asphyxia is an alternative to prescription medications in helping one die and presents an opportunity where a medical professional is not necessary).

[36] *Medical Aid in Dying is Not Assisted Suicide, Suicide or Euthanasia*, COMPASSION & CHOICES, https://compassionandchoices.org/about-us/medical-aid-dying-not-assisted-suicide/ (last visited May 20, 2022). However, in cases of MAID and suicide the individual is deciding to end their life by their own means. Removing the terminally ill from suicide's definition is an arbitrary distinction since everyone is destined to die, whether that is 6 months from now or 40 years, and deciding to end one's life at a specified moment is suicide. *See Facts About Suicide*, CDC, https://www.cdc.gov/suicide/facts/index.html (last visited May 20, 2022) (defining suicide as "death caused by injuring oneself with the intent to die").

[37] *Infra* Part I.D.

fundamental rights that right to assisted suicide would likely be limited.

Additionally, although this Note argues that any individual maintains the right to die by suicide and therefore the right to receive assistance in doing so, this Note is not meant to promote suicide in general. Although every citizen should have the right to determine the day of their death, that does not mean that death is always the best option. People may argue for a right to marriage, for example, but they might not think marriage is appropriate in every situation. For instance, marriage may be everyone's right to pursue, but marriage might not be the best choice with a partner who is physically and psychologically abusive. Similarly, this Note argues that everyone has the right to die by suicide, but that does not mean that everyone should die by suicide. There are situations where suicide may be justified and there are situations where it probably is not; however, determining in each case whether suicide is justified does not change the argument that the determination should be the individual's.

In general, this Note argues that individuals have a right to die by suicide. Following this logic, if one may die by suicide, they should be able to receive professional assistance in doing so. *Assisted suicide*, as used in this Note, will encompass the terms MAID, physician-assisted suicide, passive euthanasia, self-administered euthanasia, or any other term that entails an individual dying by suicide using professional assistance. If an individual has decided that death would be preferable to continuing a life of suffering, then that individual should have the right to die.

C. The Glucksberg *Analysis*

The case of concern in this Note is *Glucksberg*, which established that assisted suicide is not a fundamental right.[38] *Glucksberg* used the historic test to analyze assisted suicide.[39] The Court reasoned that there is a long history of the state prohibiting suicide and assistance thereof[40] and therefore declared that the right to

[38] Washington v. Glucksberg, 521 U.S. 702, 728 (1997).
[39] *Id.*
[40] *Id.*

assisted suicide is not fundamental. In their analysis, the Justices added that there must be a "'careful description' of the asserted fundamental liberty interest."[41]

Carefully asserting a right requires one to clearly formulate the specific asserted right.[42] Using this requirement, the Court viewed assisted suicide as the "right to commit suicide which itself includes a right to assistance in doing so."[43] Further, the Justices limited their analysis to only the historical practice of receiving assistance in suicide.[44] By analyzing the right through such a narrow lens, assisted suicide was denied fundamental status.[45]

To broaden the analysis, the respondents in *Glucksberg* tried to assert rights other than the specific right to assisted suicide.[46] The respondents asserted that the right in question was actually the right to die or the right to control one's final days.[47] Nevertheless, the Court reasoned that those rights were not carefully asserted, and the opinion considered only the specific act of assisted suicide.[48] The respondents were not allowed to assert that another right could encompass assisted suicide.[49]

Also, the Court refused to consider any justification other than the historical practice of assisted suicide.[50] No other historical traditions were analyzed; only assisted suicide's history came into consideration.[51] The Justices refused to consider the patient's rights to privacy and autonomy as justifications for assisted suicide.[52] Similarly, there was no consideration of how America's conscience demands assisted suicide be ranked fundamental.[53] In this case, the Court limited its analysis to only the specific history of assisted suicide.

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[41] *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).
[42] *See id.* (requiring a careful assertion of rights to limit expansion of substantive due process claims).
[43] *Id.* at 723.
[44] *Id.*
[45] *Id.* at 728.
[46] *Id.* at 722.
[47] *Id.*
[48] *Id.* at 723.
[49] *Id.*
[50] *Id.* at 728.
[51] *Id.*
[52] *Id.*
[53] *Id.*

Asserted rights are rarely viewed as narrowly as the *Glucksberg* decision viewed assisted suicide. *Glucksberg* cites the carefully asserted rule as justification to examine asserted rights from such a restrictive point of view.[54] The cases cited to for the carefully asserted rule were *Reno v. Flores*, *Collins v. City Harker Heights*, and *Cruzan v. Missouri Department of Health*.[55] These cases can be distinguished from the *Glucksberg* analysis.

In *Flores*, the Justices had to decide whether a non-citizen juvenile has the right to be free from physical restraint.[56] The issue concerned whether an non-resident child, who lacks an approved custodian, had a right to be given to another responsible adult in lieu of government care.[57] Even though the case actually concerned an immigrant, the right was viewed more broadly as the right for any child.[58] The analysis broadened the right asserted, which concerned immigrant children, and evaluated whether any child should have the asserted right.[59] Although this case required a careful assertion of rights, the Court viewed the right from a broader perspective.

Additionally, the *Collins* decision also used the carefully asserted requirement.[60] This case concerned the rights of a man killed on a government jobsite.[61] In this case, the widow sued claiming the government violated her husband's right to a safe work environment.[62] Only the right to a safe work environment was asserted, but the Court evaluated this right as including protection from arbitrary government action.[63] The analysis looked to see if deliberate indifference to a

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[54] *Id.* at 721.
[55] *Id.*
[56] Reno v. Flores, 507 U.S. 292, 299–300 (1993) (stating respondent's arguments that support their claim that juvenile aliens have a fundamental right to freedom of physical restraint).
[57] *Id.* at 300.
[58] *Id.* at 302 (describing generally the rights of a child and guardian, rather than immigrant children specifically).
[59] *Id.*
[60] Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).
[61] *Id.* at 117.
[62] *Id.* at 125–26.
[63] *See id.* at 126–29 (analyzing whether the asserted right could be justified through the duty to provide a safe work environment, whether there is a right to be protected against incorrect or ill-advised personnel decisions, and whether there was a duty to properly train government employees to protect health and safety) (citing Bishop v. Wood, 426 U.S. 341, 350 (1976)).

worker's safety constituted arbitrary government action.[64] Including arbitrary government action created another avenue to justify the asserted right. Despite requiring that the right be carefully asserted, the opinion explored multiple considerations to justify the right.

Furthermore, *Cruzan* also employed the carefully asserted rule. *Cruzan* determined the right to remove life-sustaining equipment was fundamental.[65] The petitioners asserted a guardian's right to remove life-sustaining equipment from an unconscious patient.[66] The analysis evaluated whether any patient, conscious or otherwise, had the right to remove life-sustaining equipment.[67] This right was also compared to the rights to informed consent, to abstain from eating and drinking, and to refuse medical aid.[68] This abstraction helped establish the fundamental right to remove life-sustaining equipment.[69]

Cases that employ the carefully asserted requirement generally provide more flexibility in fundamental rights analysis than the *Glucksberg* decision. Carefully asserted cases usually take the asserted right and abstract the right further in order to analyze said right. These cases look to various justifications for an asserted right as well. Nevertheless, the Court claimed that the right asserted in *Glucksberg* was only the right to assisted suicide and looked only to the specific historical practice of this right for justification. This extremely narrow view led to the wrongful determination that assisted suicide is not a fundamental right.

As shown above, the carefully asserted requirement is rarely viewed as narrowly as it was in *Glucksberg*. The *Glucksberg* decision reflects moral objections to assisted suicide; the Justices took an extremely narrow approach to fundamental rights to ensure that assisted suicide was not declared fundamental. The *Glucksberg* decision viewed fundamental rights much more narrowly than the majority of fundamental rights cases. Justices should not be able to

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[64] *Id.* at 126 (citing Rochin v. California, 342 U.S. 165, 172 (1952)).
[65] Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 268 (1990).
[66] *Id.* at 267–68.
[67] *See id.* at 278–84 (examining whether the right for a competent person to abstain from life-sustaining equipment is a protected liberty interest under the Due Process Clause, then after declaring this right to be a protected interest, the Court addressed the issue regarding guardians and the power of attorney in these situations).
[68] *See id.* at 274–78.
[69] *Id.* at 278.

explore fundamental rights so narrowly because this approach makes it difficult to recognize new rights.

D. Possible Limitations on the Right to Assisted Suicide

Recognizing assisted suicide as a fundamental right would not allow anyone to access this right. No right is absolute; all rights are subject to some restraint.[70] There likely would be certain limitations placed on assisted suicide if granted fundamental status. Laws may limit fundamental rights if they pass strict scrutiny[71] or the undue burden test.[72]

Under the strict scrutiny standard, laws must be narrowly tailored to serve a compelling state interest.[73] This means laws limiting fundamental rights must address a legitimate state concern—a concern so strong that it justifies limiting a fundamental right.[74] In addition, the law must specifically address the state concern of issue.[75]

If assisted suicide were granted fundamental status, laws could limit assisted suicide if they pass strict scrutiny. States with MAID statutes frequently limit the practice to terminally ill patients, often defining being terminally ill as having "an incurable and irreversible disease which would, within reasonable medical judgment, result in death in six months."[76] States could also limit assisted suicide to only physician-assisted suicide, where a licensed physician prescribes a lethal dose of medication.[77] Both of these options are for a compelling state interest—protecting healthy citizens. Furthermore, these restrictions appear to be narrowly tailored for that interest without

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[70] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 875 (1992) (explaining that a right to have an abortion is not free from states' interference).
[71] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014) (applying the least-restrictive-means standard of strict scrutiny to prove that the law does not pass the test).
[72] *Casey*, 505 U.S. at 876.
[73] *Burwell*, 573 U.S. at 728.
[74] *Id.*
[75] *Id.*
[76] 18 VT. STAT. ANN. §§ 5281, 5283 (2018); *accord* CAL. HEALTH & SAFETY CODE §§ 443.1–443.2 (West 2022); WASH. REV. CODE §§ 70.245.010.13, 70.245.20 (2008); OR. REV. STAT. § 127.800 (1995).
[77] *Statement on Physician-Assisted Dying*, AM. ACAD. HOSPICE & PALLIATIVE MED. (June 24, 2016), http://aahpm.org/positions/pad.

broadly prohibiting assisted suicide. Limiting assisted suicide to the terminally ill and requiring a physician's prescription are two limitations that would likely pass strict scrutiny.

Another possibility to limit assisted suicide would be adopting the undue burden test. The right to abortion is not subjected to strict scrutiny, rather abortion laws must pass the undue burden test.[78] This means laws restricting access to an abortion may not erect substantial obstacles in the way of women desiring an abortion.[79] Similarly, laws that restrict assisted suicide could be subjected to the undue burden standard. Waiting until a patient is terminally ill, as defined above, likely would not place an undue burden on patients. Likewise, requiring physicians to prescribe proper medication would likely not be an undue burden. Whether subjected to strict scrutiny or the undue burden test, various laws could restrict assisted suicide if recognized as a fundamental right.

In addition to laws that restrict assisted suicide, private actors may also limit access to this right. Medical professionals often are not forced to perform procedures they are not comfortable with.[80] This means that individuals would not be forced to write suicide prescriptions. In like manner, organizations may refuse to offer medical insurance to for their employees that the organization morally objects to.[81] Organizations who morally oppose assisted suicide would not be required to provide insurance coverage for suicide prescriptions.

Granting assisted suicide as a fundamental right would not require action from anyone who is opposed to the procedure. Only consenting individuals will participate in facilitating assisted suicide. Professionals would not be forced to prescribe lethal medications, nor would organizations be forced to provide employees with access to

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[78] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992).
[79] *Id.* at 877.
[80] *See Abortion Refusal Laws*, NARAL PRO-CHOICE AM., https://www.prochoiceamerica.org/issue/abortion-refusal-laws/ (last visited May 20, 2022) (reporting that most states permit doctors to abstain from giving abortions, and states allow pharmacists to abstain from providing birth control); June M. McKoy, *Obligation to Provide Services: A Physician-Public Defender Comparison*, 8 ETHICS J. AM. MED. ASS'N 332, 334 (2006) (explaining that generally doctors have the right to choose who they will treat, except for in times of emergency).
[81] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014) (declaring that organizations with religious objections have no legal duty to provide insurance that covers contraceptives).

assisted suicide. Further, only consenting patients will receive a suicide prescription. Recognizing the right to assisted suicide will only affect citizens who are not opposed to the procedure. The right to assisted suicide would offer patients the autonomy to decide the day of their death. At the same time, this right would not place other citizens' moral virtues in jeopardy.

Additionally, assisted suicide does not place the same burden on doctors as voluntary euthanasia. Voluntary euthanasia is when a doctor, by patient request, ends the patient's life through painless means.[82] On the other hand, assisted suicide is when a professional helps a patient die by suicide.[83]Assisted suicide is limited only to patients who can administer death by themselves.[84]

Self-administration of suicide prescriptions ensures the patient remains in control of their death. This provides the patient control over their life, without requiring others to take a life. With assisted suicide, professionals can help provide patients a painless method to end the patient's suffering. These professionals are helping their patients receive the intervention the patient desires, but they are not forced to kill. Assisted suicide, as opposed to euthanasia, respects the autonomy of both the patients and the one providing aid. This limitation ensures that professionals are in a position to help their patients, without requiring people to kill.

Assisted suicide should be a fundamental right, but that does not mean it should be a right without limitation. States would have the power to write laws that restrict access to assisted suicide. As long as these laws pass strict scrutiny or the undue burden standard, then legislation could limit assisted suicide. Moreover, various private actors could restrict access to this procedure. Lastly, patients would have to take their own life without relying on others to make death possible.

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[82] Brazier, *supra* note 33.
[83] *Id.*
[84] AM. ACAD. HOSPICE & PALLIATIVE MED., *supra* note 77.

II. ARGUMENT

A. The Broad Historic Test and Assisted Suicide

First, this Note will address the historical right to assisted suicide. *Glucksberg* viewed assisted suicide through a very narrow historic lens. Conversely, this Note will evaluate the right to assisted suicide from a broader historical view. This Note will discuss the historical right to hasten one's death and the right to risk one's life to end suffering.

1. The Right to Hasten One's Death

There are many traditions that validate the claim that the United States recognizes the right to hasten one's death. From permitting smoking to allowing removal of life-sustaining equipment, the United States has long recognized the personal liberty to hasten death. However, the Supreme Court has wrongly excluded assisted suicide from this list of liberties.

To begin, the United States currently permits people to engage in several activities that cause premature deaths. Obesity causes several of the most common conditions which lead to preventable deaths.[85] Cigarettes cause almost half a million deaths per year.[86] Moreover, many people die from alcohol consumption, totaling almost one hundred thousand deaths per year.[87] The list of undertakings mentioned above is not exhaustive; plenty of lawful activities may result in death.[88]

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[85] *Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/obesity/data/adult.html (last visited May 2, 2022).

[86] *Smoking and Tobacco Use*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm (last visited Apr. 18, 2022).

[87] *See Deaths from Excessive Alcohol Use in the U.S.*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/alcohol/features/excessive-alcohol-deaths.html (Jan. 14, 2021) (reporting over 95,000 alcohol-related deaths per year in the U.S.).

[88] *See generally 2019 Fatality Data Show a Continued Annual Decline in Traffic Deaths*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (Oct. 1, 2020), https://www.nhtsa.gov/press-releases/2019-fatality-data-traffic-deaths-2020-q2-projections#:~:text=The%20FARS%20data%20indicate%20that,the%20same%20p

Similarly, patients in the United States have the right to abstain from any life-saving medical procedures.[89] There is also a fundamental protected liberty interest to die by removing life-sustaining medical equipment.[90] In addition, the Supreme Court has reasoned that there is a right to abstain from eating or drinking—both of which lead to certain death.[91] Patients have the right to refuse life-saving treatments if the patient wishes to die.[92]

At the same time, the above examples can be temporally distinguished from the right to assisted suicide. For instance, it may take less than an hour to die from an assisted suicide prescription.[93] On the other hand, dying from the removal of life-sustaining equipment can last up to 21 days.[94] That said, the temporal differences do not warrant treating assisted suicide as distinct from other traditions of hastening one's death.

Even though assisted suicide is much quicker than other ways to die, that does not justify depriving patients their right to assisted suicide. No one wants to prolong their suffering, and assisted suicide provides patients a quick, painless death. More importantly, assisted suicide is also distinguishable given the fact it does not cause

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eriod%20in%202019 (reporting over 36,000 deaths from motor vehicle accidents in 2019); *Immunization*, WORLD HEALTH ORG. (Dec. 5, 2019), https://www.who.int/news-room/facts-in-pictures/detail/immunization (showcasing how millions of deaths could be prevented by global vaccinations); *see, e.g.*, Amanda Greer, *Extreme Sports and Extreme Liability: The Effect of Waivers of Liability in Extreme Sports*, 9 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 81, 84 (2012) (discussing the inherent dangers of extreme sports and how some sports may even cause death).

[89] Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 270 (1990).

[90] *Id.* at 279–80.

[91] *Id*. at 279.

[92] *See generally id.* at 278 (recognizing that competent people have "a constitutionally protected liberty interested in refusing unwanted medical treatment").

[93] *See* Jennie Dear, *The Doctors Who Invented a New Way to Help People Die*, ATLANTIC (Jan. 22, 2019), https://www.theatlantic.com/health/archive/2019/01/medical-aid-in-dying-medications/580591/ (reporting that the median time until death after ingestion of a suicide prescription is 25 minutes).

[94] *See Questions and Answers About "Artificial Feeding*,*"* PATIENTS RTS. COUNCIL, http://www.patientsrightscouncil.org/site/artificial-feeding/#:~:text=They'll%20simply%20feel%20thirst,from%20dehydration%2C%20not%20starvation (last visited May 21, 2022) (noting that death after removal of food may take anywhere from five to 21 days).

suffering.[95] Removal of life-sustaining equipment may place the patient in a state of duress, suffering unknowable pain.[96] Likewise, smoking and alcohol consumption can lead to years of suffering.[97] Admittedly, assisted suicide leads to a much quicker death than other methods of hastening death, but assisted suicide does not introduce additional suffering. Assisted suicide is a personal decision that allows patients to painlessly put an end to their suffering.

There is nothing more personal than one's death,[98] and suffering patients should have the option to hasten death through assisted suicide. Admittedly, the United States has not historically recognized the specific act of assisted suicide. However, prior to *Loving*, interracial marriage was not commonly practiced, but the Court derived the right to interracial marriage from the general history of marriage in the United States.[99] Similarly, one can derive the right to assisted suicide from the right to hasten one's death.

Individuals have the right to hasten their death through various means; nonetheless, *Glucksberg* failed to recognize assisted suicide as embedded in this tradition. Distinguishing assisted suicide from other ways to hasten death ignores the history of personal autonomy. Citizens are permitted to develop unhealthy addictions, drive cars, and play potentially deadly sports. Citizens have the freedom to engage in many deadly activities, but patients who have consented to die are denied this freedom. The United States has long recognized that citizens have the freedom to control their own life and body. It is time

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[95] Dear, *supra* note 93.

[96] *See* PATIENTS RTS. COUNCIL, *Questions and Answers About "Artificial Feeding," supra* note 94 (reporting that most patients removed from feeding tubes are given painkillers, however medication often is not enough to stop the pain).

[97] *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *Smoking and Tobacco Use*, *supra* note 86; CTRS. FOR DISEASE CONTROL & PREVENTION, *Deaths from Excessive Alcohol Use in the U.S.*, *supra* note 87.

[98] *See* MARTIN HEIDEGGER, BEING AND TIME 308 (John Macquarrie & Edward Robinson trans., 2013) ("Death does not just 'belong' to one's own [existence] in an undifferentiated way; death *lays claim* to it as an *individual* [existence]. The non-relational character of death, as understood in anticipation, individualizes [existence] down to itself."); *see also* SIGMUND FREUD, BEYOND THE PLEASURE PRINCIPLE 32–33 (Mary Waldrep & Jim Miller eds., 2015) ("[W]e shall be compelled to say that '*the aim of all life is death*' . . . . What we are left with is the fact that the organism wishes to die only in its own fashion.").

[99] *See supra* notes 11–17.

the Court acknowledges this freedom by overturning *Glucksberg* and declaring assisted suicide a fundamental right.

2. The Right To Risk One's Life To Alleviate Suffering

Patients are often given the autonomy to risk their lives to alleviate suffering. There are many medical procedures that may lead to a premature death. Nevertheless, patients forego this risk in situations that require drastic relief. Similarly, assisted suicide is another opportunity for patients to risk their lives pursuing an existence free of suffering.

One method available to relieve a patient's suffering is surgical intervention. Surgery is a long-recognized medical practice in the United States, despite some surgeries presenting great risks of death.[100] In addition to risky operations, all operations inherently present some risks.[101] What is more, medical malpractice kills an alarming number of citizens each year.[102] Patients are given the autonomy to receive surgical intervention even if that surgery could lead to the patient's death.

In addition to surgeries, patients may risk their lives receiving other forms of medical assistance. Patients who have cancer may receive chemotherapy to hopefully relieve their suffering.[103] That said, there is a chance that chemotherapy could kill the patient.[104] Patients may partake in experimental trials of new medications.[105] Some of

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[100] *See According to Experts, These Are the 7 Deadliest Surgeries*, BRADY, BRADY & REILLY, LLC (Apr. 2, 2020), https://bbr-law.com/according-to-experts-these-are-the-7-deadliest-surgeries/ (describing surgeries related to shock, internal bleeding, infections, adhesion, and intestinal obstruction as being abnormally dangerous).
[101] *Id.*
[102] *See id.* (chronicling how medical malpractice may be the third leading cause of death in the United States).
[103] Ralph W. Moss, *When Chemo Kills: The Inside Story*, MOSS REPS. (Feb. 26, 2019), https://www.mossreports.com/when-chemo-kills/#:~:text=%E2%80%9CPatients%20with%20cancer%20who%20die,result%20of%20the%20chemo%20itself.
[104] *Id.*
[105] Ted Gup & Jonathan Neumann, *Experimental Drugs: Death in the Search for Cures*, WASH. POST (Oct. 18, 1981), https://www.washingtonpost.com/archive/1981/10/18/experimental-drugs-death-in-the-search-for-cures/c85ad468-c91e-4cbc-b02b-6743f00bbbd0/.

these experimental medications have led to premature deaths.[106] Patients are given the autonomy to risk their life to relieve their suffering, and patients who want assisted suicide should have this freedom as well.

One might argue that the intents of the patients above differ from patients who desire assisted suicide. Patients who are seeking assisted suicide are intending to die, while other patients risking their lives are intending to live. However, one cannot assume that the intent is only to die in the case of assisted suicide. Patients seeking assisted suicide are intending to alleviate suffering through the act of dying. Similarly, patients in other procedures are intending to alleviate suffering through the procedure. In both situations, the patients are intending to alleviate suffering; the only difference is the respective means employed by the patients.

If one considers assisted suicide as a way to end suffering—rather than a desire to die—patients should not be denied this practice. Patients seeking assisted suicide do not necessarily wish to die, but they have determined that ending their suffering outweighs the risk of death.[107] In similar fashion, patients undergoing other surgeries have determined that the potential benefits outweigh the involved risks. Although the risk of death may be higher in some medical procedures, almost all procedures involve patients betting their lives on the outcome.

Nevertheless, patients who request assisted suicide are not given the option to risk their life. These patients deserve the liberty to risk their life to end suffering just like any other patient. If a higher risk of death can justify distinguishing assisted suicide from other procedures, then one must discern a maximum level of risk patients may consent to. However, when one's life is at risk, only the individual

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[106] *Id.* (showcasing how the Washington Post documented 620 deaths of cancer patients from experimental drugs in a single year); *see also* Marilynn Marchione, *More Deaths, No Benefit from Malaria Drug in VA Virus Study*, AP NEWS (Apr. 21, 2020), https://apnews.com/article/a5077c7227b8eb8b0dc23423c0bbe2b2 (reporting that COVID-19 related deaths increased when patients were administered the experimental drug hydroxychloroquine).

[107] Naomi Richards, *Assisted Suicide as a Remedy for Suffering? The End-of-Life Preferences of British "Suicide Tourists*,*"* 36 MED. ANTHROPOLOGY 348, 355–56 (2017) (reporting that a woman chose assisted suicide to end her suffering related to a disease that had no cure and no safe method existed to alleviate her pain).

should be in the position to consent to risks. Assisted suicide causes a guaranteed death, but that risk is the patient's responsibility to bear.

Additionally, where other patients are endangering their life, patients who consent to assisted suicide have determined death to be their best option. If life is so valuable that suffering patients cannot end their life painlessly, should we permit patients to stake their life on the success of medicine? Patients who want assisted suicide have placed a value on their life, and they have determined that death would be better than suffering indefinitely. Patients can gamble their life on other procedures, and these procedures do not guarantee success. On the other hand, terminally ill patients may not consent to a peaceful, guaranteed release from their pain. If a patient desires assisted suicide, they should not be denied the freedom of a dignified death.

Some individuals may think that no amount of suffering could justify the decision to die by suicide. There are many factors that contribute to whether an individual would justify suicide including religious, ethical, and psychological beliefs.[108] The justification of suicide is an extremely private decision that is best left to the individual. Patients should have the liberty to combat their suffering without the government dictating the amount of risk citizens are permitted to take.

These different opinions on how to alleviate suffering should not be within the scope of the Supreme Court to decide. The Court usually tries to avoid imposing its views of morality and philosophy because these subjects are best left to other professionals.[109] According to Albert Camus, "there is but one truly serious philosophical problem, and that is suicide. Judging whether life is or is not worth living amounts to answering the fundamental question of philosophy."[110]

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[108] *Resolution on Assisted Dying and Justification*, AM. PSYCH. ASS'N (Aug. 2017), https://www.apa.org/about/policy/assisted-dying-resolution.

[109] *See* Roe v. Wade, 410 U.S. 113, 159 (1973) ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

[110] ALBERT CAMUS, THE MYTH OF SISYPHUS 3 (Justin O'Brien trans., 2d ed. 1955). *Cf.* ARTHUR SCHOPENHAUER, *On Suicide*, *in* SUFFERING, SUICIDE AND IMMORTALITY 31 (T. Bailey Saunders trans., 2006) (1890) ("Suicide may also be regarded as an experiment—a question which man puts to Nature, trying to force her to an answer. The question is this: What change will death produce in a man's existence and in his insight into the nature of things.").

There are deep philosophical and religious implications that may arise from dictating what means a person may take to alleviate suffering.

Even though there is no tradition of assisted suicide in the United States, there is a history of permitting patients to make decisions regarding their state of suffering. *Glucksberg* failed to consider that assisted suicide was another method available to alleviate a patient's suffering. If one uses the broad historic test, then assisted suicide should be justified through the historic tradition of patient autonomy. Generally, patients have the right to choose how they will combat their suffering, and patients should have the autonomy to choose assisted suicide.

Even if the Court morally disagrees with assisted suicide, that does not justify denying patients their autonomy. The Court should not resolve medical decisions. America has long recognized that any person "of adult years and sound mind has a right to determine what shall be done with his own body."[111] There is a tradition in the United States of giving patients the autonomy to make medical decisions. If a patient makes a conscious decision to end their life, then they should have the autonomy to do so.

B. The Changing Conscience Test and Assisted Suicide

Society's conscience also demands that assisted suicide receive fundamental status. This Part will first showcase the high number of citizens that approve of patients having the right to assisted suicide. Then this section explores why assisted suicide used to be prohibited. Lastly, this section will argue that reasons for prohibition are no longer justified in this current society.

1. The Conscience of America Demands Assisted Suicide Be Ranked a Fundamental Right

Advancements in medicine are allowing people to live longer lives than ever before.[112] Even so, as many patients know too well,

[111] Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914).
[112] Mike Stobbe, *For 1st Time in 4 Years, US Life Expectancy Rises – A Little*, AP NEWS (Jan. 30, 2020), https://apnews.com/article/health-death-rates-robert-anderson-new-york-cancer-72a0edc70c1797d9570674362445574f.

advancements in medicine may also keep patients alive longer than desired. Some patients endure tremendous pain before death, and the thought of medicine prolonging this suffering would be a nightmare to countless patients. As society realizes the suffering some patients endure, many Americans are acknowledging that individuals should have the right to terminate their life. Moreover, various jurisdictions have also begun recognizing that their citizens should be given the right to assisted suicide.

The Supreme Court has not recognized assisted suicide as a fundamental right federally, but various jurisdictions within the United States have begun permitting MAID.[113] There are currently eight states in the United States who permit MAID by statute.[114] Additionally, the Montana Supreme Court legalized MAID in the case *Baxter v. Montana*.[115] Furthermore, Washington D.C. also permits MAID.[116]

In addition to jurisdictions that permit MAID, one can see a growing acceptance of MAID in the American conscience. Polls show that up to 74% of Americans agree that terminally ill patients should have the legal right to MAID.[117] Furthermore, polls show that this majority support of MAID is present across many demographics.[118] Additionally, almost 60% of American physicians believe that MAID should be legal.[119] From laymen to professionals, across religious and political spectrums, citizens throughout America strongly support the right to MAID.[120] The United States citizenry has become increasingly

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[113] *State Statue Navigator*, DEATH WITH DIGNITY, https://deathwithdignity.org/resources/state-statute-navigator/ (last visited Apr. 23, 2022).

[114] The states that have Death with Dignity Acts include California, Colorado, Hawaii, Maine, New Jersey, Oregon, Vermont, and Washington. California, Colorado, and Hawaii have MAID statutes, while Maine, New Jersey, Oregon, Vermont, and Washington have self-administer or similar statutes. *Id.*

[115] *See* Baxter v. Montana, 224 P.3d 1211, 1222 (Mont. 2009) (finding that assisted suicide is not prohibited by either Montana Supreme Court precedent nor state statute).

[116] DEATH WITH DIGNITY, *State Statute Navigator*, *supra* note 113.

[117] Compassion & Choices, *Polling on Medical Aid in Dying* (Mar. 15, 2022), https://compassionandchoices.org/resource/polling-medical-aid-dying/.

[118] *See id.* (reporting that various religions, races, and political parties all show majority support for assisted suicide).

[119] *Id.*

[120] *Id.*

supportive of terminally ill patients having the right to MAID.[121] When a patient is suffering unknowable pain, for an indeterminate sentence, death may be one's only salvation.[122] Many Americans now realize the choice to end suffering through MAID should be the patient's right, free from government prohibition. The American conscience has evolved and now recognizes that patient's should have the right to MAID.

As discussed in *Obergefell*, fundamental rights should be created to keep in sync with the public conscience.[123] If the majority of Americans admit that patients should have the right to MAID, then this right should be declared fundamental. The *Glucksberg* decision ignored the conscience of the populace, instead looking only to history to justify assisted suicide. However, when one actually considers the perception of MAID among the populace, it is clear that MAID should be ranked fundamental.

America has grown more accepting of MAID, and the Court should recognize that terminally ill patients deserve the right to MAID. Society is not stagnant, and failure to realize this fact leads to citizens being deprived of fundamental rights. Suicide has long been prohibited, but that does not mean prohibitions should remain forever. When society progresses, so does the American conscience, and with that comes the recognition of new rights. The Court should have a duty to respect the values of America by creating fundamental rights that align with the public conscience. When most Americans respect the autonomy of patients to choose MAID, the Court should grant MAID fundamental status.

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[121] *Id.*

[122] "It will generally be found that, as soon as the terrors of life reach the point at which they outweigh the terrors of death, a man will put an end to his life. . . . It is this feeling that makes suicide easy; for the bodily pain that accompanies [suicide] loses all significance in the eyes of one who is tortured by an excess of mental suffering." SCHOPENHAUER, *supra* note 110, at 30.

[123] *See supra* notes 18–21.

2. Reasons Previously Advanced in Opposition to Assisted Suicide No Longer Hold Weight

In addition to looking at America's changing conscience, *Roe v. Wade* also asked: Why was the asserted right previously prohibited?[124] The Court claimed that abortion was illegal because of Victorian prohibitions of illicit sexual conduct, and because abortions used to be very dangerous.[125] Assisted suicide has been prohibited for similar reasons, and analogous to the decision in *Roe v. Wade*, assisted suicide should be declared a fundamental right.

The Court did not take the first argument seriously, namely, the analysis viewed Victorian prohibitions as outside the realm of the law.[126] The Court does not have jurisdiction to mandate one moral or religious code.[127] When there are serious religious debates concerning assisted suicide, questions left unanswered should not be decided by the Supreme Court.[128] Religious views concerning assisted suicide differ.[129] Still, even if religions unanimously disapproved, that is not a justifiable reason for the state to prohibit assisted suicide.

Roe v. Wade also presented the argument that abortion used to be prohibited because it posed great concerns to the mother's health.[130] However, that justification for prohibition was no longer relevant

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[124] Roe v. Wade, 410 U.S. 113, 147 (1973) (explaining three historical reasons why criminal abortion laws were justified).
[125] *Id.* at 148.
[126] *Id.*
[127] *Id.* at 159 (stating that the judiciary should not speculate on matters those medically trained have not come to a consensus on).
[128] *See* Emp. Div. v. Smith, 494 U.S. 872, 877 (1990) (citing Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445–52 (1969)); *see* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95–120 (1952); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710, 713, 723–25 (1976) (declaring that the Free Exercise Clause prohibits the government from interfering with controversies between religious authorities).
[129] *Compare* Inst. of Clinical Bioethics, *Religious Perspectives on Euthanasia*, ST. JOSEPH'S U. (Mar. 14, 2011), https://sites.sju.edu/icb/religious-perspectives-on-euthanasia/ ("Methodists generally accept the individual's freedom of conscience to determine the means and timing of death."), *with* Inst. of Clinical Bioethics, *What Is the Catholic Church's Position on Suicide and Physician-Assisted Suicide?*, ST. JOSEPH'S U. (Mar. 4, 2016), https://sites.sju.edu/icb/catholic-churchs-position-suicide-physician-assisted-suicide-declaration-euthanasia/ (claiming the Catholic Church views suicide and murder as equally wrong).
[130] Roe v. Wade, 410 U.S. 113, 148 (1973).

because abortions had become safe to perform.[131] Since this justification for prohibiting abortion was no longer relevant, it was not a valid argument against abortion.[132] Similarly, suicide used to be a painful act, but advancements in medicine have invalidated this justification for prohibiting assisted suicide.

Unfortunately, humans have created many ways to die, methods that are usually painful and not always guaranteed. Some people have used hemlock, which causes respiratory failure, coma, and eventually death, to die by suicide.[133] Samurai also practiced their own form of suicide called *seppuku*, which involved cutting one's abdomen with a sword.[134] Additionally, lethal injections have been described as "[a] death of organ failure, of a dramatic nature that I recognized would be associated with suffering."[135] These few examples should suffice to provide images of dreadful methods to end one's life.

Conversely, there are some new methods of suicide that provide patients with painless deaths.[136] Two barbiturates, pentobarbital and secobarbital, have proven to be efficient prescriptions for quick, painless deaths.[137] Furthermore, doctors have created a promising mixture of sedatives, called DMP, to use as a suicide prescription.[138] DMP has proven to be an effective means to quickly and painlessly help patients die by suicide. Though some methods of suicide are very painful, medical advancements have created painless methods to aid patients in dying.

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[131] *Id.* at 149.
[132] *Id.*
[133] Douglas Brtalik et al., *Intravenous Poison Hemlock Injection Resulting in Prolonged Respiratory Failure and Encephalopathy*, 13 J. MED. TOXICOLOGY 180, 181–82 (2017).
[134] Kallie Szczepanski, *Bushido: The Ancient Code of the Samurai Warrior*, THOUGHTCO (Sept. 5, 2019), https://www.thoughtco.com/seppuku-definition-195157.
[135] Noah Caldwell et al., *Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NPR (Sept. 21, 2020), https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal troubling-effects-of-lethal-injection.
[136] Dear, *supra* note 93.
[137] *But see id.* (showcasing how pentobarbital is no longer approved for human use, and the price of secobarbital has become too expensive to be used commonly).
[138] *See id.* (noting that a mixture of morphine, diazepam, and propranolol serve as the active ingredients in the medication known as DMP).

Perhaps at some point prohibitions of suicide existed because suicide presented extreme danger to citizens' health and safety. If assisted suicide was prohibited because it was too painful, this argument no longer holds weight. According to *Roe v. Wade*, "any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared."[139] Similarly, assisted suicide is no longer a slow, painful endeavor, thus alleviating a state interest in prohibiting assisted suicide.

Assisted suicide was likely prohibited in the past because the only options available to citizens were extremely painful. In contrast, medicine allows patients to survive longer than in the past.[140] These patients may undergo long durations of suffering, until they finally die. Modern assisted suicide provides these suffering patients a painless way to terminate their life.[141] When abortions were no longer hazardous, and pregnancies posed similar risks, there was no longer any reason for the state to prohibit abortion.[142] Similarly, assisted suicide is painless, and the only other option is for these patients to experience tremendous suffering. The state does not have an interest in prohibiting painless procedures that help alleviate suffering.

Prohibiting suicide may have once seemed proper to avoid citizens inflicting severe pain on themselves. Yet, through assisted suicide, patients now have the means to painlessly terminate their lives. *Glucksberg* failed to recognize that medical advancements provide patients a painless option to alleviate their suffering. Since patients have methods to painlessly die by suicide, prohibitions against assisted suicide are no longer warranted. When technological advancements create safe avenues to practice once dangerous activities, then the Court should track these advancements by recognizing new fundamental rights.

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[139] Roe v. Wade, 410 U.S. 113, 149 (1973).
[140] Stobbe, *supra* note 112.
[141] *See supra* notes 136–38.
[142] *Roe*, 410 U.S. at 149.

C. Changes in America Demand That Glucksberg *Be Overturned*

This section investigates the *Glucksberg* ruling using the *Casey* analysis to evaluate whether changes since *Glucksberg* justify overturning it. First, this Part argues that *Glucksberg*'s ruling has become unworkable. Second, this Part discusses the reliance issues at stake in overturning *Glucksberg*. Third, this Part claims that *Glucksberg* has become an anachronism of society. Fourth, this Part presents facts that undermine arguments used in the majority opinion of *Glucksberg*. Lastly, this Part argues that although overturning precedent is difficult, *Glucksberg* should no longer remain good law.

1. *Glucksberg*'s Ruling Is an Unworkable Doctrine

The first *Casey* factor asks whether precedent has become unworkable.[143] Medical progress allows patients to live longer with terminal illness than ever before.[144] Nevertheless, medical advancements also open the door to a reality where patients are unnaturally kept alive and forced to suffer. The suffering some patients endure before death is inconceivable to people not suffering from these afflictions.[145] Patients do not consent to have their suffering prolonged just because it is medically possible. Doctors have advanced practices to keep people alive for a longer time without considering the effects this may have on suffering.[146] Suffering patients should have the freedom to peacefully die.

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[143] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

[144] *See generally* Kim Painter, *Life After Cancer: More Survivors Live Longer, Face New Health Challenges*, USA TODAY (Dec. 15, 2019), https://www.usatoday.com/in-depth/news/50-states/2019/02/13/life-after-cancer-survivors-oncology-survivorship-plans-long-term-health/2794121002/ (showcasing how early detection and better treatment have led many cancer patients to live years longer than expected); Rosalie Hayes, *Life Expectancy for People Living with HIV*, AIDSMAP (Nov. 2021), https://www.aidsmap.com/about-hiv/life-expectancy-people-living-hiv (reporting that people with HIV have as long of a life expectancy as someone without HIV, when properly treated).

[145] Paul Rousseau, *The Losses and Suffering of Terminal Illness*, 75 MAYO CLINIC PROC. 197, 197–98 (Feb. 1, 2000), https://www.mayoclinicproceedings.org/article/S0025-6196(11)64195-5/fulltext.

[146] *See* Guy C. Brown, *Living Too Long*, 16 EMBO REPS. 137, 137 (2015) (claiming that longer lives increase the *quantity* of life, but not necessarily the *quality* of life); *cf.* JURASSIC PARK, at 36:11 (Universal City Studios & Amblin Entertainment 1993)

When one considers how much suffering is involved with various afflictions, denying patients the right to assisted suicide has become unworkable. Many patients are forced to endure suffering just because medical advancements make that suffering possible. "While it is true, of course, that inventions have given us tremendous power, it is absurd to suggest that we must use this power to destroy our most precious inheritance: liberty."[147] Patients should have an option to escape their suffering through assisted suicide.

Furthermore, if precedent creates inconsistent results from drawing arbitrary distinctions, the Supreme Court should declare the precedent unworkable.[148] *Glucksberg* differentiates the right to die by abstention and the right to assisted suicide, claiming one is letting the patient die and the other is actually killing the patient.[149] However, several court opinions—both from the Supreme Court and lower courts—disagree with this distinction.[150] Patients who wish to die by removing life-sustaining equipment or from assisted suicide are both making a conscious decision to die.

One must use historical justifications to distinguish the act of removing life-sustaining equipment from assisted suicide, because one cannot differentiate these acts based on intent, outcome, or patient suffering. At the same time, "[r]eliance on history as an organizing

("Your scientists were so preoccupied with whether or not they could, they didn't stop to think if they should.").

[147] FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 52 (1944).

[148] *See* Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528, 544–45 (1985) (showing how drawing lines between government and non-government functions on the basis of historical function, necessity, or other factors are based on arbitrary distinctions, and this type of analysis is unworkable because it leads to inconsistent results).

[149] Washington v. Glucksberg, 521 U.S. 702, 725 (1997).

[150] *E.g.*, Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 296–97 (1990) (Scalia, J., concurring) ("Starving oneself to death is no different from putting a gun to one's temple . . . the cause of death in both cases is the suicide's conscious decision to 'pu[t] an end to his own existence.'"); Quill v. Vacco, 80 F.3d 716, 729 (2d Cir. 1996) (finding a violation of the equal protection clause because "those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths . . . but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs."); Compassion in Dying v. Washington, 850 F. Supp. 1454, 1461 (W.D. Wash. 1994) ("From a constitutional perspective, the court does not believe that a distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult.").

principle results in line-drawing of the most arbitrary sort," because it requires courts to predict future trends in America.[151] By using historical context to distinguish two forms of dying, *Glucksberg* has created an unworkable distinction that has led to inconsistent results. This distinction is arbitrary and has proven to be an unworkable doctrine.

2. Overturning *Glucksberg* Will Not Negatively Affect Patients Relying on the Decision

The next *Casey* factor looks at whether overruling precedent will cause inequity to citizens who have come to rely on the precedent.[152] *Casey* looked at how citizens had come to rely on *Roe v. Wade*.[153] The Court realized women had come to organize their lives around the fact they had a right to get an abortion.[154] Since women had come to rely on the right to have an abortion, it would have been unjust to overrule *Roe v. Wade*.[155]

The reliance issues involved in *Roe v. Wade* are difficult to compare to the reliance issues of *Glucksberg*. Overturning *Roe v. Wade* would have meant removing a fundamental right, whereas overturning *Glucksberg* would entail creating a new fundamental right. With *Casey*, the reliance at issue was the reliance upon a granted fundamental right, where citizens had come to rely upon having this right protected. On the other hand, *Glucksberg* has left citizens to rely upon not having a fundamental right.

Although these reliance issues are different, overturning *Glucksberg* does not create negative equity in those relying upon the old rule. These patients have come to rely on the fact that they will endure severe pain and suffering. Overturning *Glucksberg* would not negatively affect this reliance, rather overturning *Glucksberg* would create a better situation for those relying upon the decision. Patients who are affected by the *Glucksberg* decision have come to rely upon a life of suffering, and overturning such reliance would be beneficial.

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[151] *Garcia*, 469 U.S. at 544.
[152] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).
[153] *Id.* at 856.
[154] *Id.*
[155] *Id.*

Moreover, to make a reliance argument, the citizens who wish to keep the law preserved must invoke reliance.[156] Citizens who do not desire assisted suicide are not relying on *Glucksberg* remaining precedent. If a citizen does not want to receive assistance in dying, then they would not be forced to die if assisted suicide was granted fundamental status. The only patients relying on *Glucksberg*'s outcome are those who desire assisted suicide.

Suffering patients are the ones relying on *Glucksberg*. Providing patients the right to receive assistance in dying will help these patients relieve their suffering. Simultaneously, no patient is relying on the fact that they are allowed to live if assisted suicide is prohibited. Permitting assisted suicide will positively affect patients who want to end their suffering, while having zero effect on patients who want to live. The only patients that have any stake in *Glucksberg*'s ruling are those who could benefit from overturning that decision.

3. *Glucksberg* Has Become an Anachronism of Society

The third *Casey* factor asks whether old precedent has become an anachronism of society.[157] One way to evaluate whether prior precedent has become an anachronism is to look at changing laws since the decision.[158] Many cases have used changing state laws to justify recognizing new fundamental rights, even if that meant overturning prior precedent.[159] When state law begins recognizing rights, the Court should take that as evidence of their incorrect decision and deviate from *stare decisis.*

For instance, *Lawrence v. Texas* overturned prior precedent that denied individuals the right to practice same-sex sodomy.[160]

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[156] *See* Ramos v. Louisiana, 140 S.Ct. 1390, 1406–08 (2020) (rejecting reliance arguments from states claiming judicial efficiency and integrity depended on prior precedent, instead recognizing citizens' interests in unanimous jury verdicts was the true reliance issue at stake).
[157] *Casey*, 505 U.S. at 855.
[158] Lawrence v. Texas, 539 U.S. 558, 573 (2003).
[159] *See id.* at 585 (granting the right to same-sex sodomy); Obergefell v. Hodges, 576 U.S. 644, 661–62 (2015) (granting the right to same-sex marriage); *Ramos*, 140 S. Ct. at 1406 (granting the right to unanimous jury verdicts for criminal conviction).
[160] *Lawrence*, 539 U.S. at 573–74.

Bowers v. Hardwick denied the right to same-sex sodomy.[161] However, after the *Bowers* decision, 12 states stopped prohibiting sodomy.[162] The *Lawrence* decision observed society's conscience changing in regard to homosexual relationships, as manifested through changing state legislation.[163] These changes were viewed as proof of the *Bowers* decision becoming an anachronism of society.[164]

Similar reasoning has also been reflected in the case *Ramos v. Louisiana*.[165] This case overturned precedent to declare unanimous jury verdicts in criminal trials a fundamental right.[166] Louisiana argued that since prior precedent permitted less than unanimous jury verdicts, the Court should adhere to *stare decisis*.[167] Nevertheless, the Court rejected this argument because the majority of states did not permit less than unanimous jury convictions.[168] Despite precedent permitting states to enact laws that allowed less than unanimous jury verdicts, many states chose not to follow this precedent.[169] State laws deviating from Supreme Court precedent offer evidence that the precedent may have been decided wrongly.

Likewise, states have begun acknowledging that citizens should have the right to MAID.[170] There are currently nine states that permit MAID by statute,[171] and one state that permits MAID per judicial ruling.[172] Additionally, Washington, D.C. also grants its citizens the right to MAID.[173] Since the *Glucksberg* ruling, jurisdictions have begun recognizing that patients should have the right

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[161] Bowers v. Hardwick, 478 U.S. 186, 195 (1986).
[162] *Lawrence*, 539 U.S. at 573.
[163] *Id.* (noting that even in states that still had laws prohibiting same-sex relationships, the states did not enforce those laws).
[164] *Id.*
[165] Ramos v. Louisiana, 140 S. Ct. 1390, 1406 (2020).
[166] *Id.* at 1408.
[167] *Id.* at 1406.
[168] *Id.*
[169] *Id.*
[170] *See supra* notes 113–16.
[171] *See* DEATH WITH DIGNITY, *State Statute Navigator*, *supra* note 113. Some states use the term *Medical Aid in Dying* specifically, whereas others use the phrase *self-administered medication* to end one's life. *See supra* Part I.B. (providing definitions for both terms, which are functionally equivalent).
[172] Baxter v. Montana, 224 P.3d 1211, 1222 (Mont. 2009).
[173] DEATH WITH DIGNITY, *State Statute Navigator*, *supra* note 113.

to MAID. This provides a compelling argument that the *Glucksberg* decision has become an anachronism of society.

Although Supreme Court precedent carries binding authority, it is not unshakable. Sometimes the Court must look to how laws have progressed throughout the nation to make its decisions. If in the years following a decision state laws deviate from that decision, that should be evidence of the decision becoming an anachronism. After *Glucksberg*, various jurisdictions have ignored the Court's decision, thus offering proof that *Glucksberg* should be overturned.

Furthermore, if a rule causes confusion or direct obstacles to other laws and policies, then the Court will consider the rule an anachronism.[174] The *Glucksberg* decision does not present a direct obstacle to other laws, but the *Glucksberg* decision does cause confusion. *Glucksberg* has caused confusion in both the medical and legal spheres and should not be binding precedent.

First, the *Glucksberg* decision has caused confusion in medical practice. The United States recognizes the right to abstain from life-sustaining medical treatment as a fundamental right.[175] Nonetheless, the Court has made a distinction between the right to die through abstention and the right to die by suicide.[176] Some have called this metaphysical distinction arbitrary.[177] Giving patients the right to die by some means, but not the right to die by suicide, creates a confusing distinction between two life-ending procedures.

Second, *Glucksberg* causes confusion in the legal profession. In *Vacco v. Quill*, the Court was presented with the issue of whether denying patients the right to assisted suicide denied them equal protection of the law.[178] Respondents argued that refusing life-sustaining medical equipment was the same as patients dying by suicide: if a patient has the right die, the method of death should not matter.[179] However, *Vacco* reaffirmed the distinction created in

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[174] Patterson v. Mclean Credit Union, 491 U.S. 164, 173 (1989).
[175] Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 279 (1990).
[176] Washington v. Glucksberg, 521 U.S. 702, 725 (1997).
[177] *See* Helene Brodowski & Marybeth Malloy, *Suffering Against Their Will: The Terminally Ill and Physician Assisted Suicide—A Constitutional Analysis*, 12 ST. JOHN'S J. L. COMMENT. 171, 183–86 (1996) (claiming physicians play an active role in assisted suicide and removal of life-sustaining equipment).
[178] Vacco v. Quill, 521 U.S. 793, 797 (1997).
[179] *Id.* at 798.

Glucksberg.[180] *Vacco* may have upheld *Glucksberg*, but *Vacco* only occurred because of *Glucksberg*'s ruling.[181]

The ruling in *Glucksberg* has directly led to serious debates between the right to die through abstention and the right to die by suicide.[182] Distinguishing between the right to die by abstention and assisted suicide causes confusion in both the medical and legal fields. *Glucksberg* has caused confusion because it tries to arbitrarily differentiate two methods of dying. The *Glucksberg* decision creates unnecessary confusion and consequently has become an anachronism of society.

4. Recent Studies Invalidate Premises Relied upon in *Glucksberg*

For the last *Casey* factor, the Court must consider whether new information invalidates premises relied upon by the prior decision.[183] Discussed below are a few things that have changed since *Glucksberg*. These changes invalidate *Glucksberg*'s premises which led to the conclusion that assisted suicide was not a fundamental right. Since the Court's premises have proven false their conclusion should be overturned.

The *Glucksberg* opinion was premised on the idea that if assisted suicide was legalized, then vulnerable patients may be coerced to kill themselves. The *Glucksberg* decision was concerned with protecting vulnerable patients when it decided assisted suicide was not a fundamental right.[184] The Court worried that suffering may lead patients to wrongly think they wish to die when the patient may just be depressed.[185] Justices also feared that patients might decide to die,

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[180] *Id.* at 807.
[181] The issue in *Vacco* was whether prohibiting assisted suicide, while permitting removal of life-sustaining equipment, violated the Equal Protection clause. If *Glucksberg* had declared assisted suicide a fundamental right, then this case would not have been argued. *Id.* at 797.
[182] *See supra* notes 178–81.
[183] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).
[184] *See* Washington v. Glucksberg, 521 U.S. 702, 730–31 (1997) (declaring the state had an interest in protecting vulnerable patients such as those suffering with depression, disabilities, and economic difficulties).
[185] *Id*. at 730.

rather than be flooded with medical debt.[186] Even assuming these concerns are legitimate, these concerns have since proven false.[187]

There is little evidence that vulnerable patients are more likely to seek assisted suicide.[188] In states and countries where assisted suicide is legal, assisted suicide is responsible for very few deaths per year.[189] Assisted suicide accounts for roughly 0.15% of deaths in Oregon, and less than 2% of all deaths in the Netherlands. [190] What is more, the Oregon Board of Medical Examiners has received zero reports of abuse or coercion against patients seeking MAID since legalizing the practice.[191]

Additionally, there is no evidence financial insecurities play a significant role in a patient's decision to receive assistance in dying.[192] Studies have shown patients with higher education, better economic standing, and health insurance are more likely to participate in assisted suicide.[193] The studies appear to suggest that citizens in better financial situations are more likely to seek assisted suicide. If there is little worry of financial coercion against patients receiving aid in dying, then another one of the Court's concerns is absolved.

Glucksberg also presented worries of assisted suicide progressing to involuntary euthanasia.[194] Using a slippery slope analysis, the Court claimed that legalizing assisted suicide would lead

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[186] *Id.* at 732.
[187] *See infra* notes 188–93.
[188] Researchers studied suicide rates among the elderly, children, people with lower education, the poor, the physically disabled, people with medical illness, and minorities, in places that had legalized assisted suicide. This study found that none of these groups had an elevated rate of assisted suicide. However, the study did find an increased rate of assisted suicide among AIDS patients. *No 'Slippery Slope' Found with Physician-Assisted Suicide*, PATIENT CARE (Sept. 27, 2007), https://www.patientcareonline.com/view/no-slippery-slope-found-physician-assisted-suicide.
[189] *Id.*
[190] *Id.*
[191] Peter Singer, *Making Our Own Decisions About Death*, FREE INQUIRY 36, 37 (Aug.–Sept. 2005).
[192] PATIENT CARE, *No 'Slippery Slope' Found with Physician-Assisted Suicide*, *supra* note 188.
[193] *See id.* (reporting that people above average in education and wealth are more likely to seek assisted suicide); Singer, *supra* note 191 (finding that only people with health insurance sought assisted suicide since Oregon legalized the practice, and that college educated individuals were eight times more likely to ask for assisted suicide).
[194] Washington v. Glucksberg, 521 U.S. 702, 732 (1997).

to legal euthanasia, and then to involuntary euthanasia.[195] By contrast, studies show that legalizing assisted suicide does not increase involuntary euthanasia rates.[196] Similarly, there is no evidence that legalizing voluntary euthanasia, in addition to assisted suicide, increases the rate of involuntary euthanasia.[197] Assisted suicide does not lead to involuntary killings, thus eliminating another concern from *Glucksberg*.

Protecting vulnerable patients from being coerced into dying by suicide is a legitimate state interest. That said, evidence suggests that coercion is not a concern related to assisted suicide, hence invalidating the conclusion of that argument. The *Glucksberg* decision is based on incorrect premises and should no longer be binding precedent. When time demonstrates the inaccuracies in an argument, the Court should have a duty to overturn incorrect rulings.

5. The High Bar To Overturn Precedent

The Court is cautious to overturn precedent, often adhering to *stare decisis*.[198] To overcome precedent one must show "a 'special justification,' over and above the belief 'that the precedent was wrongly decided.'"[199] *Stare decisis* permits predictable outcomes in court, allows for reliance on prior rulings, and promotes integrity of the judicial system.[200] The Supreme Court recognizes the importance of *stare decisis*; nevertheless this doctrine is not infallible.[201]

Stare decisis is powerful, but that does not mean precedent is impossible to overturn.[202] One must look to precedent for guidance,

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[195] *Id.* at 732–33.
[196] *See* Christopher J. Ryan, *Pulling up the Runaway: The Effect of New Evidence on Euthanasia's Slippery Slope*, 24 J. MED. ETHICS 341, 343 (1998) (reporting that neither the Netherlands nor Australia have seen an increase in involuntary euthanasia since legalization of assisted suicide).
[197] Penney Lewis, *The Empirical Slippery Slope from Voluntary to Non-Voluntary Euthanasia*, 35 J. L., MED. & ETHICS 197, 201 (2007).
[198] Allen v. Cooper, 140 S. Ct. 994, 1003 (2020).
[199] *Id.* (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).
[200] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).
[201] *Id.*
[202] Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020).

but *stare decisis* "isn't supposed to be the art of methodically ignoring what everyone knows to be true."[203] If a powerful enough reason exists, then the Court may ignore *stare decisis* and create new precedent.[204] Failing all four *Casey* factors provides strong justification to overturn precedent.[205]

Glucksberg fails all four *Casey* factors miserably and should be overturned. *Glucksberg*'s ruling is unworkable, causes suffering, arbitrarily distinguishes two end-of-life procedures, and the conclusion is not logically supported. The faults in *Glucksberg* have become evident; this was a bad ruling and has only caused misery among the populous. Although overruling precedent may be difficult, *Casey* provides an opportunity to overturn rulings that were incorrect. The Court is wise, but it is not infallible, and mistakes should be corrected. *Glucksberg*'s ruling is erroneous and should no longer remain as precedent.

Even though *stare decisis* should guide judicial decision making, there are times where deviating from precedent is necessary.[206] The Court has overturned numerous decisions to create new fundamental rights.[207] Fundamental rights are so important that when precedent denies citizens them, the doctrine of *stare decisis* should be ignored. Denying citizens a fundamental right is one of the strongest reasons to overturn precedent, and *Glucksberg* has wrongly denied citizens the right to assisted suicide.

Admittedly, it is difficult to overturn precedent, but drastic situations call for deviations from prior rulings. Is there any reason more compelling to overturn precedent than the opportunity to provide citizens with rights that were wrongly denied? *Glucksberg*'s ruling does not respect citizen autonomy. What is more, the ruling has been the cause of unknowable suffering among the terminally ill. If any

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[203] *Id.*
[204] *Janus*, 138 S. Ct. at 2478.
[205] *Id.* at 2478–79.
[206] *Id.* at 2478.
[207] *E.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (deviating from precedent to give students the right to non-segregated public schools); Lawrence v. Texas, 539 U.S. 558, 585 (2003) (deviating from precedent to establish the right to same-sex sodomy); Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (overturning precedent to create the right to same-sex marriage); *Ramos*, 140 S. Ct. at 1408 (overturning precedent to provide citizens the right to unanimous jury verdicts in criminal trials).

decision deserves to be overturned, it is the decision that has deprived patients the right to a dignified death.

D. The Penumbra of Rights Test and Assisted Suicide

This section argues that the right to life should encompass the right to assisted suicide. One cannot have a right to life if they are forced to live. If we assume that a right to life exists, then that must encompass the right to choose life. Recognizing someone's right to life should entail recognizing that everyone has a right to live and that they also have a right to die.

First, this section outlines the historical recognition of the right to life. Then after describing the right to life, this section compares the right to life with other fundamental rights. Ultimately, this Part argues that the right to life is unfairly limited compared to other rights. Finally, this section concludes by comparing assisted suicide to wrongful deaths.

1. The Essential Nature of the Right to Life

The United States has long held the right to life to be a right which deserves the utmost respect. The Fifth Amendment reads: "No person shall be . . . deprived of life, liberty, or property, without due process of law."[208] The Fourteenth Amendment similarly says the state shall deprive no citizen of life without due process.[209] The Declaration of Independence also mentions three unalienable rights, the rights to life, liberty, and the pursuit of happiness.[210] The right to life is mentioned explicitly in foundational documents of the United States because this right is essential to the American conscious.

In addition, several Supreme Court cases have recognized the right to life. *Roe v. Wade* recognized the duty to protect a fetus's life after some development.[211] Additionally, in capital punishment cases, Justices tend to tread lightly when justifying whether a crime deserves

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[208] U.S. CONST. amend. V.
[209] U.S. CONST. amend. XIV, § 1.
[210] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[211] Roe v. Wade, 410 U.S. 113, 159 (1973).

the death penalty.[212] The Court recognizes that only the most severe crimes should justify death because the state has a duty to respect human life.[213] Finally, the right to life has been discussed in end-of-life cases as a strong state interest.[214]

The United States recognizes there is a fundamental right to life for all citizens. Although there is a recognized right to life, the United States has failed to fully recognize this right. *Glucksberg* used the established right to life as an argument against the right to assisted suicide.[215] However, the *Glucksberg* decision did not consider the "right" to life, but rather imposed a duty to live.[216]

A right is defined as "something to which one has a just claim."[217] Conversely, the *Glucksberg* analysis did not view the right to life in this regard; instead the Court viewed life as a duty imposed by existence. The Supreme Court has recognized many fundamental rights. Simply put, the declaration of rights does not impose duties, rather, rights provide citizens with an opportunity to choose. Patients should have the right to choose when to die, and patients should not be coerced by the state to remain alive.

2. The Right to Life is Not Shown the Same Level of Respect as Other Rights

As discussed, the United States recognizes there is a right to life.[218] Yet, the Court in *Glucksberg* imposed a duty to live, failing to

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[212] *E.g.*, Kennedy v. Louisiana, 554 U.S. 407, 446 (2008) (declaring capital punishment too severe a punishment for child rape); Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (plurality opinion) (declaring mandatory capital punishment statutes unconstitutional because capital punishment should be reserved for the most severe offenders and actions, which requires a case-by-case analysis).
[213] *See* Roper v. Simmons, 543 U.S. 551, 568 (2005) (asserting that the death penalty should only be reserved for the most culpable criminals, committing a narrow category of crimes).
[214] *Compare* Washington v. Glucksberg, 521 U.S. 702, 730 (1997) (claiming the State's interest in protecting vulnerable patients' lives justified the prohibition of assisted suicide), *with* Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 286–87 (1990) (requiring clear and convincing evidence that a patient wishes to be removed from life sustaining equipment to ensure the patient's wishes are protected).
[215] *Glucksberg*, 521 U.S. at 728–30.
[216] *See supra* Part II.C.1.
[217] *Right*, MERRIAM-WEBSTER (11th ed. 2020).
[218] *See supra* notes 211–16.

recognize that the right to life should include the right to choose life. Rights provide citizens the option to invoke the right, but they also present citizens with the option to abstain from said right. If one compares how other rights are treated, then assisted suicide should be a permitted practice under the right to life.

To begin, many fundamental rights provide citizens with the right to abstain from practicing said right. For instance, one has the right to marry whomever they wish.[219] The Court recognizes a right to marry, but America does not mandate citizens get married.[220] The right to marry is actually the right to choose if and to whom one wishes to marry, not the duty to marry. Similarly, the right to life should provide citizens with the option to live if they so choose.

However, giving citizens the ability to choose life does not mean there should be a duty to live. If a patient cannot invoke their right to die, then the right to life does not actually entail a choice. Patients who "choose" to live are not choosing, rather these patients are yielding to the government's imposed duty that each citizen continue to live against their will. In order to respect the right to life, citizens should be given the autonomy to live or die. Citizens who want to live are assured their right to life is protected. On the contrary, citizens who want to die have been stripped of their right to choose.

Every citizen should have the freedom to choose whether they will evoke a fundamental right. The right to marriage recognizes that each citizen has the right to find happiness, either through marriage or by remaining single. Likewise, the right to life should permit citizens to decide whether continuing life or dying will help fulfill the citizen's desires. If a patient determines that death is preferable to life, then that patient should be allowed to die.

On the other hand, one could argue assisted suicide is not choosing between having a life and not having a life. Rather, assisted suicide is the choice to end a life one already has. In this respect,

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[219] *See generally* Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (identifying the right to same-sex marriage); Loving v. Virginia, 388 U.S. 1, 12 (1967) (identifying the right to interracial marriage); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (declaring the right to marry as "essential to the orderly pursuit of happiness by free men").

[220] "Under our Constitution, the freedom to marry, *or not marry*, a person of another race resides with the individual and cannot be infringed by the State." *Loving*, 388 U.S. at 12 (emphasis added).

assisted suicide could perhaps be more fairly compared to a divorce than the right to abstain from marriage in the first place. However, this should not be a concern, since other rights do allow one to abstain from something to which they are already committed.

There are many rights that permit someone to abandon prior commitments. The right to choose marriage is fundamental, yet every state permits divorce.[221] Moreover, citizens have the right to enter into a contract, and the contract parties have the right to mutually consent to end their contract.[222] Additionally, one has the right to get pregnant, but one also maintains the right to an abortion.[223] If one may end commitments towards marriage, contracts, and pregnancy, then patients should be able to end their commitment to life.

In addition to allowing one to end commitments to other rights, the right to life is inherently different because no one consents to being born. If our country permits citizens to terminate rights the citizen chose to invoke, then it should also recognize the right to terminate a non-consensual arrangement. If one can imagine a marriage so negative that it justifies ending said marriage, then one can imagine a life so full of despair it justifies assisted suicide. When life contains "more negative elements than positive ones—more unhappiness than happiness, more thwarting of preferences than satisfaction of them," an individual may desire death by suicide.[224]

The decision whether to endure unfathomable suffering or to end one's life should be the patient's decision. The United States recognizes the right to terminate already consented to situations; nevertheless, there is no right to terminate an existence we were all thrust into. There is nothing more intimate than one's death; every human is always making progress towards their own personal death.[225]

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[221] *State Legal Requirements for Divorce*, FINDLAW, https://statelaws.findlaw.com/family-laws/divorce-legal-requirements.html (last visited Apr. 22, 2022).
[222] Maynard v. Hill, 125 U.S. 190, 211 (1888).
[223] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992).
[224] Singer, *supra* note 191, at 36.
[225] "[Humankind] . . . has in every case already been delivered over to its death. In being towards its death, [humankind] is dying factically and indeed constantly, as long as it has not yet come to its demise." HEIDEGGER, *supra* note 98, at 289, 303 ("Death is a way to be, which [existance] takes over as soon as it is. 'As soon as man comes to life, he is at once old enough to die.'").

Although death is an extremely intimate affair, patients are not permitted to make their own end-of-life decisions.

3. Assisted Suicide and Wrongful Killings

Where life is protected, it is protected against deprivation by others. The Fourteenth Amendment says citizens may not be deprived of life without due process.[226] However, this Amendment only concerns government deprivation of life.[227] Accordingly, the Fourteenth Amendment does not concern private conduct such as a patient receiving assistance in suicide.

Similarly, assisted suicide is unlike other situations where the state justifiably prohibits killing a person. The state prohibits killing a person in order to protect an individual's right to life. All the same, assisted suicide can be distinguished in two regards: (1) assisted suicide is consented to; and (2) patients receiving assisted suicide believe that death would not deprive them of life's benefits.

The first distinction between assisted suicide and other killings is the fact that one must consent to assisted suicide. Non-consensual sexual activities are federally illegal,[228] but the United States permits adults to consent to sex. Similarly, when someone strikes another person against that person's consent, the striker will be charged with assault.[229] What makes most criminal action wrong is the fact that a person is impacted against their consent. If a patient provides informed consent,[230] then assisted suicide should be permissible.

In addition to providing consent, patients who request assisted suicide have determined that their state of suffering has surmounted the possible benefits of life. A patient's suffering may be so great as to

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[226] U.S. CONST. amend. XIV, § 1.

[227] The Fourteenth Amendment protects against government actions, however, "[t]hat Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[228] 18 U.S.C. §§ 2241–2244.

[229] *Id.* § 113(a)(4).

[230] *See Informed Consent Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/i/informed-consent/ (last visited Apr. 22, 2022) (describing informed consent as an agreement to do something only if all relevant facts have been disclosed).

numb the patient to all pleasures.[231] When an individual is deprived of all their dreams and desires, that individual may long for death.

> If a person with unimpaired capacities for judgment comes to the conclusion that his or her future is so clouded that it would be better to die than to continue to live, the usual reason against killing—that it deprives the being killed of the goods that life will bring—is turned into its opposite, a reason for acceding to that person's request.[232]

Providing patients assistance in death should not be prohibited.

Assisted suicide is not a killing that the state has an interest in prohibiting. Killing is wrong when performed on non-consenting individuals. Killing is also wrong when it deprives one of the benefits of life. Conversely, assisted suicide is performed on consenting patients who believe that they only have a life of pain, anxiety, and other debilitating symptoms to look forward to. The *Glucksberg* decision requires that patients remain alive; forcing patients to remain alive creates a duty to live and ignores a patient's right to life.

If the United States recognizes a right to life, it should treat life as a right, not a duty. Rights are something one may claim; they do not impose obligations on citizens. One may abstain from other rights, but citizens are not given this option in regard to the most personal, intimate right one possesses: the right to life. "[T]hey make the nonsensical remark that suicide is *wrong*, when it is quite obvious that there is nothing in the world to which every man has a more unassailable title than to his own life and person."[233]

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[231] *See* Cees D.M. Ruijs et al., *Symptoms, Unbearability and the Nature of Suffering in Terminal Cancer Patients Dying at Home: A Prospective Primary Care Study*, 14 BIO MED CENT. FAM. PRAC. 201, 204 (2013) (reporting that many terminally ill cancer patients experience unbearable pain, an unbearable sense of loss of control over one's life, and a prevalent fear of future suffering).

[232] Singer, *supra* note 191.

[233] SCHOPENHAUER, *supra* note 110, at 25 (emphasis in original). *Cf.* MILAN KUNDERA, THE UNBEARABLE LIGHTNESS OF BEING 299 (Michael Henry Heim trans., 2009) ("Dogs do not have many advantages over people, but one of them is extremely important: euthanasia is not forbidden by law in their case; animals have the right to a merciful death.").

III. SOLUTION

This Note explored three tests employed by the Supreme Court to evaluate fundamental rights. The Court has not specified which test is appropriate, leading to inconsistent inquiries. As a result, opinions will sometimes analyze fundamental rights through a hybrid approach, where arguments from multiple tests are blurred into one jumbled investigation.[234] Moreover, giving Justices the option to employ the test of their choosing creates the opportunity to shape arguments in their favor. This could lead to decisions based not on merit, but rather based on Justices' personal opinions. To create clarity within fundamental rights jurisprudence, the Court should adopt a three-prong test for fundamental rights.

The Court should utilize each of the three existing fundamental rights tests as the three prongs for the new test. Each asserted right should be evaluated using the historic test, the changing conscience test, and the penumbra of rights test. If there is a compelling enough argument under one test, then that should convince the Court of the asserted right's fundamental nature. Evaluating an asserted right through each fundamental rights test will provide many benefits to fundamental rights jurisprudence.[235]

To begin, creating a new, concrete test will help create clarity in the realm of Supreme Court jurisprudence. Currently there is little consistency in fundamental rights analysis.[236] This Note showcased three general tests at the Court's disposal, however, the Court has not decided which approach is the most fitting. Creating this new test

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[234] *See generally* Roe v. Wade, 410 U.S. 113, 149–54 (1973) (justifying the right to abortion through both the changing views of society and the right to privacy); Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 277–79 (1990) (declaring the right to remove life-sustaining equipment as embedded in the tradition of informed consent and subsumed under the right to personal autonomy); Lawrence v. Texas, 539 U.S. 558, 570–73 (2003) (stating the right to privacy and society's changing conscience justified the fundamental right to same-sex sodomy).

[235] *See* Mitchell Chervu Johnston, *Stepification*, 116 NW. U. L. REV. 383, 429–31 (2021) (arguing that multi-step analyses provide the perception of order, can help simplify the law, are useful to organize legal arguments, and help appellate courts analyze lower court arguments).

[236] "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, 'has not been reduced to any formula.'" Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

would establish a clear-cut rule on how to evaluate an asserted right. This would avoid inconsistency in fundamental rights cases, because each asserted fundamental right would be investigated from a consistent point of analysis. This would further eliminate worries about which test should be employed. If all three tests are always employed, one does not need to be concerned with which test is the most appropriate.

Furthermore, this new three-pronged approach would ensure that each asserted right is given its due consideration by the Court. If an asserted right is evaluated using all three tests, then Justices will carefully evaluate that right. This is important because asserted fundamental rights should not be dismissed without proper deliberation. It is essential that asserted rights are given proper due diligence to ensure the Court does not overlook an asserted right.

Moreover, the new three-pronged test would help avoid judge-made law. As mentioned in Part I, *Glucksberg* approached the asserted right to assisted suicide through a very narrow historic lens.[237] If new fundamental rights can only be recognized through that specific act's historical practice, then it will be difficult to recognize new rights.[238] If Justices wish to deny an asserted right the rank of fundamental, then employing only the narrow historic test for fundamental rights will help promote this motive.

On the other hand, if Justices wish to rank a right fundamental, they may have more success with the penumbra of rights test. The penumbra of rights test can be used to rank a right fundamental in somewhat abstract terms. The Court needs to approach fundamental rights carefully because ranking new rights fundamental places the right "outside the arena of public debate and legislative action."[239] With this in mind, it is important that overzealous Justices employing the penumbra of rights test do not rank every right fundamental.

The three-pronged test will help eliminate the possibility of Justices employing the fundamental rights test which best accomplishes the Justice's desires. Justices should not be able to employ one test just because the Justice will have more success

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[237] *See supra* Part I.C.
[238] *Obergefell*, 576 U.S. at 671.
[239] Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

pushing their opinion under that test. Evaluating fundamental rights through each fundamental rights test will ensure Justices evaluate an asserted right from all perspectives. Hopefully this will eliminate the risk of Justices employing different tests for personal motives.

While this new test could bring many benefits, it will unfortunately sacrifice efficiency. Evaluating an asserted right using all three fundamental rights tests would result in a very searching analysis. Though the decision would be well informed, it would likely take considerable time and research. Nevertheless, when tasked with something as important as determining fundamental rights, the case should not be overlooked for efficiency's sake. Creating a new fundamental right, or denying one asserted, is a major decision that should receive the Court's full attention.

The Supreme Court should adopt a new test for fundamental rights. Utilizing this new three-pronged test would provide clear guidance into evaluating asserted fundamental rights. Moreover, this test would ensure every asserted right is given the respect of comprehensive deliberation, coming to a well-reasoned decision. Lastly, and most importantly, employing this test would ensure Justices do not employ whichever test best suits their desires.

CONCLUSION

Denying patients the right to assisted suicide is depriving patients of a very intimate, personal decision. Patients have been denied the right to assisted suicide for too long. It is time this injustice is corrected by overturning the Court's decision in *Glucksberg*. The decision to continue life, or to die peacefully, should be the patient's decision.

Suffering patients are the only ones who should make the choice to continue living. If a patient determines that their suffering has surmounted the benefits of life, that patient should have the autonomy to die. America respects patient autonomy; nevertheless patients who want to die by suicide are denied autonomy over their own life and person. To fix this wrong, it is time that assisted suicide be recognized as a fundamental right.

There are many reasons assisted suicide should receive fundamental status. Citizens have the right to hasten their death and

risk their lives. Furthermore, many people recognize that suffering patients should have the liberty to die. Moreover, distinguishing between the right to die by abstention and the right to assisted suicide is an arbitrary distinction that should not be enforced. In addition, assisted suicide is a painless procedure that can help patients end their suffering. Finally, if there truly is a right to life, then citizens not only have a right to live, but a right to die.