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TO: Jeff Gentes
RE: Constitutional challenges to mortgagor protections during COVID-19
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This memo assesses the likelihood of a successful takings claim, requiring just compensation, for a possible state-level policy expanding protections for mortgagors facing hardship during COVID-19. Because no specific policy has been proposed, this memo focuses on how a court might assess the policy's *impacts* rather than its design—the impact is furthermore what a court will analyze under the doctrines discussed below. I assume the policy at issue¹ is one that disallows foreclosures and requires servicers to offer forbearance and then post-forbearance workouts to homeowners facing hardship (meaning, those unable to make payments or make up missed payments). In the analysis below, I assume the policy disallows balloon payments at the end of the forbearance or immediate repayments, instead requiring either (a) life of the loan be extended by the months of forbearance offered or (b) otherwise restructuring the payments so that the mortgagee still receives all the principal plus market-rate interest on all or most of the principal over the restructured term.

SUMMARY

State-level policies allowing protecting non-paying renters during COVID-19 are most likely to face substantial constitutional challenges under the regulatory takings doctrine.²

The remedy under this doctrine—just compensation—presents a risk for state governments, which face budgetary constraints. While challengers are likely to make claims under the Contracts Clause and substantive due process doctrine as well, courts are very unlikely to invalidate policies on those grounds as they apply a highly deferential level of scrutiny. Furthermore, courts have previously upheld comparable policies as constitutional against challenges under these doctrines.³

Under *Penn Central*'s takings inquiry,⁴ courts will assess, primarily, the share of value lost. Additionally, courts will assess the owner's investment backed expectations and the character of the governmental action (meaning, whether it targets specific individuals or has the character of a physical invasion). **Policies that preserve a servicers' rights to collect mortgagors' payments eventually and foreclose in the event of default after the COVID-19 emergency are very unlikely to amount to a taking.**

¹ I note that the states may be promulgating these policies through executive order while others do so through legislation. I do not distinguish between the two for the purposes of this memo. For takings claims, the case law does not appear to distinguish between these two actions.

² U.S. CONST. amend. V (“[P]rivate property” shall not “be taken for public use, without just compensation.”). The Takings Clause applies to both state and federal government actions, *Chicago Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (incorporating the Takings Clause of the Fifth Amendment, thereby requiring states to provide just compensation for taking private property).

³ See Section I.

⁴ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

- Foreclosure Moratoria. Delaying foreclosures for *all* mortgagors⁵ until after the COVID-19 emergency does not result in significant diminution of value—rather, such a policy results in delayed recovery of that value. Furthermore, this policy arguably increases the value to servicers in the long run, as it may prevent “fire sales.”⁶
- Mandatory Loan Workouts. Requiring servicers to offer forbearance⁷ to all mortgagors facing hardship⁸ or otherwise restructure the mortgagors’ payment structure similarly only delays and does not substantially diminish the value of the stream of payments expected from homeowners over the life of the loan.

The sole risk of a court finding a taking would stem from a plaintiff facing very particular circumstances. For example, courts may find a taking if these policies delay a large enough share of mortgage payments (beyond what might happen without the policy) such that an investor who has a very short term mortgage-backed security, one year or less, faces significant losses. Even then, remaining factors weigh against finding a taking in such an unlikely scenario—for example, investor losses may be more proximately caused by servicers’ failure to maintain a sufficient amount of liquid assets and, in turn, inability to make regular interest and principal payments to investors even as homeowners fall into default – than by state action.⁹

Regardless, **where policies only protect homeowners who would be unable to make mortgage payment regardless, no taking claim will be successful.** With that policy, states do not impose costs on creditors, and no property can be claimed to have been “taken.” Courts are very likely to hold these programs affect “property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good.’”¹⁰ They cannot be characterized as a physical seizure of property and they are unlikely to result in a significant loss of value of any potential parcel.

⁵ About one-third of mortgages in Connecticut are not “federally backed” and therefore are not protected by the federal foreclosure moratorium.

⁶ Atif Mian, Amir Sufi, Francesco Trebbi, *Foreclosures, House Prices, and the Real Economy*, 70 J. FINANCE 6 (2015) (showing that states with more stringent foreclosure rules for lenders had stronger housing markets during the financial crisis).

⁷ Such as by making a failure to do so subject to liability under state consumer protection laws or elevating that failure as a defense during judicial foreclosure proceedings. With both federal and state forbearance programs, homeowners are still unsure *when* they will be required to make payments. A state policy could go further and require servicers to extend the life of the loan or otherwise restructure the stream of loan payments rather than allow servicers to demand large sums for repayment.

⁸ Similarly, about thirty percent of Connecticut homeowners with a mortgage are not eligible to receive up to twelve months of forbearance under the CARES Act.

⁹ Andrew Ackerman, *Mnuchin Forms Task Force on Mortgage Firms’ Cash Crunch*, WALL ST. JOURNAL (Mar. 27, 2020), <https://www.wsj.com/articles/mnuchin-forms-task-force-on-mortgage-firms-cash-crunch-11585265840>.

¹⁰ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1356 (Fed.Cir.2003) (“The character of the governmental action factor requires a court to consider the purpose and importance of the public interest underlying a regulatory imposition.”).

ANALYSIS

I. Courts are unlikely to invalidate this policy under the Contracts Clause or substantive due process.

A court analyzing a tenant protection policy will apply a highly deferential level of scrutiny to both Contracts Clause and substantive due process challenges. Since 1937, only one regulation has been invalidated on substantive due process grounds, and that was in state court: in April 2020, the New York Court of Appeals held retroactive liability increases for rent overcharges violated landlords' substantive due process rights.¹¹ Courts are similarly hesitant to strike down state regulations under the Contracts Clause.¹² Furthermore, the Supreme Court has upheld policies limiting rent and evictions against these challenges.¹³ Plaintiffs litigating similar regulations nonetheless make claims under these two doctrines.¹⁴

a. Contracts Clause

The Contracts Clause¹⁵ prohibits only “a substantial impairment of a contractual relationship.”¹⁶ Even a substantial impairment may be upheld if the state has a “significant and legitimate public purpose behind the regulation.”¹⁷ Courts look more favorably on relief that is “temporary and conditional.”¹⁸ Courts also assess whether the adjustment of the parties' rights is reasonable and “appropriate to the public purpose” of the regulation but defer to state legislatures in making those determinations.¹⁹

¹¹ *In re Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 2020 N.Y. Slip. Op. 02127; Erwin Chemerinsky, *Substantive Due Process*, *TOURO L. REV.* (1999) (“[S]ince 1937, not one federal, state, or local economic regulation has been invalidated on substantive due process grounds.”).

¹² The Supreme Court has not invalidated a regulation under this doctrine since 1978, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), and in the only recent Contracts Clause case to reach the Court, only Justice Gorsuch expressed interest in reviving the doctrine, *Sveen v. Melin*, 138 S.Ct. 1815 (2018) (Gorsuch, J., dissenting) (“Our modern cases permit a state to ‘substantial[ly] impai[r]’ a contractual obligation in pursuit of ‘a significant and legitimate public purpose’ so long as the impairment is ‘reasonable.’ That test seems hard to square with the Constitution’s original public meaning.”) (citations omitted). *See also* JOHN A. FLITER AND DEREK S. HOFF, *FIGHTING FORECLOSURE*, 157-77 (2012).

¹³ *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Block v. Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

¹⁴ *See, e.g.*, Complaint at 32-39, *Wells Fargo Bank, Nat’l Ass’n v. City of Richmond*, No. 13-cv-03663 (N.D. Cal. 2013).

¹⁵ U.S. CONST. art. I § 10 (“No state shall . . . pass any . . . Law impairing the Obligation of Contracts”). The Contracts Clause applies to the states and is not incorporated to the federal government. *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984).

¹⁶ *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983).

¹⁷ *Id.*; *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (holding that elimination of unforeseen windfall profits is a legitimate state interest).

¹⁸ *See Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 441 (1934) (discussing *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Edgar A Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922)).

¹⁹ *Energy Reserves Group, Inc.*, 459 U.S. at 412.

The Supreme Court has upheld foreclosure moratoria and other policies against Contracts Clause challenges. A Depression-era Minnesota law allowed homeowners to petition courts for a two-year foreclosure delay conditioned on the payment of a reasonable monthly fee. In *Blaisdell*, the Court held that Minnesota’s foreclosure moratorium, though it directly prevented the enforcement of contractual obligations between borrowers and lenders, was justified as a “rational compromise between individual rights and public welfare.”²⁰ The Court held the state’s interference with contracts was appropriate given the economic emergency: “the reservation of the reasonable exercise of the protective power of the state is read into all contracts”²¹ Courts later expanded this holding to allow permanent impairing contracts and to no longer require emergency conditions as a prerequisite.²²

This doctrine and courts’ deference to state legislatures within this area of law make them highly likely to uphold these policies against a Contracts Clause challenge.

b. Substantive due process

Courts are very unlikely to invalidate economic regulations as violations of substantive due process²³ when they are required to further the public interest, “the means are reasonably necessary for the accomplishment of the purpose,” and the interference is not “unduly oppressive” on the property owner.²⁴ Courts apply rational basis scrutiny to economic regulations and therefore give legislatures discretion in determining that a public need exists and that the policy meets the public need.²⁵ Courts will only strike down an economic regulation

²⁰ *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442 (1934). FLITER & HOFF, *supra* note 9, at 167 (The Court took “the dramatic step of moving beyond the traditional police powers emphasis on health and safety to supporting a widespread impairment of contracts based on macroeconomic conditions.”).

²¹ *Home Building & Lona Assn v. Blaisdell*, 290 U.S. 398, 444 (1934). Takings Clause and substantive due process analyses were held to be distinct inquiries beginning in 2005. *See* note 39 below.

²² *Veix v. Sixth Ward Building and Loan Association* 310 U.S. 32 (1940) (holding that emergencies are not a prerequisite for passing laws that impair contracts); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945) (upholding permanent legislation impairing contracts).

²³ U.S. CONST. amend. XIV (“No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .”). *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905).

²⁴ *Lawton v. Steele*, 152 U.S. 133, 137 (1894). Courts struck down regulations under the substantive due process doctrine during the “*Lochner* era,” but began to limit this doctrine’s reach as the Court began to uphold New Deal legislation. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *see also Williamson v. Lee Optical*, 348 U.S. 483 (1955); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

²⁵ *West Coast Hotel Co.*, 300 U.S. 379; *see also Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Williamson*, 348 U.S. 483; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

under this doctrine if it is “arbitrary,” “discriminatory,” or “in excess of legislative power.”²⁶ Courts have upheld policies against due process challenges.²⁷

During the Great Depression, the Court held that a Bankruptcy Act amendment, which allowed for, among other protections, up to a three-year foreclosure delay for essentially insolvent farmers, did not unreasonably violate creditors’ due process rights.²⁸ Furthermore, the Court in *Blaisdell* dismissed, without much explanation, the substantive due process challenge against Minnesota’s policy, discussed above.²⁹

While today’s policies may differ from the Depression-era federal and state-level policies, they are very likely to be upheld against substantive due process challenges. Given the extreme nature of the public health and economic crisis caused by COVID-19, policies limiting creditors’ remedies for delayed or delinquent mortgage payments are unlikely to be held unreasonable.

II. Courts are likely to assess whether states must compensate mortgage servicers and investors for these policies under the regulatory takings doctrine.

Under the Fifth Amendment, “private property” shall not “be taken for public use, without just compensation.”³⁰ If a taking is found, the government’s action can be maintained, but it must compensate the property owner.³¹ This doctrine therefore does not prevent the government from valid interference in property rights—instead, it requires compensation for certain actions that go “too far.”³² Courts will only analyze an action under the Takings Clause when it is otherwise

²⁶ *West Coast Hotel Co.*, 300 U.S. at 398; *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978); *SDP Beatie v. City of N.Y.*, 123 F.3d 707, 711 (2d Cir. 1997) (“Legislative acts that do not interfere with fundamental rights or single out suspect classifications carry with them a strong presumption of constitutionality and must be upheld if rationally related to a legitimate state interest.”).

²⁷ *Block v. Hirsh*, 256 U.S. 135, 157 (1921) (holding that a Washington, D.C. restriction of property owners’ excess profits during a housing shortage was not unreasonable); *see also* *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 440 (1934); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

²⁸ *Wright v. Vinton Branch*, 300 U.S. 440 (1937). The Court three years earlier held that an earlier version of the amendment, which allowed for up to a ten-year foreclosure delay, violated the Takings Clause (discussed further below). *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1934). Only recently have courts fully separated Due Process and Takings Clause inquiries. *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528 (2005).

²⁹ *Blaisdell*, 290 U.S. at 448.

³⁰ U.S. CONST. amend. V. The Takings Clause applies to both state and federal government actions. *Chicago Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (incorporating the Takings Clause of the Fifth Amendment, thereby requiring states to provide just compensation for taking private property).

³¹ *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 543 (2005) (“[The Takings Clause] does not bar government from interfering with property rights, but rather requires compensation ‘in the event of otherwise proper interference amounting to a taking.’”) (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)).

³² *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

valid.³³ The goal of the Takings Clause is to ensure that the government will not force “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³⁴

Regulations can be subject to three different Takings Clause analyses. First, a permanent, physical invasion of property, no matter how small, is a *per se* takings requiring just compensation under *Loretto*.³⁵ Second, a restriction on all economically beneficial use of property (or “total deprivation”) is a *per se* takings requiring just compensation under *Lucas*.³⁶ Third, a regulatory takings that diminishes the value of a property will be analyzed under *Penn Central*’s “essentially ad-hoc, factual inquiry,” which recognizes that government regulations can affect the value of property without necessarily amounting to a taking.³⁷

A homeowner protection policy will be analyzed under *Penn Central*, as it diminishes the value of the stream of mortgage payments. While, coupled with a foreclosure moratorium, these policies can frustrate a lender’s ability to foreclose a nonpaying mortgagor, they cannot be characterized as a permanent invasion—as they do not require lenders previously unwilling to lend money to then do so.³⁸ Rather, these facts bear on how likely a court is to find a taking under the *Penn Central* analysis.

III. Courts are very unlikely to hold policies that protect mortgagors effect a taking.

Regulations that restrict beneficial or economic use of a property (even when no physical invasion has occurred) may require just compensation—termed “regulatory takings.”³⁹ Courts

³³ *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 543 (2005) (“Conversely, if a government action is found to be impermissible—for instance because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.”). In cases where the action itself is found invalid, compensation may be required for the time between when property was first taken and when the action was invalidated—a type of “temporary takings.”

³⁴ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

³⁵ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

³⁶ *Lucas v. South Carolina Coast Council*, 505 U.S. 1003, 1017 (1992).

³⁷ *Penn Central Transp. Co.*, 438 U.S. at 123. Regulations can be subject to two other analyses. *Loretto*, 458 U.S. at 419 (holding that a permanent physical invasion is a *per se* takings, requiring just compensation); *Lucas*, 505 U.S. at 1017 (holding that a restriction on *all* economically beneficial use of property (or “total deprivation”) is a *per se* takings); *see also* *Lingle*, 544 U.S. at 539 (“Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) . . . aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”).

³⁸ *Yee v. City of Escondido*, 503 U.S. 519 (1992) (holding that rent control policies and limitations on evictions do not amount to a physical seizure of property); *Loretto*, 458 U.S. at 428 (“[T]his Court has consistently distinguished between cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion . . . on the other.”).

³⁹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

will analyze whether just compensation must be paid using *Penn Central*'s "essentially ad-hoc, factual inquiry,"⁴⁰ which comprises three factors: (1) the action's economic impact, (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action."⁴¹ Courts hold if the "law embodies a comprehensive plan," and does not single out specific parcels, it does not amount to a taking.⁴² As an initial matter, courts must find the regulation must interfere with a property right protected by the Takings Clause.⁴³

- a. *The property right at issue is likely to be a contractual right to payments or fees, but its exact nature is highly fact-dependent and subject to courts' discretion.*

As an initial matter, courts must find that there is a property interest with which a regulation has interfered.⁴⁴ The Court held that a 1934 Bankruptcy Act amendment, which compelled creditors to relinquish property without full payment of debt and allowed for up to a ten-year delay on foreclosure (at a time when the thirty-year mortgage hardly existed), amounted to an uncompensated taking.⁴⁵ The Court enumerated five rights impairing the mortgagee's security: (1) retaining "the lien until the indebtedness thereby secured is paid," (2) realizing "upon the security by a judicial public sale," (3) determining "when such sale shall be held, subject only to the discretion of the court," (4) protecting "its interest in the property by bidding at such sale . . .," and (5) controlling the property during default. The Court soon thereafter upheld a modified amendment with lesser constraints, such as a three-year instead of ten-year moratorium.⁴⁶ While loan workout and foreclosure policies considered today may be similar, changes in mortgage finance industry, such as the development of mortgage-backed securities as well as increasing federal and state regulation, mean a court may find different property rights to be at stake today.

⁴⁰ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978). Regulations can be subject to two other analyses. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a permanent physical invasion is a *per se* taking, requiring just compensation); *Lucas v. South Carolina Coast Council*, 505 U.S. 1003, 1017 (1992) (holding that a restriction on *all* economically beneficial use of property (or "total deprivation") is a *per se* taking); *see also* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) ("Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) . . . aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.").

⁴¹ *Penn Central Transp. Co.*, 438 U.S. at 124.

⁴² *Id.* at 732.

⁴³ The property protected by the Takings Clause is not necessarily congruent with property protected by the Due Process Clause. *See, e.g., Eastern Enters. v. Apfel*, 524 U.S. 498, 557 (1998) (Breyer, J., dissenting) ("Nor does application of the Due Process Clause automatically trigger the Takings Clause, just because the word 'property' appears in both. That word appears in the midst of different phrases with somewhat different objectives, thereby permitting differences in the way in which the term is interpreted.").

⁴⁴ *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."); *see also* *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)..

⁴⁵ *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1934).

⁴⁶ *Wright v. Vinton Branch*, 300 U.S. 440 (1937).

The exact property right at issue in a potential lawsuit against today’s foreclosure moratoria and loan workout programs depends on who brings the action. Each party’s rights could be delineated by the web of contracts creating mortgage-backed securities. Furthermore, courts have discretion in defining the “parcel” from which value is being taken. This is the “denominator” against which a reduction in value will be measured and therefore has a large bearing on the outcome of the case.

A court is very unlikely to define the parcel narrowly, with each payment its own parcel. Courts generally aim to define the parcel *broadly* and do not allow owners “parcelize” their property to artificially increase the share of value lost.⁴⁷ The most intuitive way to define this parcel is to set the denominator as the expected fees to be collected over the life of a loan, or even a pool of loans. Similarly, if investors do face losses, the denominator will likely be defined as their right to a stream of payouts from a certain tranche of a mortgages. While this question is key to a takings analysis, it is impossible to ascertain what a court might find given the many parties involved and the variety of possible contractual rights.

b. Courts are unlikely to find significant economic impacts.

The analysis “turns in large part, albeit not exclusively” on the economic impact of the regulation.⁴⁸ The effect must be comparable to denying owners economically viable use of their property.⁴⁹ Courts require a significant diminution in value—courts have not required compensation for losses of value ranging from three-quarters to 92.5 percent.⁵⁰

While courts have not established any bright-line tests for this factor, courts assess economic impact by “compar[ing] the value that has been taken from the property with the value that remains in the property.”⁵¹ To evaluate the share of value taken, courts must define both the “the denominator” of the equation (the value of the total parcel) as well as the proper counterfactual.

To define the denominator, courts must assess the economic impact to the “parcel as a whole”—property owners cannot divide their parcel into smaller segments to claim that a few small segments have lost all value (while the remaining lose none).⁵² In delineating the counterfactual, the parcel must, “in its present state, be regarded as capable of earning a reasonable return” for it

⁴⁷ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978); *Concrete Pipe & Prod., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993) (“[A] claimant’s parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent any portion of the property is taken, that portion is always taken in its entirety.”)

⁴⁸ *Lingle*, 544 U.S. at 540.

⁴⁹ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987).

⁵⁰ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

⁵¹ *Keystone Bituminous Coal Ass’n*, 480 U.S. at 497.

⁵² *Penn Central Transp. Co.*, 438 U.S. at 131; *Concrete Pipe & Prod., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993) (“[A] claimant’s parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent any portion of the property is taken, that portion is always taken in its entirety.”)

to experience any economic loss.⁵³ Courts, for example, will not find economic impacts rising to the level of “takings” where the investment would not have been profitable regardless of restrictions placed on it.⁵⁴ Furthermore, the claimed loss is assessed against the background principles and laws governing the property—for example, an owner cannot demand just compensation for profit losses due to restrictions on freely dumping hazardous waste.⁵⁵

An important factor in this analysis is whether the federal government offers relief to mortgage servicers. Currently, the federal government insures or guarantees the majority of payments owed to mortgage investors should servicers fail to make payments. The federal government may expand this infrastructure to cover loans that are not “federally backed” by creating a short-term lending facility for nonbank servicers.⁵⁶ which means neither servicers nor investors would face losses for introducing mandatory forbearance or foreclosure moratoria.

Because, under the policies being considered, only borrowers who are unable to pay will receive loan workouts under the policies being considered, those defaults would still—whether now or in the near future—occur even without such a policy. In other words, in “its present state” the investment would not be capable of earning a greater return.⁵⁷ Furthermore, neither (a) mandatory forbearance that simply delays these payments—the interest on those payments is all that can be argued is “taken”—or (b) workouts that merely restructure those payments to those that can be realized through market rate investment, especially when both are compared to the costs and drawbacks of a subsequent bankruptcy or foreclosure, constitutes value reduction significant enough to amount to a taking. Furthermore, without loan workouts, servicers face significant costs throughout the foreclosure process, including risks of diminution in value of the collateral due to reduced home maintenance and a homeowner filing for bankruptcy (resulting in delays, costs and potentially elimination of a deficiency balance).

Similarly, foreclosure moratoria delay servicers’ ability to recover on delinquent loans—but any potential loss in value here will be minimal. Even without moratoria, foreclosure proceedings last can last a year or more in states with judicial foreclosure. Without moratoria, servicers would still be unable to complete a foreclosure in many states, as courts are delaying non-essential proceedings during the pandemic. Thus, any additional delays in foreclosure, compared to the baseline, are slight. Furthermore, these delays could actually result in investors recovering greater value in foreclosure proceedings—at this point, mass foreclosures would likely result in an effect akin to a “fire sale.” In fact, researchers have shown that states with more stringent foreclosure rules for lenders had stronger housing markets during the financial crisis.⁵⁸ Neither the delayed foreclosures nor the delayed or restructured mortgage payments are likely to result in

⁵³ *Penn Central Transp. Co.*, 438 U.S. at 129.

⁵⁴ *Palazzolo v. State*, 2005 R.I. Super. LEXIS 108, at *48 (July 5, 2005), *on remand*, *Palazzolo v. Rhode Island*, 53 U.S. 606 (2001).

⁵⁵ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 303 (2002).

⁵⁶ *See* note 9.

⁵⁷ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978).

⁵⁸ Atif Mian, Amir Sufi, Francesco Trebbi, *Foreclosures, House Prices, and the Real Economy*, 70 J. FINANCE 6 (2015).

significant enough losses, compared to the proper baseline, for courts to find a takings based on the *Penn Central* economic loss factor—the most dispositive factor.

c. Courts are unlikely to find the policy interferes with investment backed expectations.

To assess whether a policy interferes with investment-backed expectations, courts will focus on “whether extension of existing law could be foreseen as reasonably possible.”⁵⁹ “A reasonable investment backed expectation must be more than a unilateral expectation or an abstract need.”⁶⁰ Courts look to restrictions and regulations on the property prior to the enactment at issue. That regulations predate ownership may not in itself be dispositive,⁶¹ but the general level of regulation is relevant. For example, if the property at issue is heavily regulated prior to the new policy, changes in regulation will likely be seen as “foreseeable.”⁶²

Even without the proposed policies, servicers are often required to process requests for forbearances when homeowners are facing a hardship. Servicers are also accustomed to natural disaster relief programs which similarly require servicers to delay foreclosures and offer forbearance. Furthermore, the Supreme Court has upheld state-wide and nationwide moratoria and foreclosure delays. Lastly, investors and servicers, just twelve years ago, witnessed the collapse of the housing market featuring waves of defaults. While courts in this area will have significant discretion in how they might categorize these policies, they are nonetheless likely to see the potential for mandatory workouts or foreclosure moratoria as part of the “existing rules,” “understandings,” and “background principles” that “define the range of interests that qualify for protection” under the Takings Clause—particularly during emergencies.⁶³

d. Courts are likely to find the law embodies a comprehensive plan, as opposed to one that singles out specific parcels or property owners.

Where an action “amounts to a physical invasion” courts will likely find a taking, while courts are more likely to hold that an action is not a taking if it “instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good.’”⁶⁴ Whether the regulation is successful is not dispositive (and may be irrelevant)

⁵⁹ *Cienaga Gardens v. United States*, 503 F.3d 1266, 1289 (Fed. Cir. 2007).

⁶⁰ *Loveladies Harbor, Inc. v. United States*, 38 F.3d 1171, 1177 (Fed. Cir. 1994) (quoting *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 151 (1980) (internal quotations removed)).

⁶¹ *Palazzolo*, 533 U.S. at 626-30.

⁶² *See, e.g., Concrete Pipe & Prod., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993); *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004).

⁶³ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-30 (1992). *Lucas* provides a useful analogy: “the owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land.” *Id.* at 1030.

⁶⁴ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1356 (Fed.Cir.2003) (“The character of the governmental action factor requires a court to consider the purpose and importance of the public interest underlying a regulatory imposition.”).

in this line inquiry.⁶⁵ Even where a program “disproportionately” burdens a party in order to promote the public good, courts will not find a taking unless the program goes too far.⁶⁶

Mortgage foreclosure moratoria and payment suspensions cannot be characterized as physical invasions—as described above, these policies merely delay the exercise of contractual rights to collect payments from mortgages. Furthermore, this policy does not uniquely or excessively burden any group. Rather, this program serves a clear public purpose that would perhaps benefit even the potential claimants challenging the policies. The policy additionally may prevent or mitigate another collapse in the housing market just ten years after the housing crisis.

IV. Conclusion

The Takings Clause ensures that the government will not force “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁶⁷ The proposed programs only adjust the benefits and burdens of the COVID-19 crisis just enough to mitigate the worst possible damage to homeowners. Short term foreclosure moratoria prevent a “fire sale” of foreclosures, while payment suspensions ensure homeowners do not bear the brunt of COVID-19 impacts. And these programs furthermore do not burden mortgage-backed security market actors with costs significantly greater than the alternative. In fact, many financial institutions have agreed to voluntary forbearance programs and foreclosure moratoria at the state level, illustrating that they are not excessively burdened by these policies.⁶⁸ Lastly, these programs simply delay rather than prohibit recovery of the monies owed. Courts assessing foreclosure moratoria and payment suspensions are highly unlikely to require compensation for these actions to affected private actors.

States can easily limit the risk of takings claims by introducing a policy that:

- applies to property owners widely, rather than to specific companies or a distinct group;
- reduces the value of the parcel (whether defined as the right to collect fees, as the right to a stream of payments, or another way) less than one-half (or even three-quarters);
- protects homeowners who would be unable to make payments regardless; such policies are very unlikely to be found a taking because they would only delay realization of value rather than result in value lost; and
- tracks existing regulations or past governmental actions so that the policy does not significantly alter investment backed expectations

⁶⁵ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (overruling earlier decisions that had used substantive due process-like inquiries to find a regulatory takings); *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445, 454 (9th Cir. 2018) (“*Lingle* simply held that a plaintiff could not claim that a regulation constituted a taking merely because it did not substantially advance a legitimate state interest.”); see also Michael Lewyn, *Character Counts: The “Character of the Government Action” in Regulatory Takings Actions*, 40 SETON HALL L. REV. 591 (2010).

⁶⁶ See, e.g., *Warren Trust v. United States*, 107 Fed. Cl. 533, 571 (2012).

⁶⁷ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

⁶⁸ STATE OF CONN. DEP’T OF BANKING, Mortgage Relief During COVID-19 Outbreak, <https://portal.ct.gov/DOB/Consumer/Consumer-Help/COVID-19-Mortgage-Relief#banks>.

While challengers are likely to make claims under the Contracts Clause and substantive due process doctrine as well, courts are very unlikely to invalidate policies on those grounds as comparable policies have been upheld in the past and courts nonetheless apply a highly deferential level of scrutiny to those doctrines.