



The Right to Build

HOW PROPERTY RIGHTS CAN SOLVE THE HOUSING CRISIS

Megan Jenkins, Daniel Dew, and Mark Miller

Housing costs have skyrocketed in recent years, signaling a national housing crisis. The median home price has increased by 43 percent in the past 10 years according to the Federal Reserve Bank of St. Louis. That increase has been especially sharp since 2020.¹

Housing represents the largest portion of most Americans' budgets. These increasing costs are straining finances for both homeowners and renters, half of whom said they struggled to afford their housing payments in an April 2024 survey by real estate company Redfin.² Spending over 30 percent of one's income is a common benchmark for determining whether a household is burdened by housing costs. Half of all renter households spent more than that on housing and utilities in 2022, according to the Harvard Joint Center for Housing Studies. That number, 22.4 million households, is the highest on record.³

Economists and researchers increasingly agree that the housing crisis stems from a lack of new construction.⁴ Without addressing this issue, housing prices will continue to strain finances and limit opportunity for Americans across the United States.

Low-income workers, people living on fixed incomes, and first-time homebuyers will be hit the hardest.

This research lays out a path to more housing that is rooted in property rights. Current land use regulations impinge on these fundamental, constitutionally guaranteed rights and interfere with new housing construction. These regulations restrict the supply of new homes, keeping prices high. America's housing crisis won't end until public policy reforms allow plentiful and diverse housing to be built.

Local laws determine and often restrain the type of housing that can be built. Some have proposed full-scale state preemption of local zoning rules to increase housing production.⁵ An alternative approach is for states to enact guardrails that ensure local government rules around building are followed, and that projects that fit within local rules are approved quickly and transparently. This approach respects property rights and leaves local control in place while allowing for more housing to be built.

This research in brief identifies four policy reforms that would unleash the housing supply without removing local control. Instead of telling local governments

what type of housing should be built and where, these reforms simply make it easier to build housing that complies with local rules. This approach also maintains individuals' private rights to contract with one another to create neighborhoods that match their preferences through restrictive covenants and homeowners' associations (HOAs). These reforms include:

- Establishing by-right development based on local regulations.
- Streamlining the permitting process.
- Limiting impact fees to the actual impacts of a project.
- Freeing approved projects from litigation by third-party interlopers.

When property owners are free to respond to market signals, high prices encourage them to build

homes. This individual decision, repeated over and over, increases the housing supply and brings prices down.

The research is clear: Public policy reforms that respect private property rights and allow more housing construction are most strongly associated with increased supply and lower prices. These reforms provide the most promising path to a future in which everyone in America has a place to live.

To provide more context for why these reforms are needed, this research in brief outlines the size and scope of the housing shortage using data. It then summarizes the economic literature on why the housing shortage persists, despite demand for more homes. Finally, it describes the four model policies PLF has created to help policymakers address the housing crisis.

Housing Is Expensive Because America Does Not Build Enough Homes

The main reason for high housing costs is that population growth and household formation are outpacing new home construction. As a result, more people are having trouble finding a home they can afford.

Housing data show that America has not built enough homes to keep up with population growth since the housing crash of 2008, creating a deficit of millions of homes. Estimates of the US home shortage range from 1.5 million to 6.5 million.⁶

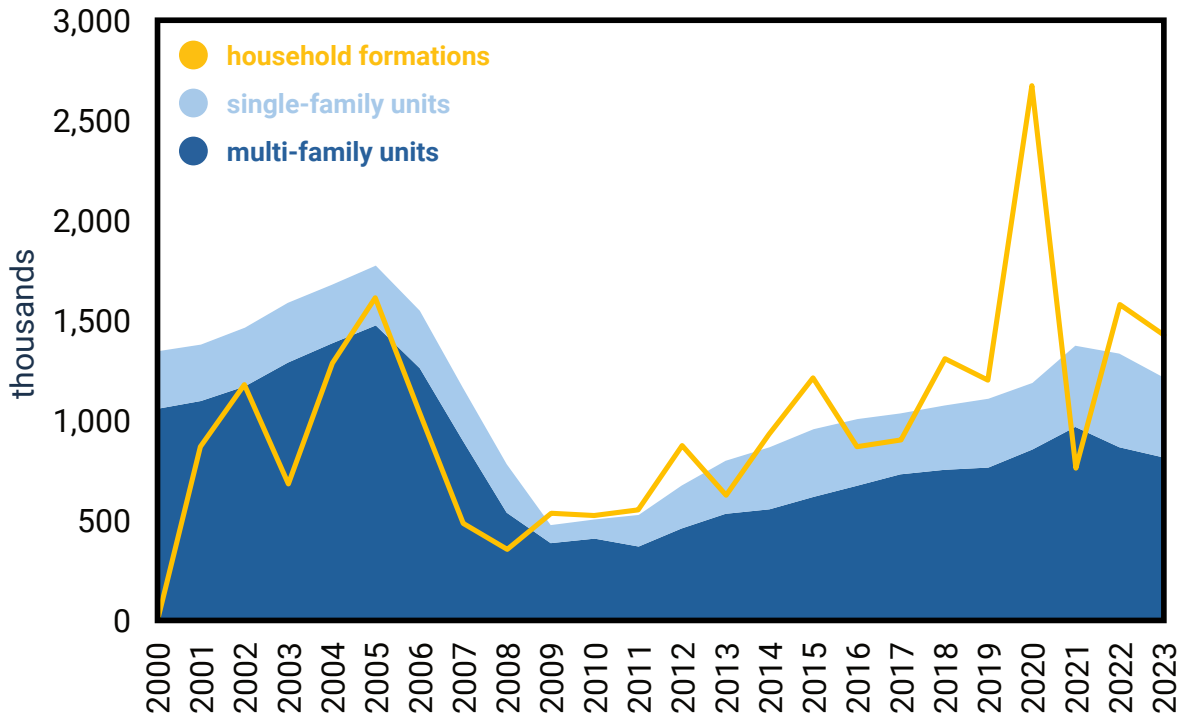
Figure 1 provides one measure of housing supply and demand by comparing household formation to housing starts. As the chart shows, new housing starts have not kept pace with household formation for much of the past decade, creating an accumulating shortage of homes. This measure likely underestimates the housing shortage,

however, because household formation does not count individuals living with family members or roommates who would like to form their own households but cannot afford to.

As home prices have ascended due to limited supply, incomes have not kept pace, pushing homeownership out of reach for an increasing share of Americans. Figure 2 plots the change in the median home price against median household income.

Failing to build enough homes to keep up with the growing US population locks many young families out of homeownership. The property tax increases that come with rising home values threaten to push retired and disabled Americans on fixed incomes out of their homes. For the lowest-income Americans, rising housing costs can lead to homelessness.⁷

Figure 1. Household Formation vs. Housing Starts, 2000–2023



Source: Census Bureau, "Housing Vacancies and Homeownership," last updated October 29, 2024, <https://www.census.gov/housing/hvs/data/histtabs.html>.

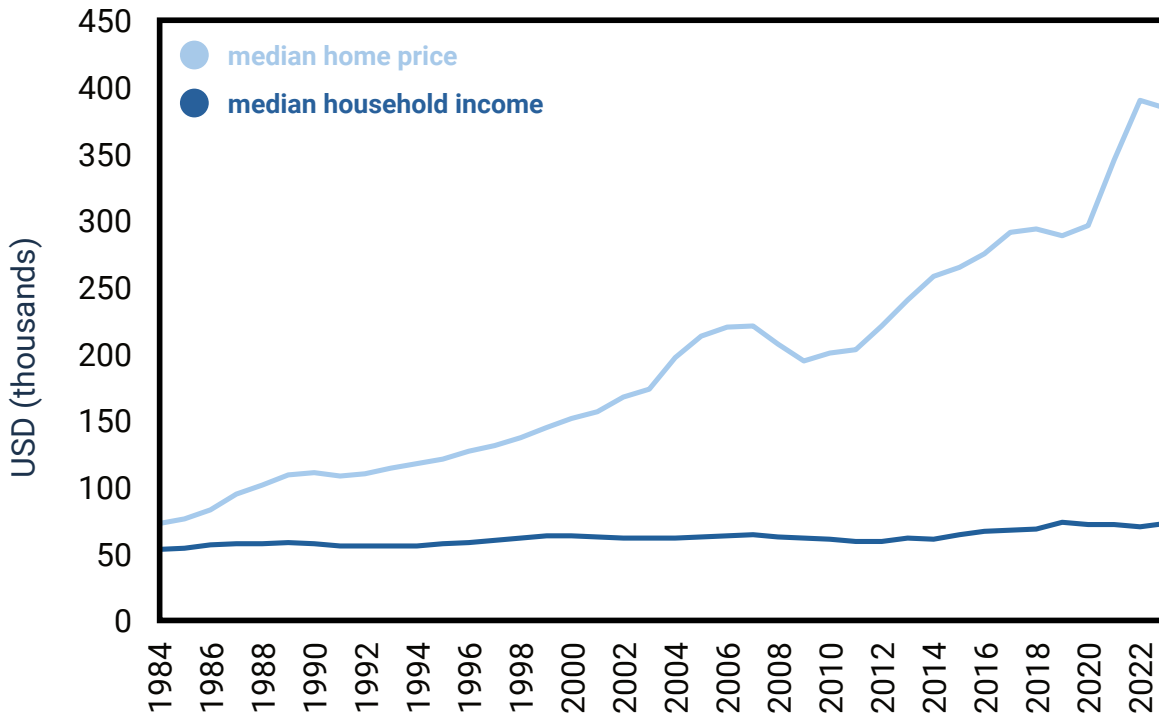
Building a Home in America Is Difficult and Complicated

Building a new home in the United States is no longer a simple process. The environmentalist movement of the 1970s led to the creation of modern environmental laws, including the Clean Water Act, the Endangered Species Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or more informally, the "Superfund" program). Builders must comply with each of these regulations.

In his book *Nowhere to Live*, Pacific Legal Foundation (PLF) attorney and author James Burling describes these laws as converting "the right to develop and use property into a privilege, where the ultimate decision-making powers were wrested from the owners and given to the public, the bureaucrats, and the courts."⁸

But the largest barriers to building more housing are the numerous state and local land use regulations. As city planning expert Nolan Gray explains in his book *Arbitrary Lines*, minimum lot sizes and minimum parking requirements are just two examples of policies that "force those houses and apartments that are built to be much more expensive than residents might otherwise prefer."⁹ Although residents may not be interested in paying more for larger lots or extra parking, they have no other option. State and local rules also determine how far back a building must be from property lines. Set-back requirements that prohibit construction along a property's edges reduce buildable land that could supply more housing.

Figure 2. Median Home Price vs. Median Household Income, 1984–2023



Source: Federal Reserve Bank of St. Louis. "Median Sales Price of Houses Sold in the U.S.," last updated October 24, 2024, <https://fred.stlouisfed.org/series/MSPUS>; Federal Reserve Bank of St. Louis, "Median Household Income in the United States," last updated September 11, 2024, <https://fred.stlouisfed.org/series/MEH01NUSA646N>.

Land Use Regulation Holds Back New Home Construction

In the past, calls for deregulation tended to come from conservative economists, but this trend is changing. From libertarian Bryan Caplan to progressive Paul Krugman to chair of President Barack Obama's Council of Economic Advisers Jason Furman, economists across the political spectrum agree that land use regulations have been a key constraint on the housing supply by making it more difficult and more expensive to build new housing.¹⁰

Researchers have employed concrete data to highlight this constraint. Economist Joseph Gyourko and his coauthors created the Wharton Index to measure the strictness of local land use regulations (such as density restrictions and caps on new construction) for 2,500 US communities. The authors found that the most highly regulated markets are on the East and West Coasts, with New York City and San Francisco being the most regulated.¹¹

Other researchers have illustrated a relationship between a city's ranking on the Wharton Index and those cities' average home price. Robert Wassmer and Joshua Williams found that tighter local land use controls increase land prices and drive up the cost of single-family housing.¹²

Using 2022 home prices and mortgage rates, economist Orphe Divounguy found that the share of families who would need to spend 30 percent or less of their incomes to buy an average-priced home in their area varied from 2.6 percent in San Diego to 25.6 percent in Pittsburgh.¹³ That variation correlated with the level of land use regulation. "Even in markets with higher-than-average incomes, those who live in highly regulated housing markets are least likely to be mortgage-ready," Divounguy notes. "This is because housing supply persistently falls short of increases in housing demand."¹⁴

Property-Rights-Based Reforms Can Unleash New Housing

Four state-level reforms could help solve America's housing crisis by ensuring that property owners can build new housing to help meet demand. These reforms would create guardrails that allow more housing to be built without preempting local rules.

These reforms are based on the principle that property owners should have the right to build on their land as long as they are meeting all reasonable health and safety standards and are not creating a traditional nuisance. Reforms must also require prompt building permit decisions, restrict project challenges to those directly affected, and tie builder fees to projects' actual impacts.

Establish By-Right Development of Housing Projects

By-right development guarantees property owners the right to build when they draw up plans consistent with local ordinances. By-right projects were permitted 28 percent faster than projects that went through discretionary review in a 2022 study of 350 multifamily projects permitted in Los Angeles County.¹⁵ This research suggests immense potential for by-right development to speed up permitting and expand the housing supply.

In many cities, local regulations are so complicated that even standard projects require a variance (granting extra flexibility when compliance is difficult or costly) or a special permit (allowing a one-time exception to use or density requirements) to comply. Each of these comes with additional delays and costs. Research by Nolan Gray found that a simple variance in Los Angeles costs an average of \$13,282, and a special permit costs about \$32,212.¹⁶

These financial costs do not include the costs of hiring a land use attorney or the time costs of delays to a project. For example, in New York City, obtaining a special permit takes between seven months and two years to complete.¹⁷

PLF's By-Right Housing Development Act states that all proposed housing developments—including

accessory dwelling units (ADUs) and multifamily units—that meet zoning and land use regulations should be approved by right, without the need for further discretionary review.¹⁸ If adopted as state law, this model legislation would allow the housing supply to expand more efficiently and end the housing crisis sooner. Localities would retain control over building and safety standards.

By-right development encourages new construction by giving builders confidence that their projects will be approved. It cuts down costly project delays and attorney fees from repeated negotiations with local zoning commissions.

Ensure Timely Decisions for Permit Applications

Time is money, especially when it comes to homebuilding. A family waiting to move into a new home must pay for another place to live. Delayed approvals can mean waiting another winter before construction can begin. Unjust denials can mean costly appeals with expert witnesses and attorney fees.

Building permit delays also increase holding costs for developers. These costs include property taxes, insurance, utilities, and business operation overhead.¹⁹ Extra holding costs can total tens of thousands of dollars and are passed on to homebuyers, pricing more people out of the market. For example, a 2022 study found that a two-year review process for mid-rise developments in New York City increased the cost per unit by \$50,000.²⁰ Another 2022 study examining Washington counties found an average permit delay of 6.5 months and a corresponding \$31,375 increase in home development costs.²¹

To ensure timely decisions and reduce unwarranted holding costs, PLF's Permitting Approval Timeliness Act would require authorities to process permit applications and issue decisions within 60 days so applicants can promptly build, amend, or appeal.²² If authorities do not respond within 60 days, then the permit would be

automatically granted. This model policy protects local control: Requiring timely decisions does not force local governments to approve anything they otherwise wouldn't.

Limit Third-Party Challenges

Another common homebuilding delay comes from third-party challenges to new development at public hearings. In their book *Neighborhood Defenders*, Katherine Levine, David Glick, and Maxwell Palmer show how opposition from local residents can prolong the permitting process by pushing local governments to require additional studies or to limit the project. Third parties may also use litigation to stop an unwanted project.

Levine, Glick, and Palmer reviewed the records of local planning meetings across the United States and found that opponents of new housing tend to be a small group of predominantly older homeowners who don't represent the preferences of the population as a whole.²³ In particular, they don't represent the younger, lower-income renters who are most likely to benefit from an increased housing supply.

The Third Party Challenges to Development Permits Act would protect property owners' rights to build new housing under locally determined rules. Under this PLF model policy, only adjacent property owners who can demonstrate that the development would create a common-law nuisance or an immediate threat to their health, safety, or welfare could challenge a development permit.²⁴

This reform does not impede local control. In fact, it empowers local government by ensuring its development approvals stick. It also discourages unjust actions to stop development by placing third parties on the hook for damages and attorney fees. Limiting third-party challenges to legal housing developments will help expand the supply of housing and ensure that property owners can exercise their right to build new housing on their property under locally determined rules.

Make Impact Fees Proportional and Connect Them to Real Impacts

Many local governments charge impact fees as a condition of issuing a building permit. These fees are supposed to account for new housing's impact on local infrastructure, such as roads, schools, and sewers. In practice, however, impact fees often lack a connection to the actual impacts of new development.

For example, when George Sheetz wanted to build a single-family manufactured home in El Dorado County, California, the local government imposed a \$23,000 traffic mitigation fee. PLF took his case to the US Supreme Court, which found in 2024 that legislatures cannot impose impact fees as a condition for obtaining a building permit unless those fees are proportional and have a real connection to the impact of a project.²⁵

In the Sheetz case, the Court held that local governments cannot use people who have a right to develop their property as a piggy bank. Despite this decision, many cities still charge arbitrary and unconstitutional impact fees that drive up housing costs. Researchers at the American Enterprise Institute found that impact fees vary significantly across states, and higher impact fees are correlated with higher housing costs. They found that reducing impact fees would result in more construction and lower new home prices.²⁶

The Safe Harbor from Excessive Exactions Act would ensure that fees required for project approval are roughly proportional to the cost of its specific impacts. This PLF model policy would also require local governments, at the property owner's request, to itemize fees and substantiate why these fees are both caused by and roughly proportional to the local government's costs because of the development. Property owners dissatisfied with the explanation would then have the right to an expedited appeal.²⁷

To be sure, local governments would retain the right to recover actual mitigation costs from developers. However, local governments cannot hold development ransom for excessive fees or conditions.

The Way Forward: Expanding the Housing Supply

Like many states in the Mountain West, Montana has a housing affordability problem driven by a shortage of homes. A recent analysis by the National Association of Realtors compared average home prices to average incomes to measure how affordable housing is in each state. Montana ranked last.²⁸

To address the problem, legislators in Montana passed property-rights-based reforms in 2023 that allow duplexes and ADUs on single-family lots with no voluntary land use restrictions. Homeowners in deed-restricted areas can keep existing single-family requirements in place. Without infringing on private property rights, these reforms aim to increase the housing supply and improve affordability for the many Montanans seeking a place to live.

Despite these positive reforms, efforts to build more housing are still being stymied in Montana. That's why PLF is representing Missoula landowners Clancy Kenck and David Kuhnle.

Kenck purchased a lot with plans to build a duplex where his two disabled Vietnam veteran brothers could live. Kuhnle was building an ADU behind his rental property to provide an additional family with a place to live. But a group of homeowners called Montanans Against Irresponsible Densification sued the state to halt the 2023 reforms. PLF is pursuing this case to defend the right of individual property owners to build new housing that is not only legal but sorely needed.²⁹

Existing research provides clear and compelling evidence that government regulations are preventing the construction of homes America desperately needs to house a growing population. State governments can help by enacting reforms that respect private property and make it easier to build. Restoring the right to build is the clearest path toward solving America's housing crisis and ensuring that everyone has a place to live.

Notes

1. Federal Reserve Bank of St. Louis, "Median Sales Price of Houses Sold for the United States (MSPUS)," last updated October 24, 2024, <https://fred.stlouisfed.org/series/MSPUS>.
2. Redfin, "Redfin Survey: Half of U.S. Homeowners and Renters Struggle with Housing Costs, Amidst High Mortgage Rates and Inflation," Redfin Newsroom, September 21, 2023, <https://investors.redfin.com/news-events/press-releases/detail/1077/redfin-survey-half-of-u-s-homeowners-and-renters-struggle>.
3. Joint Center for Housing Studies of Harvard University, "New Report Shows Housing Costs Strain Owners and Renters Alike, Millions Priced Out," press release, October 19, 2023, <https://www.jchs.harvard.edu/press-releases/new-report-shows-housing-costs-strain-owners-and-renters-alike-millions-priced-out>.
4. For an overview of how economists across the political spectrum have come to the same conclusion, see Bryan Caplan and Ady Branzei, *Build, Baby, Build: The Science and Ethics of Housing Regulation* (Washington, DC: Cato Institute, 2024).
5. "State Preemption of Local Zoning Laws as Intersectional Climate Policy," *Harvard Law Review* 135, no. 6 (2022): 1592–1615.
6. Alisa Roth, "Most Homes for Sale in 2023 Were Not Affordable for a Typical U.S. Household," NPR, December 24, 2023; Dion Rabouin, "Why the U.S. Housing Market Is So Expensive Right Now," *Axios*, December 16, 2023; Hannah Jones, "US Housing Supply Continues to Lag Household Formations," March 8, 2023, Realtor.com, <https://www.realtor.com/research/us-housing-supply-gap-march-2023/>.
7. Gregg Colburn and Clayton Page Aldern, *Homelessness Is a Housing Problem* (Oakland: University of California Press, 2022).
8. James S. Burling, *Nowhere to Live* (New York: Skyhorse Publishing, 2024).
9. M. Nolan Gray, *Arbitrary Lines* (Washington, DC: Island Press, 2023), 57.
10. Caplan and Branzei, *Build, Baby, Build*.
11. Joseph Gyourko, Daniel Hartley, and Josh Krimmel, "The Local Residential Land Use Regulatory Environment across U.S. Housing Markets: Evidence from a New Wharton Index" (NBER Working Paper No. 26573, National Bureau of Economic Research, Cambridge, MA, December 2019).
12. Robert W. Wassmer and Joshua A. Williams, "The Influence of Regulation on Residential Land Prices in United States Metropolitan Areas," *Cityscape* 23, no. 1 (2021): 9–36.
13. Orphe Divounguy, "How 7% Mortgage Rates Have Upended Home Affordability," Zillow Research, August 10, 2023, <https://www.zillow.com/research/7-mortgage-rates-affordability-34155/>.
14. Divounguy, "How 7% Mortgage Rates Have Upended Home Affordability."
15. Michael Manville et al., "Does Discretion Delay Development? The Impact of Approval Pathways on Multifamily Housing's Time to Permit," *Journal of the American Planning Association* 89, no. 3 (2022): 336–47, <https://doi.org/10.1080/01944363.2022.2106291>.
16. Gray, *Arbitrary Lines*, 5.
17. Gray, *Arbitrary Lines*, 62.
18. "By-Right Housing Development Act," Pacific Legal Foundation, accessed October 17, 2024, <https://pacificlegal.org/wp-content/uploads/2024/08/By-Right-Development-Model.pdf>.
19. Building Industry of Washington, *Cost of Permitting Delays: How Project Delays Increase New Home Prices* (Tumwater, WA: Building Industry of Washington, 2022), 5.
20. "Improving New York City's Land Use Decision-Making Process," Citizens Budget Commission, September 6, 2022, <https://cbcny.org/research/improving-new-york-citys-land-use-decision-making-process>.
21. Building Industry of Washington, *Cost of Permitting Delays*.
22. "Permitting Approval Timeliness Act," Pacific Legal Foundation, accessed October 17, 2024, <https://pacificlegal.org/wp-content/uploads/2024/08/Permitting-Approval-Model.pdf>.
23. Katherine Levine, David Glick, and Maxwell Palmer, *Neighborhood Defenders: Participatory Politics and America's Housing Crisis* (New York: Cambridge University Press, 2019).
24. "Third Party Challenges to Development Permits," Pacific Legal Foundation, accessed October 17, 2024, <https://pacificlegal.org/wp-content/uploads/2024/08/Third-Party-Permit-Challenges.pdf>.
25. "Supreme Court Rules Against Extortionate Permit Fees: *Sheetz v. County of El Dorado*," Pacific Legal Foundation, accessed November 4, 2024, <https://pacificlegal.org/case/sheetz-permit-extortion-scotus/>.
26. Edward J. Pinto and Tobias Peter, "AEI Housing Market Indicators, July 2024," American Enterprise Institute, July 30, 2024, <https://www.aei.org/research-products/report/aei-housing-market-indicators-july-2024/>.
27. "The Safe Harbor from Excessive Exactions Act," Pacific Legal Foundation, accessed October 17, 2024, <https://pacificlegal.org/wp-content/uploads/2024/08/Safe-Harbor-from-Excessive-Exactions.pdf>.
28. "Realtors Affordability Distribution Curve and Score," National Association of Realtors, accessed November 11, 2024, <https://www.nar.realtor/research-and-statistics/housing-statistics/realtors-affordability-distribution-curve-and-score>.
29. "Defending the 'Montana Miracle' and the Right to Build on Your Property: *MAID v. State of Montana*," Pacific Legal Foundation, <https://pacificlegal.org/case/maid-montana-miracle-housing/>.



Megan Jenkins is PLF's strategic research director. She leads policy research that outlines the size and scope of issues that threaten individual liberty and are core to PLF's litigation priorities.



Daniel Dew is PLF's legal policy director, leading PLF's effort to advance legislative and executive reforms that protect and expand individual liberty.



Mark Miller is a senior attorney at PLF. His work is principally concentrated on property rights litigation and policy, and he believes that liberty centers on the right to be secure in one's property.

Acknowledgments:

The authors would like to thank Nicole Divers for her contribution to the data portion of this report.

PACIFIC LEGAL FOUNDATION is a national nonprofit law firm that defends Americans' liberties when threatened by government overreach and abuse. We sue the government in court when our clients' rights protected by the Constitution are violated, and advocate for legislative and regulatory reforms in the other branches of government. Started in 1973 in California, PLF now files suits across the country, scoring precedent-setting victories for our clients, with an unmatched track record at the Supreme Court of the United States.



**PACIFIC LEGAL
FOUNDATION**