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Rejecting Federal Preference: Why Courts Should Not Exempt Fannie Mae and Freddie Mac Properties from Cities' Vacant Property Registration Ordinances

Matthew Connelly*

The law of real property usually develops in an evolutionary fashion. Change is often measured in terms of decades and centuries rather than in months and years. Yet economic turmoil can accelerate this process.¹

Today, cities² both large and small are faced with growing amounts of abandoned property resulting from the recent collapse of the housing market.³ This problem has affected communities across the nation, as abandoned homes have harmed their surrounding neighborhoods by increasing blight, decreasing tax revenue, and

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1. GRANT S. NELSON ET AL., REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 468 (6th ed. 2009).

2. The term “city” may have different legal connotations than the terms “town,” “village,” etc. *See, e.g.,* *People ex rel. Hatfield v. Grover*, 101 N.E. 216, 218–19 (Ill. 1913) (discussing different legal distinctions between these terms). For purposes of consistency, the term “city” in this Note shall refer to cities, towns, villages, municipalities, and any other form of local government. The legal distinction between these forms of local government is not relevant within the scope of this Note.

3. As an illustrative example, there is a national phenomenon known as “zombie homes,” in which residential properties are abandoned by the homeowners and the mortgage lenders refuse to finish the foreclosure proceedings, thereby leaving the properties vacant and unaccountable. *See* Michelle Conlin, *Zombie Foreclosures Terrorize Ex-Homeowners*, CHRISTIAN SCI. MONITOR (Jan. 10, 2013), <http://www.csmonitor.com/Business/Latest-News-Wires/2013/0110/Zombie-foreclosures-terrorize-ex-homeowners>. As of 2014, Milwaukee had 900 “zombie foreclosure” cases pending within its jurisdiction, and South Bend had 1,275 homes caught in zombie foreclosure, a significant rise from 600 in 2006. Furthermore, zombie foreclosures in Memphis doubled from 2011 to 2013 to 1,500 homes. *Id.* *See also* Mary Ellen Podmolik, *Unresolved Foreclosure Cases Pile Up in Cook County*, CHI. TRIB. (Jan. 22, 2014), http://articles.chicagotribune.com/2014-01-22/site/ct-foreclosures-0122-biz-20140122_1_foreclosure-crisis-foreclosure-cases-short-sale. As of January 2014, there are at least 4,000 homes in Chicago that have been caught in foreclosure proceedings for the past three years, many of which are abandoned. *Id.*

draining public resources. In order to combat the epidemic of abandoned houses, however, cities have begun utilizing a relatively new device in the realm of real estate law: vacant property registration ordinances.⁴

Vacant property registration ordinances operate by requiring either the homeowner (mortgagor) or the mortgage lender (mortgagee) to register residential property once it becomes abandoned, which ensures that some party maintains the premises and is accountable for its dilapidation.⁵ Successful ordinances enable cities to effectively monitor and regulate these properties. This system is important because local governments bear significant expenses preserving vacant houses within their jurisdictions and preventing them from crippling the surrounding communities.⁶

Recently, in *Federal Housing Financing Agency v. City of Chicago*,⁷ the Federal District Court of Northern Illinois examined whether Chicago could enforce its vacant property registration ordinance against abandoned homes if either Fannie Mae or Freddie Mac owned the mortgage.⁸ The court ruled against Chicago and held

4. See Benton C. Martin, *Vacant Property Registration Ordinances*, 39 REAL EST. L.J. 6, 9 (2010). In 2009, there were a total of 285 enacted or pending vacant property registry ordinances in the nation. *Id.* As of December 2014, there were 2,013 enacted or pending local government vacant property registry ordinances across the country. See *Vacant Property Registration*, SAFEGUARD PROPS., http://www.safeguardproperties.com/Resources/Vacant_Property_Registration/all.aspx?filter=vpr&city=&category (last visited Dec. 7, 2015).

5. *Id.*

6. See BUS. & PROF'L PEOPLE FOR THE PUB. INTEREST ET AL., HOW CAN MUNICIPALITIES CONFRONT THE VACANT PROPERTY CHALLENGE? 2 (2010), available at http://www.bpichicago.org/wp-content/uploads/2014/02/HowCanMunicipalitiesConfronttheVacantPropertyChallenge_AnIntroductoryGuide-1.pdf (according to a Harvard study, local governments spend anywhere between \$5,000 to \$34,000 to secure and maintain a single abandoned home). For further discussion regarding why local control over vacant property registration ordinances is more effective than on the state level, see Timothy A. Davis, *A Comparative Analysis of State and Local Government Vacant Property Registration Statutes*, 44 URB. LAW. 399, 421–24 (2012). Davis argues that local governments are in stronger positions than states to implement vacant property registration ordinances because they can tailor the specific ordinances to meet the needs of their municipalities, and they are generally free from the mortgage industry's lobbying influence. *Id.* at 421–22. Further, he examines how local governments are able to determine whether to implement the Classic Model or the Chula Vista Model based on their knowledge of what has caused the majority of vacant property within their jurisdictions. *Id.* at 422–24. Davis also discusses how cities must strongly enforce these ordinances to ensure that abandoned buildings adhere to the standards. *Id.* at 424.

7. 962 F. Supp. 2d 1044 (N.D. Ill. 2013).

8. *Id.* at 1047–48.

that those properties were outside the jurisdiction of the city's ordinance.⁹ By exempting Fannie Mae and Freddie Mac properties, the court's ruling impacts the effectiveness of all vacant property registration ordinances across the nation and may determine whether these ordinances remain a viable tool for local governments combating the damages inflicted by abandoned houses.¹⁰

Part I of this Note examines how abandoned property negatively affects its surrounding communities. Part II shows how cities have enacted vacant property registration ordinances to address these problems. Part III examines the Federal District Court of Northern Illinois's analysis and holding in *Federal Housing Financing Agency v. City of Chicago* regarding Chicago's vacant property registration ordinance. Part IV refutes the court's holding by arguing against implied preemption and showing that the ordinance's registration fees are permissible regulatory fees, not impermissible taxes, on the federal government. Finally, this Note proposes that future courts facing similar challenges against vacant property registration ordinances should not exempt properties where either Fannie Mae or Freddie Mac owns the mortgage. Such a massive exception will significantly inhibit cities' abilities to effectively address and maintain abandoned property.

I. THE HAZARDS ABANDONED PROPERTY INFLECTS UPON CITIES

In their article *Neighborhood Stabilization Strategies for Vacant and Abandoned Properties*, Frank S. Alexander and Leslie A. Powell state that "legal and political cultures have been strikingly unwilling to acknowledge, much less address, the impact of vacant, abandoned and substandard properties."¹¹ While the problem of neighborhood

9. *Id.* at 1048.

10. See Mary Ellen Podmolik, *Chicago Loses Court Challenge to Vacant Building Registry*, CHI. TRIB. (Aug. 26, 2013), http://articles.chicagotribune.com/2013-08-26/business/chi-chicago-vacant-building-registry-20130825_1_fhfa-federal-housing-finance-agency-fannie-mae ("More than 1,000 municipalities around the country, by one count, have laws that require the registration and maintenance of vacant properties. The court's decision could prompt the FHFA to file suit against other cities' local laws, or municipalities themselves may have to retool their own ordinances if they decide they are no more enforceable than Chicago's.").

11. Frank S. Alexander & Leslie A. Powell, *Neighborhood Stabilization Strategies for Vacant and Abandoned Properties*, ZONING & PLAN. L. REP. 1, 3 (2011), available at

blocks plagued with abandoned homes was once mainly confined to “Rust Belt” inner-city communities, nearly every region in the country is now confronting this issue.¹²

This epidemic resulted from the recent collapse of the housing market and has worsened in the subsequent years.¹³ Once residential properties are abandoned, they are at risk to damage both from vandals and lack of regular maintenance.¹⁴ Such dilapidation, however, is more than just an eyesore on a neighborhood block. A vacant home’s substantial deterioration threatens its surrounding community’s stability by increasing crime, lowering property values, and depleting local government resources.¹⁵

<http://blog.cookcountyil.gov/economicdevelopment/wp-content/uploads/2012/11/Neighborhood-Stabilization-September-2011.pdf>.

12. See, e.g., Scott Gunnerson, *When Owners Walk, ‘Zombie’ Homes Become Nuisance*, USA TODAY (Sept. 1, 2013, 3:37 PM) <http://www.usatoday.com/story/money/personalfinance/2013/09/01/foreclosed-homes-zombie-titles/2753385/>. For example, as of June 2013, Florida had more abandoned homes that were caught in a state of “zombie foreclosure” than any other state in the nation. *Id.*

13. See Courtney Hunter, Note, *Reducing the Spillover Costs of Foreclosure: Boston’s Block-by-Block Approach to Saving Neighborhoods from Foreclosure Blight*, 29 REV. BANKING & FIN. L. 533, 537–38 (2010). In January 2009, the Center for Responsible Lending estimated that one and a half million homes had been foreclosed upon as a result of the housing crisis that began in 2007, and another two million homes were in danger of foreclosure. *Id.* Furthermore, they predicted that thirteen million foreclosures were predicted to take place over the next five years. *Id.* Ten months after the Center for Responsible Lending issued its predictions, the Mortgage Bankers Association (MBA) reported that there were more than two million homeowners seriously delinquent on their loans. *Id.* Additionally, the delinquency rate for all outstanding mortgages was 9.64 percent, which is the highest rate of delinquent mortgages ever recorded since the MBA began recording data in 1972. *Id.*

14. See Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV’T L. REV. 101, 109 (2009) (“The longer it takes to get through foreclosure, the greater chance that homes will be vacant longer, and the longer they are vacant the greater opportunity for them to be vandalized, thus making it more costly for the rehabilitation and repairs necessary for eventual resale and occupancy.”). See also Kabir Bhatia, *As Number of Foreclosed Homes Grows, So Does Mold*, NPR (July 13, 2011, 12:01 AM), <http://www.npr.org/2011/07/13/137629788/as-number-of-foreclosed-homes-grows-so-does-mold> (discussing how vacant homes do not have air conditioning on in the summer or heat running during the winter, which creates mold and mildew problems in the properties).

15. See Alby Gallun & Micah Maidenberg, *Will the Foreclosure Crisis Kill Chicago?*, CRAIN’S CHI. BUS. (Nov. 11, 2013), http://www.chicagobusiness.com/article/20131109/ISSUE01/311099980/recklessabandon?utm_source=ISSUE01&utm_medium=rss&utm_campaign=chicagobusiness# (explaining that most neighborhood blocks often prefer empty lots to vacant homes because the latter are often stripped bare of piping, become structurally unsound, serve as havens for drug and gang activity, and lower the overall property values of the surrounding neighborhoods). See also ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO*

Since abandoned homes lack any form of owner supervision, they provide havens for criminal activity and increase crime rates on the blocks they inhabit.¹⁶ As a result, areas with several vacant properties within close proximity to each other are especially susceptible to increased crime rates.¹⁷ In addition, the vacant homes themselves are common victims of property crime because the lack of any security or oversight renders them vulnerable targets.¹⁸ Thus, they often fall prey to scrappers, vandals, and squatters that harm the property's overall appearance and value.¹⁹ The damage inflicted by such interlopers also increases the risk of negligent fires.²⁰

AND THE ENDURING NEIGHBORHOOD EFFECT 391 (2013). Robert J. Sampson discusses how visible cues within a neighborhood illustrate its community input and institutional connections, which are essential for its stability. As an example, he examines the Chatham neighborhood on Chicago's South Side, a stable middle class black community that has endured for decades despite close proximity to areas with high crime rates and extreme poverty. *Id.* at 393. Sampson notes that the Chatham neighborhood has visibly "neat brick homes," maintained gardens, strong presence of adults and children peacefully residing outside their homes, and signs displayed throughout the community warning against "loud music" and "walking a dog without a leash." *Id.* This atmosphere illustrates the community's stability and "warn[s] off those that would dare tread on the willed tranquility." *Id.* Sampson notes, however, that vacant homes were beginning to appear on blocks within the neighborhood from the foreclosure crisis, presenting a new challenge to the neighborhood's infrastructure. *Id.* at 393–94.

16. See Schilling, *supra* note 14, at 110 ("There is a direct correlation between crime and vacant and/or abandoned properties which results in the deterioration of housing stock and neighborhoods by spurring disinvestment. In Austin, Texas, blocks with vacant buildings had 3.2 times as many drug calls to police, 1.8 times as many theft calls, and twice the number of calls for violent behavior as those neighborhoods without vacant properties."). As an illustrative example, within the first ten days of September 2013, the Chicago Police Department 9-1-1 Call Center logged 359 complaints regarding problems from vacant buildings. Mary Ellen Podmolik, *Chicago Seeks Tougher Rules on Vacant Buildings*, CHI. TRIB. (Sept. 12, 2013), http://articles.chicagotribune.com/2013-09-12/business/ct-biz-0912-housing-ordinance-20130912_1_chicago-city-council-vacant-buildings-mortgage-servicers.

17. See Davis, *supra* note 6, at 403. The "Broken Window Theory" supports the idea that since deteriorating vacant properties are less likely to be repaired they advertise to their surrounding communities that there are no consequences for bad acts in that neighborhood because there is no local control over the property. *Id.* The Broken Window Theory also posits that decrepit abandoned homes increase residential fear and weaken confidence within the affected neighborhoods, resulting in the vacant structures serving as conduits for vandalism, illegal drug activity, and the unlawful possession of property. *Id.*

18. *Id.*

19. See Rosemary Thompson, *Sheriff Dart Outlines His Initiatives*, CBA REC., June–July 2009, at 22, 22, available at <http://www.chicagobar.org/AM/NavigationMenu/Home/Files/RecordJuneJuly09.pdf>. Sheriff Tom Dart of Cook County explained that abandoned buildings pose serious problems because they act like "magnets" that attract criminal activity. *Id.*

20. See Schilling, *supra* note 14, at 110 (explaining that annually, there is more than \$73 million in property damage resulting from fires occurring within more than twelve thousand

Substantial deterioration not only reduces the property values of abandoned homes, but it also decreases the values of occupied and maintained homes nearby.²¹ For example, a recent survey conducted in Philadelphia found that homes within 150 feet of vacant houses experienced an average net loss of \$7,627 in property value.²² In addition, houses for sale on blocks with abandoned properties sold on average for \$6,715 less than homes sold on blocks without abandoned properties.²³

When mortgagors and mortgagees neglect abandoned properties, local governments are stuck picking up the tab.²⁴ Abandoned homes are often caught in a state known as “zombie foreclosure,” in which the mortgagor has abandoned the house, but the mortgagee has withdrawn from or stalled the foreclosure proceedings.²⁵ Once stuck in this foreclosure limbo, neither the mortgagor nor the mortgagee assumes responsibility for the abandoned property.²⁶ As a result, local governments are left as the only remaining party accountable for preventing the dilapidation and decay of the property.²⁷

Local governments often drain their financial resources by responding to problems caused by vacant properties. For example, abandoned homes require increased police presence to respond to higher crime rates within their surrounding blocks.²⁸ They also drain

vacant structures throughout the United States).

21. *See, e.g.*, Davis, *supra* note 6, at 404 (“A recent study by Stephan Whitaker and Thomas J. Fitzpatrick, analyzing Cuyahoga County, Ohio, determined that each additional vacant home within 500 feet of a sale reduces the sale price of a home by 1.7% in a low-poverty area and 2.1% in a medium-poverty area. Moreover, the study found that a recent foreclosure within 500 feet decreases the sale price of a home by ‘2.7[%] in medium-poverty tracts and 4.6[%] in low-poverty tracts.’”).

22. NAT’L VACANT PROPS. CAMPAIGN, VACANT PROPERTIES: THE TRUE COSTS TO COMMUNITIES 9 (2005), available at <http://www.smartgrowthamerica.org/documents/true-costs.pdf>.

23. *Id.*

24. Davis, *supra* note 6, at 403–04.

25. *See* Barbara Liston, *Zombie Foreclosures: 300,000 ‘Undead’ Properties Stalk Ex-Owners*, CHRISTIAN SCI. MONITOR (Mar. 28, 2013), <http://www.csmonitor.com/Business/Latest-News-Wires/2013/0328/Zombie-foreclosures-300-000-undead-properties-stalk-ex-owners>.

26. *Id.*

27. *Id.* (“According to the Reuters special report, municipalities are left to deal with the mess when people move out after receiving a notice of a planned foreclosure sale that the bank then cancels.”).

28. *See* Schilling, *supra* note 14, at 111 (discussing a 2008 study of eight Ohio cities which found that vacant and abandoned properties cost those local governments over \$15

fire department resources due to the increased risk of negligent fires and building collapses.²⁹ Further, while abandoned properties deplete public finances, they also lower local government revenue. Vacant homes decrease the amount received through property taxes because they lower the values of homes within close proximity, while simultaneously providing no revenue from their own property taxes due to absent owners.³⁰

Many cities, however, do not have the financial resources necessary to properly secure all of the abandoned properties within their jurisdictions.³¹ As a result, vacant homes decay beyond preservation, and local governments often turn to demolition in order to prevent further detrimental harm from plaguing the surrounding neighborhoods.³²

II. GROWTH OF VACANT PROPERTY REGISTRATION ORDINANCES AND HOLDING MORTGAGEES ACCOUNTABLE FOR ABANDONED PROPERTY

Recently, local governments across the United States have developed vacant property registration ordinances as a new device to address the issues caused by abandoned properties.³³ These ordinances enable cities to identify abandoned property and hold

million annually in public services, such as maintaining and securing the premises, requiring police and fire responses, and demolishing properties that posed severe community hazards).

29. *Id.* at 110.

30. *Id.*

31. See Keith H. Hirokawa & Ira Gonzalez, *Regulating Vacant Property*, 42 URB. LAW. 627, 629 (2010) ("Especially in tight economic circumstances, local governments find themselves in a Hobson's choice between ignoring the problems associated with property vacancy or allocating law enforcement, fire, and other services in disproportionate measures to areas surrounding vacant buildings."). See also Podmolik, *supra* note 16 (referencing Chicago as an example, which has an estimated eighteen thousand vacant buildings and twenty-one total building inspectors). See also Conlin, *supra* note 3 (explaining that although the city of Los Angeles passed a strict vacant property registration ordinance, the lack of city inspectors within the city's budget led to low enforcement, which ultimately rendered it ineffective).

32. See Kermit J. Lind, *Can Public Nuisance Law Protect Your Neighborhood from Big Banks?*, 44 SUFFOLK U. L. REV. 89, 104 (2011) ("Taxpayers in cities like Cleveland, Buffalo, Flint, Detroit, St. Louis, Pittsburgh, and Cincinnati spend millions every year demolishing unusable housing stock, and so far, the pace of abandonment is running ahead of the pace of demolition.").

33. Martin *supra* note 4, at 9.

parties accountable for maintenance and preservation.³⁴ While these ordinances are an emerging trend in real estate law, they are deeply rooted in the historical police power that allows cities to enact laws promoting public safety and welfare.³⁵

Vacant property registration ordinances require either mortgagors or mortgagees to register abandoned homes with local governments shortly after they are abandoned along with a registration fee.³⁶ Further, these ordinances require the registering party to post contact information on the actual vacant home that lists a twenty-four-hour maintenance crew responsible for the premises.³⁷ The property is also usually required to have liability insurance.³⁸ Once it is registered, the abandoned property must conform to the ordinance's maintenance standards.³⁹ Failure to comply with the standards subjects the registering party to fines and penalties.⁴⁰

While vacant property registration ordinances vary across the country, there are two main models that determine which party, the mortgagor or the mortgagee, is responsible for registering and maintaining the property: the "Classic Model" and the "Chula Vista Model."⁴¹

34. *Id.*

35. *See, e.g.,* Goldstein v. City of Wilmington, No. 84C-JL-36, 1986 WL 6586, at *1 (Del. Super. Ct. June 3, 1986) ("A necessary concomitant . . . is the authority vested in a municipality to declare, prevent, and abate a public nuisance, which is broadly defined as any behavior that unreasonably interferes with health, safety, peace, comfort or convenience of the general community."). *See also* Evenson v. City of St. Paul Bd. of Appeals, 467 N.W.2d 363, 365 (Minn. Ct. App. 1991) (upholding the constitutional challenge against the city's vacant property registry ordinance by stating that "statutes are presumed to be constitutional . . . [t]he city merely refused to allow [the appellee] to continue an *un* reasonable [sic] use by denying appellant's request for an indefinite waiver of the vacant building fee. The fee is not unreasonable or confiscatory"). *See also* Vill. of Brady v. Melcher, 502 N.W.2d 458, 462 (Neb. 1993) ("This court has long held that municipalities may, in the exercise of a valid police power, protect the public health through ordinances that operate within legislative limits.").

36. *See* C. Tyler Mulligan, *Toward a Comprehensive Program for Regulating Vacant or Abandoned Dwellings in North Carolina: The General Police Power, Minimum Housing Standards, and Vacant Property Registration*, 32 CAMPBELL L. REV. 1, 40, 43–45 (2009).

37. *Id.* at 40.

38. *Id.*

39. *Id.*

40. *Id.* at 43–44.

41. *See* Davis, *supra* note 6, at 406 ("[Vacant property registration] ordinances generally implement one of two types of registration models, or a combination of the two. These registration models are the classic model and the [Chula Vista] model. The classic model requires registration based on length of vacancy. The [Chula Vista] model requires registration

The Classic Model requires the mortgagor to register the abandoned home and pay a registration fee that correlates to the length of time that the property was vacant.⁴² The Classic Model was first developed in Wilmington, Delaware and was designed to create incentives for mortgagors to prevent their abandoned homes from substantially decaying, as well as pursue efficient uses for their properties.⁴³

The Chula Vista Model has similar motives, but differs in its approach to owner liability. Rather than holding the individual homeowner responsible, the Chula Vista Model holds the mortgagee responsible for registering and maintaining the property once it has initiated foreclosure proceedings.⁴⁴ The city of Chula Vista, California developed this vacant property registration ordinance model, and it proved immensely successful shortly after its enactment.⁴⁵ Because the Chula Vista Model achieved such success,

initiated at foreclosure. While most, if not all [vacant property registration] ordinances utilize one of the two models, there is a large amount of flexibility over the implementation within each model.”).

42. See Schilling, *supra* note 14, at 135–37.

43. *Id.*

44. *Id.* at 142–43. Schilling provides a detailed description of how Chula Vista’s vacant property registration ordinance operates:

Chula Vista’s program requires mortgage lenders to inspect defaulted properties to confirm whether they are occupied or abandoned. If a given property is found to be vacant, the program requires that the lender exercise the abandonment clause in their mortgage contract and register the property with the City, after paying a \$70 registration fee. The lender must further secure and maintain the property to comport with neighborhood standards, which typically requires that landscaped areas be maintained. Mortgage companies are also required to “hire a local company to inspect the property on a weekly basis.” On the property must be posted the name and twenty-four-hour contact number of this company. As the city’s description of the program states, “[i]t is hoped that the combination of observant neighbors and an accessible local responsible party will deter . . . potential deterioration of the property” and maintain existing property values.

Id. at 142–43. See also Alexander & Powell, *supra* note 11, at 7–8 (explaining that local governments that pass vacant property registration ordinances that hold mortgagees liable for maintaining the premises are able to do so under a theory “that the mortgagee has the contractual, if not statutory, right to manage and control the property once there has been a default”).

45. See Martin, *supra* note 4, at 20–21 (describing that once the city began imposing fines on mortgage lenders and servicers, the city began bringing in enough revenue from compliance with the vacant property registration ordinance that after eight months the program had “nearly paid for itself”).

it is becoming a common form of vacant property registration ordinance in the country.⁴⁶

There are many benefits to enacting the Chula Vista Model. First, holding mortgagees responsible for registering and maintaining abandoned property places the liability of home preservation on the party that has more financial resources to preserve the abandoned property.⁴⁷ Second, the revenue generated from the registration fees and fines compensates cities for the financial resources spent trying to maintain abandoned properties within their jurisdictions.⁴⁸ Finally, requiring mortgagees to pay registration fees and face potential fines for failing to maintain vacant homes creates incentives for large institutions in the mortgage industry to actively prevent owners from abandoning their homes.⁴⁹

The mortgage industry, however, often opposes local government efforts to shift liability onto mortgagees for preserving and maintaining abandoned property.⁵⁰ Since many of the major

46. *Id.* at 21.

47. For a detailed examination of the benefits of formulating vacant property registration ordinances that hold the mortgagee accountable for registering abandoned properties, see Kristin M. Pinkston, *In the Weeds: Homeowners Falling Behind on Their Mortgages, Lenders Playing the Foreclosure Game, and Cities Left Paying the Price*, 34 S. ILL. U. L.J. 621, 641–42 (2010). Pinkston explains that mortgagees know when the property has been vacated, whether the owner is fighting foreclosure, and any other specific concerns about that property. *Id.* at 641. Therefore, having mortgagees register the property notifies the city that the home has been vacated; otherwise, local governments may not be aware until the property has deteriorated to the point that motivates neighbors to register complaints with the city. *Id.* Furthermore, requiring mortgagees to register the property puts the world on notice as to who holds the mortgage on that property. *Id.* at 642. Oftentimes, the homeowners depart after the foreclosure proceedings have initiated due to their complete financial inability to handle the property. As an illustrative example, Reuters issued an article examining a fifty-eight-year-old former social worker who fell behind on his mortgage payments. *See, e.g.*, Conlin, *supra* note 3. Once the former social worker fell behind, the mortgagee foreclosed on his property, forcing him and his wife to move out. *Id.* However, because the mortgagee never finished the foreclosure proceedings and the property was abandoned, the former social worker found himself liable for city fines for waste removal, sewer fees, and back taxes adding to his already outstanding mortgage loan. *Id.*

48. *See* BUS. & PROF'L PEOPLE FOR THE PUB. INTEREST ET AL., *supra* note 6, at 7 (“Effective registry programs also require registrants to pay a fee at regular intervals, which defrays the additional costs of providing municipal services associated with such properties. Fees also create a strong financial incentive for owners to secure and maintain vacant property and return it to productive use.”).

49. *Id.*

50. *See* Lind, *supra* note 32, at 101–02. Oftentimes, servicers for large corporations or entities that own thousands of mortgages have a contractual obligation prohibiting them from

institutions in the mortgage industry own pools of mortgages and operate on a national scale, they have little incentive to prevent community decay, nor are they concerned with local neighborhood blight.⁵¹ Additionally, the mortgage industry has taken precautions to protect itself from liability regarding foreclosed and abandoned properties.⁵² For example, the Mortgage Bankers Association, the national association that represents the entire real estate finance industry,⁵³ has lobbied to decrease the maintenance and security requirements in local government vacant property registration ordinances.⁵⁴

The mortgage industry prefers state or federal regulations over local government ordinances because it can lobby and affect large scale legislation, thereby minimizing the impact of the property

spending “non-recoverable” finances on maintaining vacant property in a declining housing market. *Id.* As a result, servicers often refuse to spend resources and avoid completing foreclosure proceedings to avoid taking title, in order to minimize the economic losses for the corporations that own the mortgages. *Id.*

51. See Pinkston, *supra* note 47, at 635–36. Pinkston states that “[t]he financial institutions creating and securing these mortgages are motivated first and foremost by profit margins. Perhaps in the area of foreclosure, the drive for producing profits outweighs any consideration of neighborhood stability or revitalization.” To strengthen her argument, Pinkston examined how large lender-mortgagees that conduct business on a national level have no strong ties to municipalities or local communities, which led to a disproportionate use of sub-prime mortgages in lower-income and minority neighborhoods in highly distressed urban areas. *Id.* at 635–36. Since larger institutions have no investment in a particular community’s stability, they gave sub-prime loans that contributed to the foreclosure crisis and have ignored notices to appear in court to defend those properties from municipal code violations. *Id.*

52. See Mike McIntire, *Tracking Loans Through a Firm that Holds Millions*, N.Y. TIMES (Apr. 23, 2009), http://www.nytimes.com/2009/04/24/business/24mers.html?pagewanted=all&_r=0. To secure anonymity of the mortgagee’s identity throughout foreclosure proceedings, the largest corporations in the mortgage industry, such as Fannie Mae and Freddie Mac, designed the Mortgage Electronic Registration System (MERS). *Id.* MERS is a confidential computer registry for tracking mortgage loans. *Id.* It often initiates foreclosure proceedings on behalf of the mortgagee without identifying its identity, thereby acting as a “corporate cloak” to shield over three thousand registered mortgagees from the distressed communities and judicial foreclosure proceedings resulting from their properties. *Id.*

53. MORTGAGE BANKERS ASS’N, <http://www.mbaa.org/AboutMBA> (last visited Jan. 5, 2015).

54. In 2008, Chicago proposed a vacant housing registration ordinance that required mortgagees to provide steel panels and reinstall windows and doors on abandoned structures (as opposed to using standard plywood boards). See Schilling, *supra* note 14, at 145–47. It also required mortgagees to maintain the lighting within the properties and hire private security firms to monitor the premises. *Id.* at 146. The mortgage industry applied a “full court press” to successfully defeat the strict measures proposed by the city council. *Id.*

regulations.⁵⁵ In fact, in the wake of growing vacant property registration ordinances, the mortgage industry has offered its own alternative system of recording vacant property and has promoted it to local governments,⁵⁶ which presents another issue in and of itself.⁵⁷

III. THE RECENT THREAT OF FANNIE MAE AND FREDDIE MAC EXEMPTION FROM VACANT PROPERTY REGISTRATION ORDINANCES

As cities throughout the nation have enacted vacant property registration ordinances, successful ordinances are often those that maintain local government control and permit few exceptions.⁵⁸ Exempting large amounts of property decreases cities' regulatory authority, which thereby inhibits the effectiveness of vacant property registration ordinances in combating urban blight.

Recently, in *Federal Housing Financing Agency v. City of Chicago*,⁵⁹ the Federal District Court of Northern Illinois considered whether Chicago could enforce its vacant property registration ordinance against properties where either Fannie Mae or Freddie Mac was the mortgagee.⁶⁰ Chicago's ordinance, a combination of the Classic and Chula Vista models,⁶¹ requires the mortgagee to register

55. See Davis, *supra* note 6, at 421 ("Due to the greater influence of the mortgage industry at the state legislative level, the banking industry can have a larger role in crafting the [vacant property registration ordinance]. This could potentially lead to legislation that favors the mortgage industry as opposed to accomplishing the goals of [vacant property registration] ordinances."). Furthermore, the relative autonomy local governments have from lobbyists makes them better situated than state governments to draft vacant property registration ordinances that effectively address their local needs without succumbing to outside pressures. *Id.*

56. Martin, *supra* note 4, at 23.

57. *Id.* at 35–36. There is potential for abuse due to MERS's reputation for protecting mortgagees by hiding their identities throughout foreclosure proceedings. *Id.* Furthermore, the MERS registration system lacks any governmental regulation, which allows room for misconduct. *Id.* at 36.

58. See Davis, *supra* note 6, at 416. Davis examined how one local government drafted a vacant property registration ordinance so that it did not apply when mortgagees registered the property through MERS. *Id.* Due to the significant amount of mortgages registered through MERS, this approach presented too broad of an exception for the ordinance to have a successful impact on preventing or maintaining abandoned property. *Id.* As a result, the statute was "rendered virtually useless." *Id.*

59. 962 F. Supp. 2d 1044 (N.D. Ill. 2013).

60. *Id.* at 1047–48.

61. Chicago Municipal Code states that the "owner" of the property is responsible for registering it with the city:

an abandoned property and maintain the premises after it is vacated.⁶² While the ordinance is similar to others, this case presented a new issue regarding whether the courts will enforce local government vacant property registration ordinances against Fannie Mae or Freddie Mac.⁶³ Fannie Mae and Freddie Mac are major entities in the mortgage industry, as they collectively own or guarantee half of all mortgages in the United States.⁶⁴ The Federal Housing Finance Authority (FHFA), however, has had a conservatorship over both entities since 2008.⁶⁵ The FHFA brought suit against the city of

The owner of any building that has become vacant shall within 30 days after the building becomes vacant or within 30 days after assuming ownership of the building, whichever is later, file a registration statement for each such building with the department of buildings on forms provided by that department for such purposes.

CHL., ILL., MUNICIPAL CODE § 13-12-125(a)(1) (2013). This is similar to the Classic Model because it holds the owner/mortgagor liable for registering the property. However, under § 13-12-126(a)(1), if the owner/mortgagor has not registered the vacant property after 30 days, then liability shifts onto the mortgagee to register:

The mortgagee of any residential building that has become vacant and which is not registered pursuant to this section or Section 13-12-125(a) of this Code shall, within the later of 30 days after the building becomes vacant and unregistered or 60 days after a default, file a registration statement with the department of buildings on forms provided by that department for such purposes and pay a registration fee of \$500.00.

CHL., ILL., MUNICIPAL CODE § 13-12-126(a)(1) (2011).

62. CHL., ILL., MUNICIPAL CODE § 13-12-126(b) (2011). The ordinance lists the standards required to properly maintain abandoned property, such as securing the building's doors and windows, maintaining the grass on the premises, shoveling snow off the sidewalk, abating any accumulation of trash or debris outside the premises, reasonably maintaining the physical integrity of the building, keeping the property free of vermin and rodents, and posting signs that signify the structure is vacant, as well as providing contact information in case issues arise regarding the property. *Id.*

63. Fed. Hous. Fin. Agency, 962 F. Supp. 2d at 1056. Although the government created Fannie Mae and Freddie Mac as Government Sponsored Enterprises, prior to 2008, they were both run as for-profit corporations owned by private shareholders. *See* FED. HOUS. FIN. AGENCY, OFFICE OF INSPECTOR GEN., A BRIEF HISTORY OF THE HOUSING GOVERNMENT-SPONSORED ENTERPRISES 2-4 (2011), available at <http://fhfaog.gov/Content/Files/History%20of%20the%20Government%20Sponsored%20Enterprises.pdf>. In 2008, Congress established the Federal Housing Finance Agency and granted it a conservatorship over Fannie Mae and Freddie Mac. *Id.* at 6.

64. *Mortgage Giant Freddie Mac Posts \$4.2B Profit in 2Q; Paying \$3.9B Dividend to Government*, STAR TRIB. (Aug. 4, 2015, 10:30 AM), <http://www.startribune.com/freddie-mac-posts-4-2b-profit-in-2q-paying-3-9b-dividend/320598992/>. In Chicago alone, Fannie Mae and Freddie Mac own over 258,000 mortgages. *See* Fed. Hous. Fin. Agency, 962 F. Supp. 2d at 1049.

65. *See* FED. HOUS. FIN. AGENCY, OFFICE OF INSPECTOR GEN., *supra* note 63, at 6. *See also* Zachary A. Goldfarb et al., *Treasury to Rescue Fannie and Freddie*, WASH. POST (Sept. 7,

Chicago seeking both a declaratory exemption from the ordinance and an injunction halting its enforcement against properties where either Fannie Mae or Freddie Mac was the mortgagee.⁶⁶ Chicago responded by filing a motion to dismiss the complaint.⁶⁷

The court rejected Chicago's motion and ruled in favor of the FHFA.⁶⁸ After dismissing Chicago's procedural arguments, the court's main analysis relied upon determining Congressional intent regarding the extent of FHFA's authority over Fannie Mae and Freddie Mac homes under the *Housing and Economic Recovery Act of 2008 (HERA)*.⁶⁹ Specifically, the court was concerned with whether the *HERA* preempted local governments from regulating abandoned property owned by Fannie Mae or Freddie Mac.⁷⁰ The pertinent provision the Court addressed reads: "When acting as conservator or receiver, the [FHFA] shall not be subject to the direction or supervision of any other agency of the United States or

2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/06/AR2008090602540.html?hpid=topnews> (describing the Bush Administration's decision to takeover Fannie Mae and Freddie Mac due to the financial collapse of 2008).

66. The FHFA argued that it was exempt from Chicago's vacant property registration ordinance, and thus it should receive an injunction against the ordinance's enforcement regarding properties where either Fannie Mae or Freddie Mac was the mortgagee. Fed. Hous. Fin. Agency, 962 F. Supp. 2d at 1050. The FHFA supported its claim by arguing that the Housing and Recovery Act of 2008 (HERA) preempted local governments from regulating properties where either Fannie Mae or Freddie Mac owned the mortgage. *Id.* at 1056. Furthermore, it alleged that the registration fees, as well as the fines imposed for failure to properly maintain abandoned structures, were an impermissible tax on the federal government when imposed against Fannie Mae or Freddie Mac properties. *Id.* at 1062.

67. Chicago presented procedural objections against the FHFA's standing to bring suit against the ordinance, as well as the ripeness of the issue. *Id.* at 1050. Chicago's substantive argument to dismiss the FHFA's request for summary judgment, however, was that the *HERA* did not expressly preempt local governments from enforcing vacant property registration ordinances against FHFA properties because Congress did not include local governments as entities that could not direct the FHFA's actions. *Id.* Further, the city argued against implied preemption because "there is a presumption against finding preemption in cases involving the traditional exercise of police powers by local government entities." *Id.* at 1058. Finally, Chicago argued that the registration fee imposed against the FHFA for registering its vacant properties was a permissible local government "fee," not a "tax," on the federal government. *Id.* at 1062.

68. *Id.* at 1064.

69. *Id.* at 1056-63.

70. *Id.* at 1056-61.

any State in the exercise of the rights, powers, and privileges of the [FHFA].”⁷¹

Relying on this provision, the court acknowledged that the *HERA* expressly preempts federal agencies and state governments but is silent regarding local government vacant property registration ordinances.⁷² Nevertheless, the court applied both “field preemption” and “conflict preemption” analyses to find that there was “implied preemption” within the provision that prevented cities from enforcing vacant property registration ordinances against the FHFA.⁷³ Under the field preemption analysis, the court found that because the language of the *HERA* gave the FHFA exclusive control over Fannie Mae and Freddie Mac’s assets, Congress must have also intended the FHFA to have exclusive control over how to manage homes owned by Fannie Mae and Freddie Mac, rather than subject them to municipal oversight.⁷⁴ The court applied a similar conflict preemption analysis, finding that since Congress must have intended the FHFA to have exclusive control over Fannie Mae and Freddie Mac’s assets, Chicago’s ordinance conflicted with *HERA* by enabling the city to manage the abandoned properties.⁷⁵

Furthermore, the court held that the ordinance’s registration fees and possible fines for failing to properly maintain abandoned properties were impermissible taxes on the federal government, as opposed to permissible regulatory fees.⁷⁶ The court cited the Seventh Circuit’s standard for distinguishing permissible fees from impermissible taxes against the federal government, which focuses on “whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency’s cost of regulation.”⁷⁷ Chicago argued that the registration fee was

71. 12 U.S.C. § 4617(a)(7) (2012).

72. The court further noted that not only are cities not included in the statute’s language, but the statute’s definition of a “State” also did not include local governments or cities. Fed. Hous. Fin. Agency, 962 F. Supp. 2d at 1056.

73. *Id.* at 1057–61.

74. *Id.* at 1059–60.

75. *Id.* at 1061.

76. *Id.* at 1062.

77. *Id.* (quoting *Hager v. City of W. Peoria*, 84 F.3d 865, 870 (7th Cir. 1996)).

permissible because it was narrowly connected to the costs of monitoring and inspecting vacant buildings, as well as discouraging the growth of more abandoned properties and offsetting the city's expenditures from maintaining the damages caused from vacant buildings.⁷⁸ The court, however, rejected the argument and held that the registration fee was a tax because the revenue from the fee did not pay for a service that Chicago rendered to the FHFA and because monitoring vacant buildings benefitted the entire city's residents in general.⁷⁹

Therefore, the court held that abandoned houses owned by Fannie Mae and Freddie Mac were not subject to Chicago's vacant property registration ordinance.⁸⁰

This case is not the first instance where a court has relied on implied preemption to exempt a federal agency in the mortgage industry. For example, in *United States v. Stadium Apartments, Inc.*⁸¹ the Ninth Circuit Court of Appeals held that properties owned by the federal government were preempted from local property ordinances because the federal government was "not in the real estate business."⁸²

78. Fed. Hous. Fin. Agency, 962 F. Supp. 2d at 1062.

79. *Id.* at 1063. The court also found that the FHFA did not cause the buildings to become vacant and that "vacant properties are not a necessary aspect of the FHFA's participation in the mortgage market." *Id.*

80. The Court found that the *HERA* granted the FHFA exclusive control over Fannie Mae and Freddie Mac to protect the agency's assets. Fed. Hous. Fin. Agency, 962 F. Supp. 2d at 1058. Since Fannie Mae and Freddie Mac's assets included mortgages on abandoned properties, the court expanded this protection to conclude that the FHFA must also have exclusive control to determine how to maintain and secure those abandoned properties. *Id.* at 1060. Therefore, the court rejected Chicago's argument that the *HERA* only granted exclusive authority regarding mortgage lending, while Chicago's ordinance was focused on regulating abandoned buildings in its neighborhoods. *Id.* Finally, the court found that since the *HERA* expressly prohibited states or other federal agencies from regulating the FHFA, Congress must have also intended to include cities, "[otherwise] [s]uch a result would invite chaos, as FHFA would be subject to a variety of potentially conflicting ordinances, raising the expenses of FHFA in not only complying with those ordinances, but in simply monitoring the various requirements." *Id.*

81. 425 F.2d 358 (9th Cir. 1970).

82. *Id.* at 366-67. Although the Ninth Circuit was faced with the issue of whether properties owned by the federal government were subjected to a state's statutory redemption laws, as opposed to vacant property registration ordinances, the case still involved the same issue of whether the federal government should be preempted from local property laws when it acts as a property owner.

Further, to determine whether a registration fee constitutes a tax or regulatory fee, courts generally examine the local government's purpose for the generated revenue and whether it was intended to provide a general benefit as a tax, or compensate cities for the specific services rendered.⁸³ For example, in *Easthampton Savings Bank v. City of Springfield*,⁸⁴ the United States District Court for the District of Massachusetts examined whether Springfield's vacant property registration ordinance imposed a tax or regulatory fee by requiring mortgagees to pay a \$10,000 cash bond when registering vacant property.⁸⁵ The court held that it was a regulatory fee because the money was intended to reinsure compliance with the ordinance and compensate the city for the costs spent regulating foreclosed property.⁸⁶

IV. ANALYSIS OF THE COURT'S HOLDING AND PROPOSAL FOR WHY FUTURE COURTS SHOULD REFUSE TO EXEMPT FANNIE MAE AND FREDDIE MAC

The Federal District Court of Northern Illinois erroneously determined that Congress intended to preempt the FHFA from local vacant property registration ordinances. The court erred because it focused its analysis on the burdens that Chicago's ordinance imposed on Fannie Mae and Freddie Mac, rather than on Chicago's local concerns with regards to maintaining abandoned property. Further, the court mistakenly inferred preemption from statutory silence and

83. *See, e.g.*, Fed. Hous. Fin., 962 F. Supp. 2d at 1062 (The Seventh Circuit distinguishes impermissible taxes from permissible fees by examining the ultimate use of the revenue, "whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's cost of regulation"); *see also* *Easthampton Sav. Bank v. City of Springfield*, 874 F. Supp. 2d 25, 33 (D. Mass. 2012) (noting Massachusetts standard similarly examines who benefits from the revenue generated from the registration fee, as well as whether the intent is "to raise revenues [or] to compensate the governmental entity providing the services for its expenses").

84. 874 F. Supp. 2d 25, 28 (D. Mass. 2012).

85. *Id.* at 33.

86. *Id.* at 33-34 ("The City's retention of a portion of the bond under the Foreclosure Ordinance is directly tied to defraying its costs of regulating foreclosures in the City Because the portion of the bond that the City retains is 'reasonably designed to compensate the [City] for its anticipated regulation-related expenses,' the charge constitutes a regulatory fee, not a tax.").

unjustifiably treated Fannie Mae and Freddie Mac differently than private corporations in the mortgage industry.

The court should not have favored Fannie Mae and Freddie Mac's interests in avoiding compliance with Chicago's vacant property registration ordinance because abandoned property is a local problem. The court's determining factor for finding implied preemption was not express Congressional intent, but rather its own concern that subjecting Fannie Mae and Freddie Mac to various cities' ordinances would be burdensome and expensive.⁸⁷ By focusing its analysis on the ordinance's impact on Fannie Mae and Freddie Mac, the court ignored the hazards that abandoned properties inflict upon Chicago through increased crime, greater urban blight, and complete dilapidation of communities.⁸⁸ Because abandoned properties pose hazards to their surrounding neighborhoods, Chicago's concerns in maintaining vacant homes in its jurisdiction should have trumped the court's concerns regarding the burdens and costs the ordinance imposed on Fannie Mae and Freddie Mac. Further, both entities are major national corporations, and therefore are not as closely impacted by abandoned properties' hazards as are local governments.

The court also erred in finding that Congress intended to preempt the FHFA from local government regulation. The *HERA* only explicitly preempts states and other federal agencies.⁸⁹ This does not necessarily prove that Congress intended to preempt local government property regulations as well. In fact, Congress may have intentionally omitted local governments from the statutory language for that purpose.⁹⁰ Furthermore, it is worth noting that other federal courts have found that properties owned by the federal government are still subject to local governments' property ordinances.⁹¹

87. "In enacting HERA, Congress could not have intended . . . [to] permit thousands of municipalities all over the country to impose varying ordinances and obligations on FHFA. Such a result would invite chaos, as FHFA would be subject to a variety of potentially conflicting ordinances, raising the expenses of FHFA in not only complying with those ordinances, but in simply monitoring the various requirements." *Id.* at 1060.

88. In fact, the court's only mention of the detrimental impact that abandoned property inflicts upon Chicago is in a brief footnote. *Id.* at 1062 n.22.

89. *Id.* at 1056.

90. See generally 12 U.S.C. § 4617(a)(7) (2012).

91. As an example, the Seventh Circuit in *Burroughs v. Hills* determined whether

Finally, the court should not have treated Fannie Mae and Freddie Mac differently than private mortgagees that have to adhere to vacant property registration ordinances. Fannie Mae and Freddie Mac are some of the largest entities in the mortgage industry.⁹² Thus, they share the same responsibility for the recent the growth of abandoned properties as other private companies within the mortgage industry. By finding implied preemption, the court exempted Fannie Mae and Freddie Mac because of their affiliation with the federal government through the FHFA's conservatorship. However, Fannie Mae and Freddie Mac's affiliation with the federal government does not warrant special exemption, and thus the courts should not continue preempting agencies from local regulations merely because of their affiliation with the federal government.

The court also erroneously determined that the registration fees required under Chicago's vacant property registration ordinance constituted an impermissible "tax," as opposed to a permissible "regulatory fee."⁹³ Other courts have examined this issue regarding the registration fees for vacant property registration ordinances, and have come to different conclusions.⁹⁴ Here, Chicago's vacant

properties owned by the United States Department of Housing and Urban Development (HUD) were subject to city ordinances regarding maintaining and securing premises. *Burroughs v. Hills*, 741 F.2d 1525, 1528 (7th Cir. 1984). The court noted that federal law requires HUD property management to conform with local law requirements. *Id.* While this case involved HUD properties, as opposed to properties where Fannie Mae or Freddie Mac were the mortgagee, and the Seventh Circuit acknowledged that there are exceptions, this case demonstrates that simply because a property is owned by the federal government does not in and of itself mean that it is preempted from local property ordinances and regulations.

92. On August 8, 2013, Fannie Mae reported a \$10.1 billion profit from the second quarter, which was the sixth straight profitable period for the company, and Freddie Mac posted its second largest quarterly profit ever during that same period. *See* Margaret Chadborn, *Fannie, Freddie Should Recognize Bad Loan Costs Immediately: Watchdog*, CHI. TRIB. (Aug. 19, 2013), http://articles.chicagotribune.com/2013-08-19/business/sns-rt-us-usa-fanniefreddie-watchdog-20130819_1_fhfa-federal-housing-finance-agency-fannie-mae.

93. *Fed. Hous. Fin. Agency v. City of Chi.*, 962 F. Supp. 2d 1044, 1063 (N.D. Ill. 2013).

94. For example, the Supreme Court of Washington also examined whether the registration fee within Seattle's vacant property registration ordinance constituted a regulatory fee or an improper tax. *Margola Assocs. v. City of Seattle*, 854 P.2d 23, 28–31 (Wash. 1993). The mortgage industry argued that the ordinance was a tax. It stated that because the ordinance was silent on the purpose of the registration fee, it was primarily intended to raise money as opposed to regulate. *Id.* at 31–32. Although the court rejected this argument and found that the ordinance's silence on the purpose of the registration fee did not render it a tax, it remanded the case on the issue of whether the revenue generated from the registration fee "greatly exceed[ed]

property registration ordinance imposes a registration fee (and possible fines), which the city claims compensates for expenses the city incurs through securing and maintaining abandoned property.⁹⁵ Furthermore, the registration fee does not create general revenue for the city because the only guaranteed funds from the ordinance are a base registration fee of \$500.⁹⁶ A mere \$500 per vacant home cannot generate revenue because maintaining each abandoned property costs Chicago thousands in public funds.⁹⁷ Additionally, because Chicago's ordinance does not require registration renewal fees,⁹⁸ mortgagees do not have to pay anything further unless the vacant property violates the maintenance or security standards.⁹⁹ This indicates that the fines imposed are primarily designed to ensure compliance with the ordinance's requirements, as opposed to raising revenue for the city. Therefore, the ordinance's registration fee constitutes a permissible regulatory fee, rather than an impermissible tax.

Future courts faced with FHFA challenges to local vacant property registration ordinances should not adopt the holding from *Federal Housing Financing Agency v. City of Chicago* because of its ramifications. If courts adopt this ruling, they will essentially nullify all vacant property registration ordinances within their jurisdictions. Fannie Mae and Freddie Mac own a vast majority of mortgages

the proper regulatory costs associated with those ordinances," to determine whether the registration fee was a regulatory fee or improper tax. *Id.*

95. See Memorandum in Support of Defendant's Motion to Dismiss the Complaint at 23, *Fed. Hous. Fin. Agency v. City of Chicago*, 962 F. Supp. 2d 1044 (N.D. Ill. 2013) (No. 11 C 08795) ("It is evident from looking at the Ordinance as a whole that the one-time \$500 fee, charged to mortgagees, is connected to the City's cost of monitoring vacant properties and the follow-up inspections for compliance. Moreover, mortgagees have it in their power to avoid the fee entirely in a number of ways: for instance, by working with the owner to keep the building occupied, to keep it in good repair, or to attempt to rent or sell it."). See also Alexander & Powell, *supra* note 11, at 8 (noting that registration costs and penalties from vacant property registration ordinances are not taxes, but rather constitute regulatory fees reflective of the costs imposed on local governments as a result of increased fire, police, and building inspection duties that accompany foreclosed residential properties).

96. CHI., ILL., MUNICIPAL CODE § 13-12-126(a)(1) (2013).

97. See *supra* note 6 and accompanying text.

98. CHI., ILL., MUNICIPAL CODE § 13-12-126(a)(1) (2013).

99. CHI., ILL., MUNICIPAL CODE § 13-12-126(c) (2013) ("Any person who violates any provision of this section or of the rules and regulations issued hereunder shall be fined not less than \$500.00 and not more than \$1,000.00 for each offense.").

throughout the nation.¹⁰⁰ Allowing them to escape liability effectively renders all vacant property registration ordinances moot because too many homes would be beyond cities' jurisdictions.¹⁰¹ Such a large exception harms every local government's ability to use vacant property registration ordinances as an effective tool to control and maintain the hazards caused by abandoned houses.¹⁰²

While the court in *Federal Housing Finance Authority v. City of Chicago* was concerned with the burdens resulting from subjecting Fannie Mae and Freddie Mac to various cities' ordinance requirements, there are viable alternatives available. For example, large institutions that own thousands of mortgages, such as Fannie Mae and Freddie Mac, can hire local servicer companies that ensure that properties conform to particular cities' vacant property registration ordinances.¹⁰³ This solution would relieve both entities from the burdens resulting from having to constantly research and adhere to various local government ordinance requirements.

Although this option imposes financial costs on Fannie Mae and Freddie Mac, the alternative is for local governments to continue using taxpayer funds to maintain, preserve, and demolish abandoned property.¹⁰⁴ Because Fannie Mae and Freddie Mac are national institutions and local governments have more limited resources, future courts should favor cities' concerns and require Fannie Mae

100. Fannie Mae and Freddie Mac are two of the largest financial institutions in the world and own about \$5 trillion in combined mortgage assets throughout the nation. JOHN GRIFFITH, CTR. FOR AM. PROGRESS, 7 THINGS YOU NEED TO KNOW ABOUT FANNIE MAE AND FREDDIE MAC 1 (2012), available at <http://www.americanprogress.org/wp-content/uploads/2012/09/GriffithFannieFreddieBrief.pdf>.

101. See *supra* text accompanying note 58.

102. See Benton C. Martin, *Federalism and Municipal Innovation: Lessons from the Fight Against Vacant Properties*, 46 URB. LAW. 361, 372–73 (2014) (discussing how both state governments and the federal government have reacted negatively to local government vacant property registration ordinances). In this piece, Martin discusses *Federal Housing Financing Agency v. City of Chicago* as a recent example of how federal agencies have attempted to limit cities' abilities to regulate vacant property through vacant property registration ordinances. *Id.*

103. See Martin, *supra* note 4, at 24. There are servicers in Chicago that register vacant properties, install security devices, and ensure that the properties remain compliant with local property regulations. *Id.* Other companies provide similar services, such as registering properties, ensuring compliance, and even providing mortgagees who wish to secure the property themselves with access to different municipal forms outlining standards for registering and maintaining vacant properties in different cities. *Id.*

104. See *supra* note 6 and accompanying text.

and Freddie Mac to bear the financial burden of maintaining abandoned property.

Furthermore, since abandoned property presents detrimental hazards to its surrounding community, local concerns should trump Fannie Mae and Freddie Mac's financial concerns. Abandoned property increases crime rates, lowers property values, and drains local government resources. These issues severely impact cities, but they do not substantially harm Fannie Mae or Freddie Mac.¹⁰⁵ Therefore, future courts should prioritize local government concerns by enforcing vacant property registration ordinances against both Fannie Mae and Freddie Mac.

CONCLUSION

The rise of abandoned properties resulting from the foreclosure crisis continues to trouble cities across the nation.¹⁰⁶ In fact, in Chicago, the problem of vacant homes has been described as the worst disaster to strike the city since the Great Chicago Fire of 1871.¹⁰⁷ Vacant property registration ordinances provide local

105. See *Fannie, Freddie Investors Ramp Up Push for Companies' Revival*, REUTERS (Feb. 5, 2014, 4:00 PM), <http://www.reuters.com/article/2014/02/05/usa-fanniefreddie-shares-idUSL2N0LA1L120140205> (explaining that Fannie Mae and Freddie Mac are now making "record profits").

106. See Katheleen Conti, *After Brief Decline, Foreclosures Up Again in Greater Boston*, BOS. GLOBE (July 30, 2015), <https://www.bostonglobe.com/metro/regionals/south/2015/07/30/after-brief-decline-foreclosures-are-again-greater-boston/tqzL8nWhT3N8UnaB5aeJvJ/story.html> (discussing recent rises in foreclosures across Boston and Massachusetts as "aftershocks" of the foreclosure crisis); see also Christine DiGangi, *States Where Foreclosures Are Stubbornly High*, USA TODAY (July 19, 2015, 9:32 AM), <http://www.usatoday.com/story/money/personalfinance/2015/07/16/credit-dotcom-foreclosures-states/30196747/> (listing states in which foreclosure rates remain high). Recently, Crain's Chicago Business issued a special report entitled "Reckless Abandon," that covered the crisis of abandoned properties throughout Cook County, Illinois. Gallun & Maidenberg, *supra* note 15. The city of Chicago had 33,902 vacant properties by the middle of 2013, which was a 22 percent increase from 2010. *Id.* In the Washington Park neighborhood on Chicago's South Side, the population has plummeted 79 percent between 1950 and 2010, which has left more than a third of the neighborhood's homes vacant. *Id.* Furthermore, this problem was not contained to the city, as the suburbs in Cook County had a total of 21,479 vacant homes in 2013, which was a 79 percent increase from 2010. *Id.*

107. Gallun & Maidenberg, *supra* note 15 ("'Basically what we're seeing are the effects of something much larger than the Great Chicago Fire,' says architect and urban planner Marshall Brown, an assistant professor at the Illinois Institute of Technology . . . 'how do we rebuild in this new world in a way that's smarter, knowing what we know now?'").

governments with the means to preserve abandoned properties within their jurisdictions. They hold parties accountable to ensure that homes do not decay and damage their surrounding communities. These ordinances also reduce the public resources currently spent attempting to maintain the negative effects vacant properties impose on their communities.

Exempting all Fannie Mae and Freddie Mac properties disrupts the effectiveness of these ordinances. Further, it unfairly prioritizes the financial interests of major federal mortgage institutions over the sustainability of the cities substantially harmed by the problems inflicted by the plight of abandoned properties. Vacant property registration ordinances cannot succeed as an effective tool for maintaining abandoned homes if the largest mortgage institutions in the country are exempt because of their affiliation with the federal government. Therefore, future courts should not rely on the precedent set in *Federal Housing Financing Agency v. City of Chicago*.¹⁰⁸

108. It is worth noting that rather than appeal the ruling, the City of Chicago and the FHFA settled the matter outside of court. See Mary Ellen Podmolik, *FHFA, Chicago Settle Vacant Property Dispute*, CHI. TRIB. (Apr. 7, 2014), http://articles.chicagotribune.com/2014-04-07/business/chi-fhfa-vacant-buildings-dispute-20140407_1_fhfa-vacant-building-ordinance-fannie-mae. Under the terms of the settlement, the FHFA will voluntarily register vacant properties owned by Fannie Mae and Freddie Mac with the city, but it will not pay a registration fee or endure fines for failing to register. *Id.* In addition, the FHFA will not seek to recover fines and fees that the federal agency had already paid to Chicago prior to the lawsuit. *Id.* Finally, the FHFA agreed to work with Chicago to find solutions to some of the problems plaguing the city due to abandoned properties, as well as boost neighborhood recovery in these areas. *Id.*