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March 11, 2003

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Re: Topa Equities Ltd. v. City of Los Angeles
U.S. Court of Appeals Case No. 02-56034;
U.S. District Court Case No. CV 00-10455 GHK (RNBx)

Dear Jim and Dave:

Thought you might be interested in a copy of Topa's Reply Brief. When it comes time to prepare for oral argument on this appeal, perhaps we can have a brainstorming session. Again, thanks for your great work on the amicus brief and in helping with the City's Opposition.

Sincerely,

Kenneth T. Fong
Deputy City Attorney

KTF:zra(#190852)
Enclosure: Appellant's Reply Brief

No. 02-56034

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOPA Equities, Ltd.,
Plaintiff-Appellant,

vs.

The City of Los Angeles,
Defendant-Appellee,

and

Coalition for Economic Survival,
Intervenor/Defendant.

Appeal from the United States District Court for the Central District of California,
Judge George H. King, Case No. CV-00-10455-GHK (RNBx)

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION.

At base, the City's primary contention that neither express preemption nor implied preemption applies in this case is simply a back-door assertion that the Housing Opportunity Extension Act of 1996 ("HOPE") impliedly repealed the Low Income Housing Preservation and Resident Homeownership Act of 1990 ("LIHPRHA's") express preemption provision.[1] Well-settled law, of course, disfavors implied repeals absent an irreconcilable conflict between an earlier statute and a later enactment. The City cannot begin to establish that predicate here. Far from presenting an irreconcilable conflict, the text, structure and legislative history of LIHPHRA and HOPE demonstrate that HOPE's expansion of owners' prepayment rights is fully consistent with LIHPRHA's express preemption of state laws restricting or inhibiting prepayment.

The City's claim that the 1990 Amendments to the Los Angeles Rent Stabilization Ordinance ("LARSO") do not violate LIHPRHA's express preemption provision ignores reality. The 1990 Amendments inhibit owners from prepaying their mortgages by making conversion to conventional rentals financially infeasible

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[1] The City's argument mirrors the district court's erroneous determination that, while LIHPRHA was not technically repealed, HOPE nevertheless altered the balance struck by Congress in LIHPRHA, thereby obviating the need for LIHPRHA's preemption provision. E.R. 1579, Order, at 20.

because lenders will not provide the financing necessary to prepay if the properties are limited to sub-market, HUD-prescribed rents. E.R. 0186A. Moreover, the City concedes that in enacting LIHPRHA's preemption provision, Congress wanted to protect owners who prepaid from state or local prepayment penalties, including criminal sanctions. City's Brief, at 54. The 1990 Amendments are inconsistent with this goal. The City's insistence that the 1990 Amendments to LARSO are saved from preemption as laws of general applicability is specious. The legislative history of these Amendments reveals that the Amendments were enacted precisely to affect these federally insured programs. The City's effort to garnish the Amendments with a few categories of non-federally assisted housing to make them appear "general" cannot save them. Indeed, a law is no less targeted simply because it includes a few subsidiary objects in its sights.

Even if the 1990 Amendments were not expressly preempted, they would nonetheless be nullified by the doctrine of conflict preemption. In arguing otherwise, the City ignores the fundamental reality that the Section 221 and 236 programs sought to provide housing for the nation's middle- and low-income families *by encouraging private developers to build and operate low-income housing*. HUD, on delegated authority from Congress, implemented the incentives it thought necessary to encourage that private participation, including the right of owners, after 20 years, to prepay their mortgages and remove their properties from

the federal programs. Had the City enacted a law like the 1990 Amendments at the time HUD was soliciting private owners to join the programs, it would plainly have stood as an obstacle to accomplishing the purposes of the federal programs. Indeed, owners would never have participated in these programs had they been told that, upon prepayment of their mortgages (or, for that matter, at the completion of the mortgages' terms), they would be prohibited from raising their severely below-market, HUD-prescribed rents to market. The answer can be no different just because the City waited until the owners had already entered the federal program to punish them for having done so. If courts were to permit states and localities to block the receipt of benefits promised by federal programs, the federal government will find far fewer private partners in the future.

Lastly, the City's argument that TOPA is barred from bringing a Supremacy Clause challenge because its proper remedy was under 42 U.S.C. § 1983, and the related argument that the statute of limitations has run on such a claim, are erroneous as a matter of law. Unlike suits brought to enforce substantive constitutional rights, this Circuit has made clear that suits challenging state law on the grounds of federal preemption are not properly brought under 42 U.S.C. § 1983. But, even if the one-year statute of limitations for Section 1983 claims applied, TOPA's suit was timely, as the limitations period was not triggered until the City began enforcing the 1990 Amendments against TOPA in June of 2000. In 1998, when

TOPA prepaid its mortgage, the City was intentionally foregoing such enforcement in light of the Court of Federal Claims' holding in Cienega Gardens v. United States, 38 Fed. Cl. 64, 83 (Fed. Cl. 1997), rev'd on other grounds by, 265 F.3d 1237 (Fed. Cir. 2001). The City did not assert that the 1990 Amendments forbade TOPA from raising its HUD-established rents until June 28, 2000, when it sent TOPA a letter demanding a retroactive rent decrease. TOPA filed a timely suit challenging this position in September of 2000.

II. THE 1990 AMENDMENTS TO LARSO ARE EXPRESSLY PREEMPTED BY LIHPRHA.

Notwithstanding the City's arguments to the contrary, the 1990 Amendments to LARSO are expressly preempted by LIHPRHA.[2] First, HOPE did not render LIHPRHA's preemption provision inoperative; to the contrary, the language, structure and history of the legislation demonstrate that LIHPRHA's preemption provision remains fully in effect. Second, the 1990 Amendments to LARSO are doubly preempted by LIHPRHA, as they both restrict and inhibit an

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[2] The City contends that TOPA waived the issue of express preemption by failing to raise it in the district court. City's Brief, at 29. The City's contention is meritless. TOPA argued express preemption directly and relied on it heavily in support of its implied preemption argument. E.R. 0139-0142; 0144-0145; 0145-0152. Moreover, the district court ruled on the issue. E.R. 1567. Express preemption was preserved, therefore, both as raised and as passed upon below. See United States v. Baxley, 982 F.2d 1265, 1268 n.5 (9th Cir. 1992).

owner's right to prepay his or her federally insured mortgage, and are inconsistent with the purposes of LIHPRHA in that they upset Congress' resolution to the problem of balancing the interests of tenants against the rights of owners. Third, the 1990 Amendments to LARSO are not saved from preemption by 12 U.S.C. § 4122(b), as they specifically target federally assisted housing and are, thus, not generally applicable laws.

A. HOPE Did Not Nullify LIHPRHA's Express Preemption Provision.

The City argues that the 1990 Amendments to LARSO are not preempted because "TOPA did not prepay its mortgage under LIHPRHA but, instead, under HOPE and subsequent enactments, which do not contain any preemption language." City's Brief, at 30. The City's characterization ignores the language and structure of LIHPRHA and HOPE and their respective legislative histories.[3] While HOPE eliminated federal limitations on prepayment, HOPE did not eliminate, or otherwise alter, LIHPRHA's express preemption of state laws hindering the prepayment of mortgages insured under Sections 221 or 236 of the federal low-income housing program.

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[3] The City's articulation of this very same argument in terms of "standing" has no greater merit. City's Brief, at 22.

1. LIHPRHA's Preemption Provision is not Limited to Properties that Received Incentives or Prepaid While LIHPRHA Incentives Were Being Funded.

The City's argument erroneously assumes that LIHPRHA's preemption provision applies only to properties that received incentives or prepaid during the time LIHPRHA incentives were funded. City's Brief, at 30-33, 35. The plain language of LIHPRHA contains no such limitations. See United States v. Turkette, 452 U.S. 576, 580 (1981) ("In determining the scope of a statute, we look first to its language" and holding that RICO applies to both legitimate and illegitimate enterprises). Section 4122(a)(1) preempts any state efforts to "restrict or inhibit" the prepayment of "any mortgage described in Section 4119(1) of this title" including mortgages "insured, assisted, or held by the Secretary or a State or State agency under section 1715z-1 of this title." 12 U.S.C. § 4122(a)(1) (emphasis added); see also 12 U.S.C. § 4199(1)(A)(iiii). Section 1715z-1, in turn, applies to all federal mortgages insured under HUD's Section 221 and 236 programs, including the mortgage on TOPA's Morton Garden Apartments. E.R. 0006, Complaint ¶ 17. Preemption is, thus, not dependent on whether the owner submitted a plan of action or received incentives funded under LIHPRHA or prepaid his or her mortgage under LIHPRHA's prepayment provisions.

Had Congress intended to limit the preemptive effect of Section 4122(a)(1) in the manner the City suggests, it could have easily done so. Absent

any such textual limitation, or any other evidence of such a legislative intent, this Court must give effect to the plain meaning of LIHPRHA's preemption provision, which applies to prepayment of any Section 221 or 236 mortgage. See Turkette, 452 U.S. at 580-81.

2. The Text of HOPE Does Not Limit LIHPRHA's Preemption Provision to Properties that Received Incentives or Prepaid While LIHPRHA Incentives Were Being Funded.

The district court correctly found that the plain language of HOPE evinces no Congressional intent to alter LIHPRHA's preemption provision, which, by its terms, applies regardless of whether owners submitted a plan of action, received incentives or prepaid their mortgages during or after the LIHPRHA incentives were funded. No provision of HOPE even addresses, much less repudiates, LIHPRHA's preemption provision. E.R. 1578, Order, at 20 n.14 ("The express statutory language of HOPE does not repeal LIHPRHA."). To the contrary, the plain language of HOPE (which acknowledges owners' rights to raise rents after 60 days) demonstrates an intention to lift federal limits on prepayment, an incentive that, as explained below, is entirely consistent with the continued preemption of state law limitations under LIHPRHA.

3. HOPE Did Not Impliedly Repeal LIHPRHA's Preemption Provision.

A repeal of one statute by subsequent legislation may be either express or implied. See, e.g., Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 307 (9th Cir. 1989). Implied repeal is disfavored and will only will be found where "'[t]he intention of the legislature to repeal [is] clear and manifest.'" Firebaugh Canal Co. v. United States, 203 F.3d 568, 575 (9th Cir. 2000) (citations omitted); see also Morton v. Mancari, 417 U.S. 535, 549 (1974) (stating the "cardinal rule . . . that repeals by implication are not favored"). Indeed, "'the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.'" Firebaugh Canal, 203 F.3d at 575 (citations omitted). Significantly, this "doctrine of disfavoring repeals by implication 'applies with full vigor when,'" as here, "'the subsequent legislation is an appropriations measure.'" Id. (citations omitted).

As the district court found, HOPE contains no express repudiation of LIHPRHA's preemption provision, and there is no other evidence, let alone *manifest* evidence, that Congress intended HOPE to repeal LIHPRHA's preemption provision. Moreover, far from being in irreconcilable conflict, HOPE is entirely consistent with the rationale behind LIHPRHA's preemption provision.

Thus, notwithstanding the City's assertion to the contrary, LIHPRHA's preemption provision was not repealed by HOPE.

4. HOPE's Legislative History Demonstrates That When It Enacted HOPE Congress Purposefully Retained LIHPRHA's Preemption Provision.

This presumption against implied repeal operates with particular force here, because the legislative history behind HOPE demonstrates that it was an amendatory act. See, e.g., City's Request for Judicial Notice, at 00000082, 00000107, S. Rep. No. 104-140 at 48, 73 (1995) ("[I]f a *revised* program is not enacted, the Government is obligated to restore the right of [property] owners to leave the program, notwithstanding the loss of affordable housing stock and the added cost of providing vouchers to current eligible residents. . . . The Committee recommends a new section 215 which *amendments [sic]* the existing LIHPRHA (preservation statute) . . . . *The basic structure of LIHPRHA is changed as little as possible* so that LIHPRHA processing now in place can be easily converted for the capital grant/loan.") (emphasis added).

It is well established that where one act amends another act, the two acts must be read together, and those provisions of the original act that have not been amended must be given continued effect. See, e.g., 1A Norman J. Singer, Statutes and Statutory Construction, Section 22:34 (6th ed. 2002) ("In accordance with the general rule of construction that a statute should be read as a whole, as to

future transactions, the provisions introduced by the amendatory act should be read together with the provisions of the original section that were reenacted or left unchanged, in the amendatory act, as if they had been originally enacted as one section."); Markham v. Cabell, 326 U.S. 404, 411 (1945) (stating that "[t]he normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole.").

a. Congress Considered Amending LIHPRHA's Preemption Provision but in the End Left it Unchanged.

Congress amended certain provisions of LIHPRHA through HOPE but left other provisions unchanged. Where Congress amended a provision of LIHPRHA, it expressly stated its intention to do so. See, e.g., S.E.R. 00000102, Pub. L. No. 104-204, 110 Stat. 2885, 12 U.S.C. § 1715z-6(f) ("Section 241(f) of the National Housing Act [section 1751z-6(f) of this title] is repealed and insurance under such section shall not be offered as an incentive under LIHPRHA and ELIHPHA.").

With respect to preemption, however, the legislative history is clear that Congress specifically contemplated amending Section 232, but in the end declined to do so. The Senate Report 104-140 at 75 (to H.R. 2099), related to the Department of Veteran Affairs and Housing and Urban Development

Appropriations Act of 1996, had the following language proposing an amendment to Section 232: "Section 232. This section dealing with Federal preemption is amended to remove the language on annual authorized return and to state that local laws cannot preempt any benefit provided under the new act." City's Request for Judicial Notice, at 00000109. Both in the original (*i.e.*, LIHPRHA) version and in the proposed amended version, the law clearly provided for supremacy of the federal law over any inconsistent state or local laws. Accordingly, had the bill passed, the end result for the purposes of this action would have been the same. The fact that Congress proposed amending Section 232 shows that it specifically considered the issue of preemption but decided to leave the original provision as is.

Because Congress adverted to but left unchanged the preemption provision of LIHPRHA, it, along with the other unamended provisions of LIHPRHA, must be read along with HOPE as one coherent whole. See, e.g., Morton, 417 U.S. at 551 ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). The City's argument to the contrary, that "if Congress had intended for Section 4122 to apply to prepayments made under HOPE, Congress could have explicitly stated so in HOPE" turns the law on its

head. Congress did not need to include a preemption provision in HOPE because LIHPRHA's preemption provision remains operative.[4]

b. HOPE's Prepayment Provision is Consistent with LIHPRHA's Preemption Provision.

In enacting LIHPRHA, Congress recognized that there might be situations where Congress would be unable to fund incentives for owners to remain in the federal low-income housing program, and resolved to permit prepayment in those circumstances:

> Unlike the existing law, the conference report recognizes that some prepayments may need to occur. A willing buyer, for example, may not emerge during the voluntary or mandatory sale periods. Alternatively, HUD may approve a plan of action only to find that it does not have sufficient funds for the approved incentives. An owner may prepay where the owner's plan to extend the affordability restrictions is approved but HUD does not provide any assistance to fund the approved incentives for 15 months following the date of approval.

H.R. Conf. Rep. No. 101-943, reprinted in 1990 U.S.C.C.A.N. 6070, 6171. To effectuate that intent, Congress provided expressly in Section 4114(a) of

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[4] Notably, LIHPRHA contains a severability provision. See 12 U.S.C. § 4123 (2001) ("If any provision of this subchapter, or the application of such provision with respect to any person or circumstance, is held invalid, the remainder of this Act, and the application of such provision to any other person or circumstance, shall not be affected by such holding."). Surely, if the invalidity of one provision of LIHPRHA does not disable another, neither should the modification (or moratorium on the enforcement of) one provision disable another.

LIHPRHA that, where owners were unable to obtain federal incentives to remain in the program, they would be allowed to prepay their mortgages and raise their rents to market without interference from state and local laws. See 12 U.S.C. §§ 4122, 4114 (2001).

HOPE was fully consistent with this legislative scheme. In light of Congress' inability to fund new plans of action or otherwise offer incentives for owners to remain in the program, Congress, through HOPE, restored generally the right of owners to prepay and raise rents after 60 days notice. See Pub. L. No. 104-120, § 2(b)(1), 110 Stat. 834. HOPE thus consummated Congress' intention in LIHPRHA that, when the government was unable to fund incentives, the owners' rights to prepay must be restored. As with LIHPRHA, this critical right to prepay could be nullified absent an enforceable preemption provision. Thus, continued enforcement of LIHPRHA's preemption provision is entirely consistent with HOPE.[5]

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[5] The point that there is no conflict between HOPE's prepayment provision and LIHPRHA's preemption provision that would warrant a finding of implied repeal is further illuminated by the facts of this case. As recognized by the City, LIHPRHA provides that an owner may prepay his or her mortgage where a plan of action is approved under LIHPRHA but is not funded within 15 months. City's Brief, at 10. Here, TOPA's plan of action was approved effective August 1, 1995. E.R. 0336. Although the plan of action was not funded within 15 months of approval and TOPA could have prepaid its mortgage under 12 U.S.C. § 4114(a)(1)(A), TOPA did not prepay at that time because it was high up in the

B. The 1990 Amendments to LARSO Are Expressly Preempted By 12 U.S.C. § 4122.

The City argues that the 1990 Amendments to LARSO do not implicate Section 4122 because they do not restrict or inhibit owners from prepaying their mortgages, but merely restrict base rents upon prepayment. City's Brief, at 33 ("The 1990 Amendments do not 'restrict' or 'inhibit' owners from prepaying. Owners still have the right to prepay. All the 1990 Amendments do is restrict base rents."). The City's contention ignores financial realities. By mandating that owners such as TOPA must continue to charge the substantially below-market rents set by HUD after they exit the federal program, the City plainly "inhibit[s]" those owners from prepaying and also "restrict[s]" prepayment, because any who still want to prepay will be deprived of market rents and, thus, will be unable to secure the financing necessary to do so.[6] E.R. 0186A.

"funding queue" of LIHPRHA-eligible properties and intended to stay in the program if there was any chance of getting funded. When it became clear that its property would not get funding, TOPA prepaid its mortgage in January 1998, well after the 15 month period required by 12 U.S.C. § 4114(a)(1)(A). E.R. 0185. Thus, TOPA's prepayment in 1998 was entirely consistent with LIHPRHA, which recognized that owners must be allowed to prepay their mortgages where incentives were not funded. To ignore LIHPRHA's preemption provision on the facts of this case would be to eviscerate the prepayment right that Congress sought expressly to safeguard - a result that was clearly not intended by Congress nor in line with the structure of the statutes.

[6] The City asserts that LARSO "includes provisions to adjust rents so that an

Moreover, contrary to the City's argument, (City's Brief, at 33-35), the 1990 Amendments to LARSO are flatly inconsistent with LIHPRHA and are thus preempted under Section 4122(a)(3). The City argues otherwise based on its faulty premise that LIHPRHA's preemption provision does not apply to owners like TOPA that did not receive federal financial incentives with accompanying restrictions under the LIHPRHA program. City's Brief, at 35. As discussed above, LIHPRHA's preemption provision applies regardless of whether a property received funding under LIHPRHA or qualified for prepayment under LIHPRHA's more stringent prepayment restrictions.

More generally, LARSO is inconsistent with LIHPRHA because it upsets Congress' resolution of the problem of balancing the interests of tenants against the rights of the owners. To accomplish both goals, LIHPRHA offered incentives to owners to stay in the program, thereby preserving the low-income housing stock. See 12 U.S.C. §§ 4101 *et seq.* Where HUD could not offer such incentives, in order to uphold its end of its bargain with owners, Congress allowed

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owner may obtain a fair and reasonable return on its investment" and states that TOPA did not apply for any increases under Los Angeles Municipal Code Section 151.07(B)(1). City's Brief, at 15-16. That argument is a red herring, as the City indicated it would not allow TOPA to increase its rents to street-market levels, thus continuing the effect of financially inhibiting and restricting TOPA's right to prepay and interfering with the federal scheme enacted in LIHPRHA.

owners to prepay their mortgages and raise their rents to market levels unhindered by state laws. E.R. 0057. LARSO is inconsistent with LIHPRHA because it materially interferes with this balance by eviscerating one of the options Congress intended to protect—an owner's right, absent the availability of incentives, to prepay his or her mortgage and convert to a conventional, market rental, and substituting a conflicting regime that entirely subjugates the interests of owners to those of tenants.

In sum, the 1990 Amendments to LARSO are preempted by LIHPRHA both because they restrict and inhibit an owner's right to prepay his or her mortgage and because they are inconsistent with LIHPRHA. See Cienega Gardens v. United States, 265 F.3d 1237 (Fed. Cir. 2001) (rejecting argument that the owners' request for permission to prepay would not have been futile because LARSO would lawfully have prevented owners from raising rents to market upon prepayment, thereby preventing a greater than 10% increase in rents).[7]

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[7] The Court in Cienega Gardens stated that the appeal before it did not require it to rule definitively upon whether LIHPRHA does indeed preempt LARSO. See id. at 1247. Yet, the only explanation for its holding—that the owners would have been able to raise their rents to market upon prepayment of their mortgages and, thus, would not have qualified for prepayment under LIHPRHA—is that LIHPRHA preempts the 1990 Amendments to LARSO.

C. The 1990 Amendments to LARSO Are Not Saved As Laws of General Applicability.

A law is considered generally applicable where it pertains equally to similarly situated people without targeting for special treatment any one group or activity. See, e.g., Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) ("There can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota."); KDM v. Reedsport Sch. Dist., 196 F.3d 1046, 1050 (9th Cir. 1999) (holding that the regulation in question was generally applicable and stating that the regulation "does not have 'the object or purpose ... [of] suppression of religion or religious conduct'" and that the petitioner was "not subjected to '[o]fficial action that targets religious conduct for distinctive treatment.'") (citations omitted).

The determination of whether a law is generally applicable often involves a "motive analysis." "In other words, for a law to be generally applicable, the legislative motive underlying its creation must be generally applicable. If the legislature intended to specifically target or disadvantage a particular group, then the law is not generally applicable." Wendy K. Olin, Note, Constitutional Survival Camp: What Are the Chances that the General Applicability Test Will Make It? 68

S. Cal. L. Rev. 1029, 1030 (1995); see, e.g., Church of Lukumi Babalu Aye Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (finding that city ordinances prohibiting animal sacrifices were neither neutral nor generally applicable where the text of the city council's enactments disclosed an improper attempt to target a specific religion).

The 1990 Amendments to LARSO are not laws of general applicability because they do not pertain equally to all similarly situated people. To the contrary, the Amendments specifically target owners who have participated in the NHA and pre-pay their mortgages in two major ways. First, under the 1990 Amendments to LARSO, owners who pre-paid begin their tenure as private landlords subject to LARSO at "the amount of rent last charged for the rental unit while it was exempt," meaning the below-market HUD-approved rents under the federal program. E.R. 0381, Los Angeles Municipal Code Section 151.02. In sharp contrast, other owners enter the private rental business under LARSO at street-market levels. See id. (providing that if a rental unit was not rented in 1979, and an owner did not participate in the NHA, then the rent under LARSO "shall be the rent legally in effect at the time the rental unit was or is first re-rented after the effective date of this Chapter"). In other words, whereas an owner who never entered the NHA program and who began renting after 1979 could begin its tenure under LARSO at "the rent legally in effect" at the time it entered LARSO—*i.e.*,

market level—a participating owner under the NHA would be restricted to charging the significantly below-market rents permitted under the federal program. The latter is at a significant disadvantage.

The facts here make clear that this scheme puts those who participated in HUD's programs at a massive disadvantage. Under the 1990 Amendments, TOPA is limited to rents sufficient to earn a maximum 6% return on its original investment, which amounts to $9569 per year. E.R. 0183-0184, Clopp Decl., at ¶¶ 4-5. In contrast, had TOPA not entered the NHA, its units would have become subject to LARSO at market rates as of April 1979. See E.R. 0380-0381, Los Angeles Municipal Code Section 151.02. Thereafter, TOPA would have been permitted yearly rent increases. From 1979 to 1985, the maximum allowable rent increase was 7% per year. See E.R. 0393, Los Angeles Municipal Code Section 151.06(D) (notes of amendments). From 1985 to 1998, the units would have been allowed a rent increase tied to the Consumer Price Index for that year. Id. at 0392. A regulation which targets and singles out exiting owners for such disparate treatment is not a law of "general applicability."

The 1990 Amendments also specifically target owners who pre-pay in a second way, by depriving owners who pre-pay their mortgages the benefit of "vacancy decontrol." While owners who never participated in the NHA program may raise their rents to market level every time a rental unit is vacated voluntarily,

the 1990 Amendments ensure that exiting owners are restricted to charging the existing rates. See E.R. 0392, Los Angeles Municipal Code Section 151.06 Subsection (C)(5). Tenants who no longer qualify as low income who are the beneficiaries of the LARSO-mandated below-market "low-income" rents are extremely unlikely to ever vacate their units. Thus, participants in the federal program such as TOPA are again at a disadvantage compared to owners who never entered the NHA.[8]

Moreover, the manifest purpose of the Amendments was *precisely* to target Section 221 and 236 properties:[9]

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[8] The City's argument that "the purpose of those Amendments was simply to ensure that formerly exempt units, including government-assisted rental properties, did not have an unfair advantage upon re-entry into the private sector" is specious. City's Brief, at 39. TOPA would not be getting an unfair advantage. Rather, it would simply get the same treatment as all other properties: the ability to start its tenure as a private landlord under LARSO at market rents.

[9] The City's argument that the 1990 Amendments do not target exiting owners because they were intended only to clarify existing law (City's Brief, at 37) is meritless. Prior to the 1990 Amendments, LARSO provided that units first entering LARSO would enter at the rent "legally in effect at the time the rental unit [entered the market]." City's Brief, at 18. As those exiting HUD's program were released from regulatory restrictions on their units, they entered the market at market rents, like anyone else. If these developers had instead been required by LARSO to maintain their severely below-market HUD rents, one would expect the City to cite some pre-1990 authority applying LARSO in that way. The City cites no such authority. Finally, the City's brief to this Court betrays its own level of conviction that the Amendments merely clarified existing law. The City argues that the statute of limitations started running for TOPA on its purported Section

> One of the most urgent housing issues in the City today is the threatened loss of approximately 20,000 rental units from the City's supply of affordable housing. The affordable rent levels of these units could be lost as Federal rent restrictions expire. . . . However, beginning this year and continuing in the years to follow, the owners of these units will have the option to withdraw from the Federal program and raise rents to the market level. The estimated 20,000 threatened units are those that involve the prepayment of federally subsidized low interest loans under the Section 236 and Section 221(d)(3) programs and/or the opting out of Section 8 contracts. . . . Although applicability of the Rent Stabilization Ordinance to these 20,000 units is certain, the existing ordinance language that applies to these units is not clear on certain items such as the precise rent level for the units once the Federal rent restrictions expire.

E.R. 0054-0055, Motion of Councilwoman Ruth Galanter, 6th District (adopted as amended, 23 August 1988).

Thus, even assuming that the 1990 Amendments tangentially apply to more than just LIHPRHA-eligible properties,[10] the clear purpose behind their

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1983 claim in 1990 when the Amendments were enacted. If the City truly believed that the 1990 Amendments were merely a clarification and that LARSO applied to exiting owners prior to 1990, the City surely would have argued that the statute of limitations began running when LARSO was first enacted.

[10] That the City threw into the legislation some token nonassisted properties does not render the targeted Amendments generally applicable laws within the meaning of Section 4122(b). See, e.g., County of Allegheny v. A.C.L.U., 492 U.S. 573, 598 n.48 (1989) (stating "[t]he presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum, fail to negate the endorsement effect of the crèche" displayed on the Grand

enactment was to deter owners from prepaying their mortgages in contravention of Congress' goal. See 12 U.S.C. § 4122(a)(1). Because the 1990 Amendments to LARSO purposely target properties exiting HUD's low-income housing programs for disparate treatment, and because the motive behind their enactment was to preclude these properties from raising their rents (thereby forcing those units to remain low-income housing), they are not generally applicable laws within the meaning of LIHPRHA.

III. THE 1990 AMENDMENTS TO LARSO ARE PREEMPTED UNDER THE DOCTRINE OF CONFLICT PREEMPTION.

A. The 1990 Amendments Are Preempted to the Extent They Frustrate the Accomplishment of Federal Statutory or Regulatory Objectives.

The 1990 Amendments to LARSO are not only expressly preempted by LIHPRHA, they are void under the doctrine of conflict preemption. See Cienega Gardens, 38 Fed. Cl. at 83. Contrary to the City's argument, it is well established that the existence of express preemption and savings clauses does not preclude implied preemption where state law stands as an obstacle to the accomplishment of federal goals. See Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 352 (2001) (holding that neither an express preemption provision

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Staircase of the courthouse); see also Church of Lukumi, 508 U.S. 520 at 543 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

nor a savings clause barred the ordinary working of conflict preemption principles).

The City also errs in insisting that, to establish conflict preemption, TOPA must satisfy a heightened burden of proof. TOPA need not demonstrate that "it was the clear and manifest goal of Congress to give owners the right to raise rents to market level unregulated by local police power controls after prepayment of a § 236 mortgage" in order to demonstrate that the 1990 Amendments to LARSO are preempted. City's Brief, at 46. Nor must TOPA overcome a presumption against preemption. Indeed, the Supreme Court rejected that very contention in United States v. Locke, 529 U.S. 89, 108 (2000), a case involving preemption claims based on the government's comprehensive regulation of oil tankers. The Court explained that where a state regulates in an area where there has been a significant federal presence, "an 'assumption' of nonpre-emption *[sic]* is not triggered." Id. at 108; see also Bank of Am. v. City and County of San Francisco, 309 F.3d 551, 558 (9th Cir. 2002) (quoting Locke for the proposition that "the presumption against preemption ... is 'not triggered when the State regulates in an area where there has been a history of significant federal presence.'").[11]

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[11] Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) and Indus. Truck Ass'n, Inc. v.

Here, as in Locke, the City seeks to regulate in an area where there has been an overriding federal presence – namely, the creation, preservation and regulation of national-low income housing programs. The federal interest in promoting a coherent national housing policy has been manifest since the 1930s and is now well established. See, e.g., 40A Am. Jur. 2d, Housing Laws and Urban Redevelopment, Sec. 7--Federal Legislation ("The Federal Government has a vast interest and influence in the field of private and public [housing], slum clearance and urban redevelopment. Congress has declared a national housing policy . . . ."). Thus, in this case, as in Locke, the presumption against preemption is not triggered, and a showing of clear and manifest Congressional intent to preempt is

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Henry, 125 F.3d 1305 (9th Cir. 1997), provide the City no support in this regard. While those cases teach generally that "[p]reemption analysis begins 'with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress,'" (E.R. 1566, Order, at 8), that maxim should not avail the City in this case. Four years after Medtronic was decided, the Supreme Court in Locke clarified the applicable standard and unequivocally stated that the presumption against preemption is not triggered where the States regulate in an area where there has been a history of significant federal presence. See Locke, 529 U.S. at 108. The Ninth Circuit is in complete accord. See, e.g., Bank of Am., 309 F.3d at 559 (*citing* Locke and declining to apply presumption against preemption where there was "history of significant federal presence"). These principles apply even to a "matter of special concern to the States: 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (citations omitted).

not required to find conflict preemption. Rather, TOPA merely must show that the 1990 Amendments frustrate or otherwise stand as an obstacle to the administration of these federal housing programs. See Perez v. Campbell, 402 U.S. 637, 652 (1971) (stating within the context of its conflict preemption analysis that it is a "controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.").

Moreover, notwithstanding the district court's finding to the contrary, the pertinent inquiry is not whether Congress clearly and manifestly intended to confer upon owners an unfettered, everlasting right of prepayment. E.R. 1580-1581, Order, at 22-23. Rather, the relevant question is whether the 1990 Amendments impermissibly interfere with Congressional and executive intent to encourage private participation in the federal programs, and to preserve the integrity of the balance Congress struck between tenants and owners.[12]

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[12] The City's suggestion that federal restrictions on prepayment rights undermine a finding of preemption is similarly devoid of merit. First, as stated, the relevant inquiry is not whether TOPA had an "unfettered" right of prepayment. Second, and more significantly, that the federal government may have imposed federal restrictions on owners' prepayment rights has no bearing on whether and to what extent local governments can lawfully do the same.

B. The Enforcement of the 1990 Amendments to LARSO Would Frustrate the Federal Goal of Maintaining Incentives for Private Participation in Federal Housing Programs.

Congress delegated to HUD the authority and the responsibility to regulate the terms and conditions of the mortgages insured by the federal housing program. See, e.g., 12 U.S.C. § 1715l(e)(2) (1970). Pursuant to this authority, and in order to advance the Congressional goal of encouraging private participation in the NHA, HUD drafted and prescribed contractual documents and enacted regulations that granted private owners participating in the federal programs the express right to prepay their mortgages and exit the programs after 20 years, upon which they would be free to raise their rents to market. See 24 C.F.R. § 221.524 (1970); 24 C.F.R. § 236.30 (1970). This prepayment option was extended specifically for the purpose of encouraging private participation in the low-income housing program. See, e.g., Loss of Subsidized Multifamily Housing Units: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs, 99th Cong., 2d Sess. 17-18 (1986) (comments of Hon. R. Hunter Cushing, then Deputy Assistant Secretary for the Multifamily Housing Programs of HUD, confirming that the HUD regulations allowing for prepayment after 20 years were enacted pursuant to the bargain the government reached with owners in order to encourage private participation in the NHA). E.R. 1434-1435; accord Cienega Gardens, 38 Fed. Cl. 64 at 83.

Without question, at the time the HUD regulations were enacted, the states would have been precluded from frustrating the promised prepayment right with laws like the 1990 Amendments to LARSO because such laws would have nullified the prepayment incentive; and, more generally, because by condemning the properties to perpetual below-market rents, they would have made participation in the low-income housing programs financially unviable.[13] The fact that the City is trying to take away the prepayment incentive after the fact, and not *ex ante*, should make no difference. Permitting the states to prevent the owners from realizing the benefits of the federal incentives after the owners have lived up to their part of the bargain is deeply cynical and would destroy the federal government's ability to secure similar private participation in the future. See, e.g., Free v. Bland, 369 U.S. 663 (1962) (holding that federal treasury regulations allowing a right of survivorship, which functioned to entice investors, preempted state community property laws that would have, *ex post facto*, deprived investors of that enticement). Because the 1990 Amendments prevent owners from realizing

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[13] Significantly, the 1990 Amendments to LARSO materially interfere with the goals of the NHA not only in their application to owners who prepay their mortgages after 20 years but also because they freeze in place the rents of those owners who participate in the federal program for the full 40 years. It is improbable that the government could ever get owners to participate in the federal program if, after entering the program, they could never leave.

incentives the federal government afforded them to encourage their participation in the federal housing programs, the 1990 Amendments to LARSO cannot lawfully be applied to the owners' properties.

Congress enacted LIHPRHA's preemption provision for precisely this reason, because it recognized that, consistent with the federal program, owners must be permitted to prepay their mortgages without interference or deterrence from state or local laws. See, e.g., E.R. 0557, 101st Cong. 165 (1989) (statement of Charles Edson, Counsel, National Leased Housing Association) ("Once a Federal solution is arrived at we should then preempt specifically the State laws that are coming into this area that are putting greater restrictions on owners."). Indeed, even the City concedes that the purpose of LIHPRHA's preemption provision was to allow prepayment and protect owners from local prepayment penalties. City's Brief, at 54. Thus, even if the City succeeded in fitting the 1990 Amendments in a loophole to LIHPRHA's express preemption provision – which it did not — for the reasons stated above, enforcement of the 1990 Amendments should nonetheless be precluded, as the 1990 Amendments directly impede the realization of Congress' intent.

C. The Enforcement of the 1990 Amendments to LARSO In Fact Would Reduce the Availability of Low-Income Housing.

The 1990 Amendments to LARSO materially interfere with Congress' scheme as reflected in HOPE not only by restricting and inhibiting the owners' federally mandated prepayment rights, but also by interfering with the tenant voucher solution crafted by Congress in LIHPRHA. Congress enacted tenant protections in order to assist the community in replacing the lost housing stock. The application of LARSO would frustrate Congress' intent -- rather than increase the availability of low-income housing, it would decrease the supply as it puts units that would otherwise be available for low-income housing (through federal vouchers) in the hands of those who don't need it.

More specifically, when an owner prepays under LIHPRHA, tenants who qualify as low-income automatically receive enhanced vouchers, which allow them to stay in their units (while the owners are compensated at market rents). Tenants who no longer qualify as low-income (because their incomes have increased and now exceed the low-income qualifying levels) do not receive vouchers and generally vacate the units, freeing the units up for other low-income tenants with Section 8 vouchers or certificates. Under the 1990 Amendments to LARSO, once an owner prepays his mortgage, tenants who no longer qualify for low-income housing nonetheless would continue to have their rents fixed at the

federally mandated HUD levels and are thus incentivized to remain in the units indefinitely. These tenants would take up units that could otherwise be made available to low-income persons and families who are currently on a 15-year wait-list in Los Angles County. This windfall to tenants who no longer qualify as low-income would operate to the detriment of those tenants who need and would otherwise have access to the low-income housing. The net effect of applying the 1990 Amendments to LARSO, therefore, would be to decrease, not increase, the City's low-income housing stock in contravention of Congress' goals.

D. The City, its Amici and the Intervenors Characterize Congressional Intent Too Narrowly.

The City asserts that the 1990 Amendments are perfectly consistent with the federal scheme because the NHA was enacted to help low-income tenants, not landlords. City's Brief, at 49. Its amici similarly protest that "federal courts have always recognized that the purpose of the NHA was to benefit low income tenants, not commercial developers." Intervenors' Brief, at 19. These arguments are far too simplistic and do not tell the full story. As the Court explained in Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986), "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." Id. While "Congress may be unanimous in its intent to stamp

out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises." Id. "Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." Id.

What the City, its amici and the intervenors miss here when focusing only on the "broad purpose" of the NHA to help tenants, is that in order to accomplish that goal, Congress and HUD encouraged the private sector to participate in a public/private partnership to provide the needed affordable housing. Incentivizing private participation was a crucial component of Congress' scheme to create and preserve low-income housing. See, e.g., M.B. Guran Co. v. City of Akron, 546 F.2d 201, 204 (6th Cir. 1976) ("In analyzing the Housing Act, we note that the expression of Congressional interest that private industry be encouraged to participate to the fullest extent and that the housing industry's involvement will thereby contribute to a strong national economy."); Cedar-Riverside Assoc. v. City of Minneapolis, 606 F.2d 254, 257 (8th Cir. 1979) ("Although the legislative history of the 1968 and 1970 Acts indicates a congressional purpose to encourage private entrepreneurs in local home building industries, that history also discloses that Congress intended such assistance to private developers to serve as a means of

achieving the underlying goal of the Housing Act; namely, additional well-planned housing for the benefit of the public."); see also TOPA's Request for Judicial Notice, at 25-26 ("This will be especially useful in connection with the goal of attracting large amounts of private-equity money into the provision of low and moderate income housing through the establishment of national partnerships (proposed by title IX) of the bill. It will give the limited-dividend mortgagor a ready means of disposing of his project, thereby making his investment more liquid and attractive."). Because the 1990 Amendments to LARSO conflict with and frustrate the federal government's ability to secure for private owners the prepayment incentive used to encourage their participation in the HUD programs, the 1990 Amendments to LARSO may not lawfully be enforced in the manner the City prescribes.

IV. TOPA CORRECTLY BROUGHT ITS CHALLENGE DIRECTLY UNDER THE SUPREMACY CLAUSE.

The City argues that a plaintiff cannot bring a challenge directly to redress a constitutional wrong if a plaintiff has a statutory remedy, and that TOPA's proper remedy in this case was a claim under 42 U.S.C. § 1983. City's Brief, at 23. Contrary to the City's argument, it is well-established in this Circuit that a Supremacy Clause challenge will not support a Section 1983 claim. See, e.g., White Mountain Apache Tribe v. Williams, 810 F.2d 844, 850 (9th Cir. 1987)

("We thus come down on the side of the weight of authority that preemption of state law under the Supremacy Clause--at least if based on federal occupation of the field or conflict with federal goals--will not support an action under Section 1983, and will not, therefore, support a claim of attorney's fees under Section 1988"); see also Howard v. City of Burlingame, 937 F.2d 1376, 1381 (9th Cir. 1991) (finding that the district court correctly held that plaintiff's preemption victory below did not vest him with any enforceable rights under 42 U.S.C. § 1983 because the Supremacy Clause merely safeguards federal interests against state infringement, and operates to preempt state regulatory action without creating individual rights). Instead, under Ninth Circuit precedent, a plaintiff seeking declaratory relief or an injunction based on express preemption or conflict preemption must (as TOPA has done here) bring such an action directly. Associated Gen. Contractors v. Smith, 74 F.3d 926, 931 (9th Cir. 1996) (holding that plaintiff's preemption claim brought pursuant to ERISA's express preemption provision would not support an action under Section 1983 and would, therefore, not support a claim for attorneys' fees under Section 1988).

V. TOPA'S COMPLAINT WAS TIMELY.

The City also argues that the one-year statute of limitations applicable to Section 1983 claims bars TOPA's claim. Specifically, the City asserts that the statute of limitations began to run in this case in 1990 when LARSO was amended

to clarify that it applied to properties exiting federal low-income housing programs, and that TOPA's claim filed in September of 2000 was therefore not timely.

Even assuming a one-year statute of limitations applies, the City's argument is incorrect, because the City did not begin enforcing the 1990 Amendments to LARSO until June of 2000; and, thus, TOPA did not suffer an injury capable of redress until June of 2000.

A. The Statute of Limitations Does Not Begin to Run Until a Party May Maintain a Cause of Action.

State law determines the statute of limitations for claims brought under 42 U.S.C. § 1983. See Harding v. Galceran, 889 F.2d 906, 907 (9th Cir. 1989). Under California law, the period of limitations begins to run at the time a cause of action accrues. See E.O.C. Ord, Inc., v. Kovakovich, 246 Cal. Rptr. 456, 461 (Cal. Ct. App. 1988) (citing Cal. Civ. Proc. Code Section 312). Federal law determines when a cause of action accrues, see Cline v. Brusett, 661 F.2d 108, 110 (9th Cir. 1981), and "[u]nder federal law, a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action." Id. Thus, even assuming TOPA's remedy was under Section 1983, TOPA's cause of action did not accrue until it had, in fact, suffered an injury, was aware of such injury, and could maintain an action to seek relief for such injury.

See also Franconia Assoc. v. United States, 122 S.Ct. 1993, 1997 (2002) (holding that plaintiffs' causes of action accrued not upon the enactment of ELIHPHA but when plaintiffs tendered prepayment and the Government dishonored its obligation to accept the tender).

B. TOPA Did Not Suffer A Cognizable Injury And Its Statute Of Limitations Was Not Triggered Until June of 2000.

TOPA prepaid its Section 236 mortgage on January 22, 1998. At that time, the City was not, as a matter of undisputed fact, enforcing the 1990 Amendments to LARSO. E.R. 0354-0355. Thus, TOPA was permitted to, and did, raise its rents to street-market levels as approved by the Housing Authority of Los Angeles ("HACLA"). It was not until June 28, 2000—two years after TOPA prepaid and raised rents to market level—that the City demanded that TOPA roll back its rents to the rates last charged under Section 236. E.R. 0354-0355. Thus, TOPA did not suffer an injury, capable of redress by this Court, until June of 2000. Because TOPA's cause of action against the City did not accrue until June of 2000, the statute of limitations did not begin to run until that time. Thus, the filing of TOPA's Complaint in September of 2000 was timely.

C. The Limitations Period Did Not Begin in 1990 or 1997.

The City argues that the limitations period instead began in late 1990 when LIHPRHA was enacted, citing De Anza Properties X, Ltd. v. County of

Santa Cruz, 936 F.2d 1084 (9th Cir. 1991), to support its argument. City's Brief, at 25-26. Its reliance on De Anza is misplaced. In De Anza, the Ninth Circuit held that the plaintiffs were barred by the statute of limitations from bringing their action to challenge a local rent-control ordinance as an unconstitutional taking. In that case, however, the relevant rent-control ordinance was in effect and being enforced against the plaintiffs since the time of its enactment. In this case, in contrast, the 1990 Amendments to LARSO were not even applicable to TOPA until 1998, when TOPA prepaid its mortgage, and the Amendments were not enforced against TOPA until June of 2000. Thus, unlike the plaintiffs in De Anza, TOPA did not have an injury capable of redress by this Court until long after the enactment of the challenged statute.

The City is equally incorrect in arguing that the limitations period began to run on December 29, 1997, when TOPA stated its intention to pre-pay its mortgage and received a letter from the City giving TOPA "actual notice of the conflict" between the 1990 Amendments to LARSO and LIHPRHA. Notwithstanding the City's December 29, 1997 letter, HACLA approved TOPA's increase to market rents and the City did not seek to enforce the 1990 Amendments to LARSO until June of 2000. E.R. 0354-0355, City's Letter Dated June 28, 2000 ("[w]hile we believed the trial court opinion [in Cienega Gardens III] was wrong, and would be reversed on appeal, we felt precluded from enforcing the RSO in

prepayment buildings until the appeals process was concluded. . . . Please consider this to be formal notice that, effective August 1, 2000, you must roll back your rents to those required under the R.S.O. . . . ."). Because the City was not enforcing the 1990 Amendments to LARSO in December of 1997, and because TOPA did not suffer an injury capable of redress until June of 2000, the City's reliance on its December 29, 1997 letter is misplaced.

VI. CONCLUSION.

In sum, the City's tortured interpretation of HOPE and its effect on LIHPRHA's preemption provision misdirects the relevant inquiry and, in so doing, misses the forest for the trees. The question is not whether the legislative history behind HOPE evidences Congressional intent to protect owners "unfettered" prepayment rights. Rather, the question is whether LIHPRHA's preemption provision was enacted as one aspect of a carefully constructed regulatory scheme, which remains in effect today, that sought to balance the rights of the owners against the rights of the tenants and whether LARSO upsets this balance. The answer to both of these questions is undoubtedly yes, and leads to one conclusion: the 1990 Amendments to LARSO are preempted by LIHPRHA.

As such, and for the reasons outlined above, TOPA respectfully requests that this Court reverse the district court's entry of judgment in favor of the City of Los Angeles.

Dated: March 4, 2003

Respectfully submitted,

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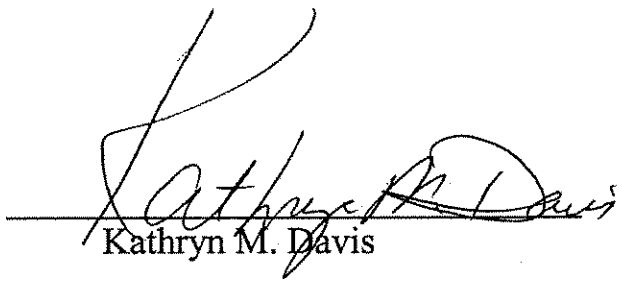
CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32

I hereby certify that pursuant to Federal Rule of Appellate Procedure 32 and Ninth Circuit Rule 32-1, this brief is proportionately spaced, has a typeface of 14 point, and contains 8929 words.

Dated: March 4, 2003



Kathryn M. Davis

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