IN THE COURT OF APPEALS OF THE STATE OF OREGON

SARAH NORDBYE, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

BRCP/GM ELLINGTON, an Oregon limited liability corporation; and the OREGON HOUSING AND COMMUNITY SERVICES DEPARTMENT,
Defendants-Respondents.

Multnomah County Circuit Court
071113783

A141698

BRIEF OF *AMICUS CURIAE* NATIONAL HOUSING LAW PROJECT

Appeal from the Judgment of the Circuit Court for Multnomah County
Honorable Dale R. Koch, Judge

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I. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

The National Housing Law Project ("NHLP") relies on the parties' descriptions of the nature of the action. NHLP does not seek specific relief; NHLP submits this brief to present a position as to the correct rule of law that does not affect a private interest of NHLP.

The central aspect of the circuit court's judgment concerned a finding that the State Housing Credit Agency in Oregon ("OHCS") had the authority to terminate a large property from the Low Income Housing Tax Credit ("LIHTC") program, Internal Revenue Code ("IRC") 26 USC §42, for non-compliance with the LIHTC program. The circuit court also found that OHCS had the authority to terminate the extended use agreement that keeps the property affordable and income-restricted for low-income tenants.

NHLP submits this *amicus curiae* brief to explain more comprehensively how Congress intended the extended use agreement in LIHTC properties to function and the importance of these mandatory affordability and income-restrictions to low-income tenants.

B. Nature of the Judgment Sought To Be Reviewed

NHLP relies on the parties' descriptions of the nature of the judgment sought to be reviewed.

C. Statutory Basis for Appellate Jurisdiction

NHLP relies on the parties' statement of the statutory basis for appellate jurisdiction. The Oregon Court of Appeals may allow *amicus* participation in an appeal pursuant to ORAP 8.15.

D. Dates of Entry of Judgment and Notice of Appeal

NHLP relies on the parties' statement of the dates of entry of judgment and notice of appeal.

E. Question Presented on Appeal

Under federal and state law, may a State housing credit agency lawfully terminate a federally required extended use commitment, recorded as a restrictive covenant naming tenants as direct beneficiaries with enforcement rights, prior to its expiration, for an owner's noncompliance with program rules?

F. Summary of Argument

This case raises the important issue of whether a state housing finance agency, Oregon Housing and Community Services, may terminate a low income housing tax credit project from its extended use commitment to keep the property affordable for low-income families, for noncompliance with program rules. It may not. Congress created the tax credit program with the intent of maximizing its investment in affordable low-income rental housing by providing tax credits in exchange for a minimum 30-year period in which the owner must restrict occupancy to low-income families paying statutorily set rents. It only created two ways in which a project may end its extended use commitment early – through involuntary foreclosure or when a state agency fails to find a qualified purchaser for the project. Further, Congress

carefully prescribed mechanisms by which use restrictions would be enforced. Termination is not one of those mechanisms. Given Congress' stated desire to maximize affordable housing and to enforce the required use restrictions for at least 30 years, releasing an owner from its program obligations would create a perverse incentive where owners would be rewarded for noncompliance. Because Congress clearly intended for recipients of low income housing tax credits to operate their properties for the use of low-income families for at least 30 years, a state housing finance agency cannot legally terminate that commitment because of the owner's noncompliance.

G. Summary of Facts

NHLP relies on the parties' summary of facts.

H. Description of *Amicus Curiae*

The National Housing Law Project (NHLP), established in 1968, is a national nonprofit housing law and advocacy center. The goal of NHLP is to advance housing justice for the poor by increasing and preserving the supply of decent affordable housing, improving existing housing conditions, including physical conditions and management practices, expanding and enforcing low-income tenants' and homeowners' rights, and increasing opportunities for racial and ethnic minorities. NHLP works to achieve that goal by providing legal assistance, advocacy advice and housing expertise to legal services and other attorneys, low-income housing advocacy groups, and others who serve the poor. NHLP is also regularly called upon by Congressional and federal agency staff to provide expertise on pending legislation and regulations related to low-income housing programs. NHLP has extensive knowledge

of the low income housing tax credit program and has consistently sought to ensure that regulations and policies governing the program will continue to provide affordable housing for millions of low-income families.

II. LEGAL ARGUMENT

A. Congress Carefully Designed the LIHTC Program to Ensure Affordable Housing Over the Long Term.

Congress created the Low-Income Housing Tax Credit (LIHTC) program to provide long-term affordable housing to low-income families. The program accomplishes this goal by guaranteeing that units will be restricted to low-income families paying restricted rents for 30 years. To implement the program, Congress has committed an annual federal investment of $5 billion. HUD USER, About the LIHTC Database, http://www.huduser.org/datasets/lihtc.html (last visited August 23, 2009). Originally created by the Tax Reform Act of 1986, Congress made the program permanent in 1989. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106, 2308 (1989). Responding to the overwhelming need for affordable low-income rental housing, the LIHTC program has grown steadily since its inception. From 1995 to 2006, the program created an average of 1,400 projects and 103,000 low-income units annually nationwide. Dep't. of Hous. and Urban Dev., Office of Economic Affairs, Updating the Low-Income Housing Tax Credit (LIHTC) Database: Projects Placed in Service Through 2006, Jan. 2009, at 17. It is now the primary vehicle for creating new low-income affordable housing units in the United States. By the end of 2006, the program had created approximately 1.67 million units of affordable housing. Id. at 9. In Oregon alone, the program houses nearly 25,000

low-income families. HUD USER, LIHTC Database Access, http://www.huduser.org/datasets/lihtc.html (last visited Aug. 23, 2009).

While the LIHTC program has grown since inception, the need for affordable rental housing continues to grow with it. About 36 million households currently rent their housing, and approximately 13.7 million of these households qualify as low-income. Bruce Katz & Margery Austin Turner, Rethinking U.S. Rental Housing Policy, Brookings Inst., Apr. 2008, at 2-4. However, only a fraction of these families live in federally-assisted rental units. Katz & Turner at 4. For every 100 very low-income families,[1] there are only 67.9 affordable, available, and adequate rental housing units available. Dep't of Hous. and Urban Dev. Office of Policy Dev. and Research, Affordable Housing Needs 2005: Report to Congress, 37 (2008). Given the current state of the housing crisis, preserving low-income tax credit units is vital to achieving Congress' goal of increasing affordable housing opportunities for low-income people with the greatest housing needs.

Congress designed the LIHTC program to take advantage of private developers' expertise in building and managing rental housing. Unlike traditional housing subsidy programs, which are administered by HUD or the USDA, the LIHTC program is administered and regulated by the Internal Revenue Service (IRS). Additionally, the program provides its subsidies through tax credits to developers, on a one-for-one basis, for every dollar invested in low-income rental housing. 26 USC § 42(g)(1)(A)-(B).

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[1] 42 USC § 1437a(b)(2) (defining "very low-income" as 50% of area median income).

The federal government allocates tax credits to each state annually, on a per capita basis. 26 USC § 42(h)(3)(C)(i). State housing agencies maintain responsibility for allocating credits and monitoring program compliance. These agencies distribute the credits to applicants through a competitive process, based on criteria set forth in a state "qualified allocation plan." 26 USC § 42(m)(1)(B)-(C). In Oregon, Oregon Housing and Community Services (OHCS) is the agency designated with this responsibility. Recipients, usually corporate investors who purchase the credits from developers, use the tax credits to reduce income taxes. 26 USC § 42(b). Most developers sell tax credits to investors at a discount, in order to turn the credits into development capital. When using 9% (of eligible development cost) credits that are claimable annually over a ten-year period, the capital provided by the sale of the credits accounts for the vast majority of the project's development costs. This equity capital reduces the level of debt capital needed for a project, permitting owners to charge lower rents for the entire term of the commitment.

In return for receiving tax credits over the first ten years of a project, developers must commit to low-income rent and occupancy restrictions for at least 30 years. Unless a state has imposed additional requirements, income occupancy restrictions follow one of two forms. An owner may choose to restrict at least 20% of project units for households with incomes at or below 50% of the area median income (AMI) or to restrict at least 40% of units for individuals with incomes at or below 60% of AMI. 26 USC § 42(g)(1). In many LIHTC properties, all units are designated for low-income households. Actual rents are restricted to 30% of the applicable income limits, assuming a family size of 1.5 persons per bedroom. 26 USC §

42(g)(2)(A). Owners must maintain these restrictions during a 15-year "compliance period" and agree to an "extended use agreement" for an additional 15 years. 26 USC § 42(h)(6)(A)-(B) (definition and requirements of extended use agreement). Owners are given the option to exit the program by requesting, after the fourteenth year of the compliance period, that the state housing finance agency find a qualified buyer who will purchase the property for a price determined by statutory formula. Any qualified purchaser must keep the property in the program for the remainder of the restricted use period of at least 30 years. 26 USC § 42(h)(6)(E)-(F). Some states require that a project owner waive this transfer option as a condition of receiving tax credits.

Because developers receive the full benefit of the tax credits during a project's first ten years, Congress mandated that state agencies enter into an enforceable restrictive covenant - containing the long-term affordability restrictions - with the project owners. 26 USC § 42(h)(6)(B). Federal law requires that these restrictions be "binding on all successors of the taxpayer" and that the restrictions be "recorded pursuant to State law as a restrictive covenant." 26 USC §42(h)(6)(B)(v)-(vi). This mechanism ensures that owners comply with income and rent restrictions for the entire extended use period of at least 30 years, protecting the government's long-term investment in affordable housing.

To ensure that LIHTC developments remain compliant with these restrictions, Congress has specified, in the Internal Revenue Code (IRC), only two circumstances in which an extended use commitment may be terminated early. The extended use period terminates if the building is acquired by foreclosure, or if the State cannot find

a qualified buyer when an owner requests to transfer the project.[2] The IRC prohibits termination if the Secretary determines that a transfer by foreclosure was arranged for the purpose of terminating the extended use period. 26 USC § 42(h)(6)(E)(i)(I). Once released from the program by either of these recognized methods, affordable units are not replaced.

The LIHTC program's legislative history further demonstrates Congress' intent to restrict the program's benefits to projects maintained for the full extended use period. Although the program originated with the Tax Reform Act of 1986, it was amended in 1989 in order to more effectively maximize long-term low-income use restrictions on subsidized units. After initial creation of the program, the Senate commissioned a task force made up of individuals representing "all segments of the low-income housing community," including state agencies, developers, and credit

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[2] 26 U.S.C. § 42(h)(6)(E). (E) Exceptions if foreclosure or if no buyer willing to maintain low-income status.—
(i) In general.--The extended use period for any building shall terminate--
(I) on the date the building is acquired by foreclosure (or instrument in lieu of foreclosure) unless the Secretary determines that such acquisition is part of an arrangement with the taxpayer a purpose of which is to terminate such period, or
(II) on the last day of the period specified in subparagraph (I) if the housing credit agency is unable to present during such period a qualified contract for the acquisition of the low-income portion of the building by any person who will continue to operate such portion as a qualified low-income building.
Subclause (II) shall not apply to the extent more stringent requirements are provided in the agreement or in State law.
(ii) Eviction, etc. of existing low-income tenants not permitted.--The termination of an extended use period under clause (i) shall not be construed to permit before the close of the 3-year period following such termination—
(I) the eviction or the termination of tenancy (other than for good cause) of an existing tenant of any low-income unit, or
(II) any increase in the gross rent with respect to such unit not otherwise permitted under this section.

syndicators. 135 Cong. Rec. S5162, S5188 (1989). The bipartisan Mitchell-Danforth Task Force on the Low-Income Housing Tax Credit, as it came to be called, released its findings regarding the progress of the program, the role of the program in the larger housing policy framework, and what improvements were necessary. Report of the Mitchell-Danforth Task Force on the Low-Income Housing Tax Credit, prepared for Senator George J. Mitchell and Senator John C. Danforth (1989). The Task Force listed its first priority as ensuring the extended use of projects for affordable low-income rental housing. Task Force Report at 13. This priority was reflected in the statements of Senator Danforth, who commissioned the task force, when he stated that the program had "an important role to play in a reinvigorated national housing policy" and that "in order to fulfill this role, the credit must . . . achieve an extended duration of low-income use . . . ." 135 Cong. Rec. S4502-3 (1989). Congress adopted the Task Force's recommendation to extend the 15-year compliance period for an additional 15-year extended use period, totaling a minimum 30-year use restriction. 26 USC § 42(h)(6)(A)-(B); see also, Task Force Report at 18.

The LIHTC program provides rental housing for millions who could not otherwise afford it. Congress deliberately structured the LIHTC program to ensure that its multi-billion dollar annual investment would provide desperately needed affordable housing for at least 30 years per project. Only on rare occasions specified by law has Congress authorized an agency to terminate a property from the program and remove affordable housing units, created by federal investments, from the already inadequate supply.

B. Congress Carefully Proscribed Early Termination of the Program's Extended Use Period.

In order to preserve the LIHTC program's restrictions for the long term, Congress has provided only two exceptions that allow early termination of an extended use period. These two exceptions — foreclosure and the failure to find a qualified buyer — are exhaustive and exclusive, designed to attract necessary supplemental debt capital and to ensure competent ownership when tax benefits have been extracted. The statute specifies that the extended use period "shall terminate" on the date of foreclosure "or" if no qualified buyer is found when an owner opts out. 26 USC § 42(h)(6)(E)(i). If Congress had intended there to be more than two exceptions, it could have used open-ended language such as "at least two" or "two exceptions, among others." It did not. Other sections of the Code governing tax credits provide examples of such open-ended statutory language that authorizes agency-created exceptions. For example, Congress unmistakably directed the IRS to promulgate regulations governing the qualified contract process, especially with regard to preventing owner manipulation of the profit margin in a regulated sale. 26 USC §42(h)(6)(F). It did not direct agencies to create rules regarding termination of the extended use commitment because it did not intend that any additional grounds justify such extraordinary action. Moreover, the House Report for the Technical and Miscellaneous Revenue Act of 1990, which made technical corrections and clarifications to the LIHTC program, plainly states that "[t]here are two exceptions to the extended use requirement." H.R. Rep. No. 101-894 (1990). Both Congress' statutory terms and the legislative history clearly demonstrate that Congress intended

only two exceptions authorizing early termination of an extended use period. Noncompliance is not one of them.

The program's design bolsters this conclusion. The statute's explicit bar of termination where a foreclosure "is part of an arrangement with the taxpayer a purpose of which is to terminate such period" demonstrates Congressional intent that owners not circumvent the LIHTC program's use restrictions. 26 USC § 42(h)(6)(E)(i). Arrangements purposefully resulting in foreclosure would offer owners a way out of the required restrictions after tax credits were received, frustrating the program's central purpose to provide long-term affordable housing. Allowing noncompliance to result in termination would offer a similar way to avoid the program's use restrictions. But in specifically prohibiting purposeful foreclosure from terminating an extended use period, Congress clearly articulated its intent to ensure compliance with long-term use requirements. Congress certainly did not intend to prohibit purposeful foreclosure while simultaneously allowing noncompliance with program requirements – which is also wholly within an owner's control – to produce the identical result.

The tenant protections established by Congress in the statute further demonstrate that the two specified exceptions to the extended use period are exclusive. Under the statute, low-income tenants may not be evicted (other than for good cause) or experience rent increases in the three years following a termination due to foreclosure or failure to find a qualified buyer. 26 USC § 42(h)(6)(E)(ii). Congress' limitation of post-termination tenant protections to those two scenarios illustrates that Congress envisioned foreclosure and failure to find a qualified buyer as

the only situations authorizing termination. Interpreting the statute to permit agencies or owners to effect additional terminations would leave affected tenants without even the modest protections provided for the two specified termination situations – clearly an absurd result. By creating post-termination protections for only two circumstances, Congress clearly intended termination to occur only in those two circumstances.

IRS regulations also illustrate that noncompliance is not cause for terminating an extended use period. Under IRS regulations, if a state agency finds that an owner is not in compliance, it sends a Form 8823, "Low-Income Housing Credit Agencies: Report of Noncompliance," to the IRS, stating that the particular project is noncompliant. 26 CFR § 1.42-5(e)(3)(i). The Form 8823 must explain the nature of the noncompliance and indicate whether the owner has corrected the noncompliance. Id. Even where the state agency reports to the IRS that a building is "entirely out of compliance and will not be in compliance at any time in the future," the state agency cannot remove the building from the LIHTC program. Rather, while pursuing state law remedies for breach of covenant, the agency also reports the noncompliance to the IRS, which decides whether to pursue credit recapture. The project stays in the program and "[i]f the noncompliance or failure to certify is corrected within 3 years after the end of the correction period,[3] the Agency is required to file Form 8823 with the Service reporting the correction of the noncompliance or failure to certify." 26

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[3] "*Correction period.* The correction period shall be that period specified in the monitoring procedure during which an owner must supply any missing certifications and bring the project into compliance with the provisions of section 42. The correction period is not to exceed 90 days from the date of the notice to the owner described in paragraph (e)(2) of this section . . . ." 26 CFR § 1.42-5(e)(4)

CFR § 1.42-5(e)(3)(i). Nothing in the statute, the IRS regulations or the LIHTC regulatory agreement permits premature termination of the extended use restrictions.

OHCS violated federal law when it terminated the property's extended use agreement. Noncompliance is clearly not one of the two statutorily specified circumstances justifying termination of an extended use period. The circuit court below cited no statutory or regulatory provision that would allow this termination because there is none.

C. Other Effective Enforcement Mechanisms Exist to Ensure Compliance.

Terminating an extended use commitment for noncompliance not only exceeds the agency's authority, but also bypasses key Congressionally mandated enforcement mechanisms. Federal law provides many enforcement tools designed to aid the LIHTC program's goal of creating and preserving long-term affordable housing. Most importantly, these tools provide a way for regulatory agencies and program beneficiaries to ensure compliance with program requirements without eliminating desperately needed affordable housing.

Congress provided several enforcement tools in the program's authorizing statute. These tools include: 1) allowing the IRS to recapture tax credits; 2) requiring the state housing agency and the owner to enter into an enforceable restrictive covenant; and 3) creating a right for qualified low-income tenants to enforce these restrictions in court.

The first enforcement tool is recapture of the tax credits. If an owner violates the restrictions contained in the extended use agreement, the IRS may recapture a

specified portion of the tax credits,[4] without releasing the property from the LIHTC program. 26 USC § 42(j). To recapture credits, the IRS increases the taxpayer's taxes. 26 USC § 42(j)(1)(B). Because the taxpayer in the limited partnership that owns a project is usually the investor and not the managing general partner of the property, the investor then has a potential cause of action against the managing general partner or other guarantor for the noncompliance that led to recapture. In this case, only a small percentage of the allocated tax credits were recaptured.

Congress recognized that partial recapture alone is not enough to enforce the extended use commitment to maintain tax credit projects as affordable low-income housing. Accordingly, the Mitchell-Danforth Tax Force on the Low-Income Housing Tax Credit recommended: "The allocating agency should be required to establish a form of regulatory agreement or other legal impediment that would make it impossible for an owner to convert the property to other than low income use during the compliance period." Task Force Report at 18. Adopting this recommendation in 1989, Congress mandated an additional enforcement tool – that the use restrictions be recorded in a restrictive covenant signed by the state and the owner. 26 USC § 42(h)(6)(B). Such a covenant ensures that state property and contract law may also be used to keep the property in compliance with LIHTC requirements for the full extended use period of at least 30 years. The restrictive covenant is governed as any other contract or recorded security instrument, with all attendant enforcement mechanisms available. In this case, the Declaration of Restrictive Covenants states:

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[4] The credit amount subject to recapture is small, only one-third in years two through 11, with a declining percentage each year until year 15. Instructions for IRS Form 8611.

> "The Owner acknowledges that the primary purpose for requiring compliance by the Owner with restrictions provided in this Declaration is to assure compliance of the Project and the Owner with IRC Section 42 and the applicable regulations, AND BY REASON THEREOF, THE OWNER IN CONSIDERATION FOR RECEIVING LOW-INCOME HOUSING TAX CREDITS FOR THIS PROJECT HEREBY AGREES AND CONSENTS THAT THE DEPARTMENT AND ANY INDIVIDUAL WHO MEETS THE INCOME LIMITATION APPLICABLE UNDER SECTION 42 (WHETHER PROSPECTIVE, PRESENT OR FORMER OCCUPANT) SHALL BE ENTITLED, FOR ANY BREACH OF THE PROVISIONS HEREOF, AND IN ADDITION TO ALL OTHER REMEDIES PROVIDED BY LAW OR IN EQUITY, TO ENFORCE SPECIFIC PERFORMANCE BY THE OWNER OF ITS OBLIGATIONS UNDER THIS DECLARATION IN A STATE COURT OF COMPETENT JURISDICTION. The Owner hereby further specifically acknowledges that the beneficiaries of the Owner's obligations hereunder cannot be adequately compensated by monetary damages in the event of any default hereunder."

(ER 8 at §8(b) (capitalization in original)). This clause in the declaration includes several key points: 1) the state has the right to enforce the agreement in state court; 2) any person eligible for tenancy may also enforce the agreement; 3) all remedies available under state law and under equity are available to enforce the agreement; and 4) monetary damages are not a sufficient remedy. Remedies available to the state for noncompliance include seeking specific performance, declaratory and injunctive relief, or receivership. See ORCP 80 (giving the court broad authority to appoint a receiver.) Although the state clearly has the authority to enforce the agreement in state court, it never attempted to do so, much less seek specific performance under real property and contract law, as specifically authorized by the covenant, given the stated inadequacy of monetary relief. Thus, the state should have used its power, as articulated in the restrictive covenant, to enforce the use restrictions and ensure that the building remained affordable for the required 30 years.

Further indicating its intent to create enforcement mechanisms to ensure compliance for the full extended use period, Congress mandated that low-income individuals, "whether prospective, present, or former occupants of the building," have "the right to enforce [the affordability restrictions] in any State court." 26 USC § 42(h)(6)(B)(ii). This tenant right to enforce is reiterated in the restrictive covenant. (ER 8 at §8(b)). Senator Danforth, in his testimony regarding the 1989 amendments to the tax credit program, stated "A permanent low-income housing tax credit coupled with the task force's recommended changes will enable the development community, tenants and the administering States to implement the low-income housing tax credit program more effectively." 135 Cong.Rec. S4502-3 (1989). In the wake of the state's failure to enforce the restrictions, the tenants' efforts here to use Congress' specifically designated tenant enforcement tool -- by filing claims seeking specific performance -- have been wholly eviscerated by the lower court's ruling.

Pursuant to these statutory enforcement mechanisms, the IRS developed regulations governing the LIHTC compliance monitoring system, one in which the state agency is required to engage in an ongoing process to ensure owners comply with the required extended use commitment. These regulations charge state housing agencies or their agents with monitoring and reporting noncompliance. 26 CFR § 1.42-5(a) (2009). An owner must certify each year that its property met program requirements during the preceding 12 months. 26 CFR § 1.42-5(c)(2009). If a property is found noncompliant, the housing agency must file Form 8823 with the IRS, indicating the reason for such a finding and whether or not the issue has been corrected. 26 CFR § 1.42-5(e)(3)(i). If the issue has not been corrected, the IRS, the

owner, and the state agency commence a process under which the owner is given time to come into compliance and recommendations on how to do so. See 26 CFR § 1.42-5(e). When the project is back in compliance, the state must resubmit Form 8823 indicating the correction. Id. In this case, the state took the unlawful measure of terminating a project from its extended use commitment when it found the project in noncompliance, instead of fully engaging in the interactive process assumed by statute and regulations. Instead, the state prematurely terminated the property from the LIHTC program without using all the tools available to enforce the federally-mandated agreement ensuring that the public actually received the long-term benefit of its substantial investment in the property.

D. Terminating a Property from the LIHTC Program for Noncompliance Creates Perverse Incentives for Owners.

Releasing a property from the extended use restrictions for noncompliance creates a perverse incentive for owners who have received tax credits in exchange for a long-term commitment to provide affordable housing. Regardless of the circumstances surrounding the noncompliance, a precedent allowing premature termination would promote the anomalous result that some owners may increase profits more by violating restrictions rather than by compliance. Congress has established enforcement mechanisms to ensure that an owner, having received the LIHTC tax benefits, follows the program's rules and public benefit restrictions. In contrast, premature termination from the program allows an owner to convert units to market-rate, which could be highly profitable, after having received millions of dollars in investment in the form of federal tax credits. In this case, the owner was

able to sell the unrestricted property for $5.4 million more than the purchase price after just a brief holding period. (Plaintiff's Opening Brief at 12). Requiring a State to pursue the legal remedies established by Congress to ensure the long-term affordability of LIHTC properties provides a more appropriate incentive to noncompliant owners, as Congress clearly intended.

III. CONCLUSION

Congress created the Low Income Housing Tax Credit program to provide long-term affordable housing. In doing so, it developed a structure by which the value of its investment would be realized through use restrictions and protected for the full extended use term through the specified enforcement scheme. That enforcement scheme includes recapture of the credits and a restrictive covenant on the property enforceable by both States and beneficiaries. Permitting termination in the case of noncompliance violates the LIHTC statute, flouts Congressional intent, perniciously rewards bad owners, and squanders precious federal investment in affordable housing – a vital resource to meet inexorably growing needs for millions of families. Because the law does not allow it, this Court must not sanction such a scheme, and should reverse the judgment below.

RESPECTFULLY SUBMITTED this _____ day of August 2009.

____

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CERTIFICATE OF FILING AND SERVICE

I certify, under penalty of perjury, that on the _____ day of August 2009, I filed the original and 13 copies of the BRIEF OF *AMICUS CURIAE* NATIONAL HOUSING LAW PROJECT with the Oregon Court of Appeals, State Court Administrator, Records Section, Supreme Court Building, Third Floor, 1163 State Street, Salem, OR 97301, by UPS pursuant to ORAP 1.35(d).

I further certify that on the _____ day of August 2009, I served two true copies of the BRIEF OF *AMICUS CURIAE* NATIONAL HOUSING LAW PROJECT by first class mail, postage prepaid, on each of the attorneys of record listed below.

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