21-35789

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMTAX HOLDINGS 260, LLC, an
Ohio limited liability company; et al.,

Plaintiffs-Appellants,

v.

WASHINGTON STATE HOUSING FINANCE COMMISSION,
a public body Corporate and politic of the State of Washington; et al.,

Defendants-Appellees,

and

MIKE PELLICCIOTTI and PEDRO ESPINOZA,

Defendants.

ON APPEAL FROM UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE
No. 2:20-cv-01698-BJR

BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), the *Amici Curiae* (collectively "***Amici***") state that there is no publicly held corporation that owns 10% or more of any of the *Amici*'s *stock*. The *Amici* further states Beacon Development Group is a subsidiary of HumanGood, a non-profit senior living provider.

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INTEREST OF THE *AMICI CURIAE* AND THE SOURCE OF THEIR AUTHORITY TO FILE

The *Amici*'s authority to file their brief resides in FRAP 29 and related Circuit Court Rules. Pursuant to Fed. R. App. P. 29(a)(4)(D), the 22 *Amici* respectfully refer the Court to ¶¶ 6 through 27 of their Notice of Motion and Motion for Leave to File an *Amicus* Brief in Support of Defendants-Appellees for the identity and brief description of each *amicus curiae*. (*See also*, Appendix A for an alphabetical list of the identity of each *amicus curiae* and a brief description of each organization's mission) The *Amici* include national, state, and local organizations, housing non-profits, and coalitions with decades of experience working with, investing in, developing, and managing affordable housing financed through the federal government's Low-Income Housing Tax Credit ("**LIHTC**") program. The *Amici* are interested in this case because they believe its outcome impacts the future building and maintenance of affordable housing developed under the LIHTC program, as well as the preservation of the LIHTC program's future sustainability in Washington state. The *Amici* submit the proposed *amicus curiae* brief (the "**A*micus* Brief**") to support the Washington State Housing Finance Commission's (the "**Commission**") important policy rule (the "**Transfer Policy**") designed to address a troubling trend negatively impacting the LIHTC program whereby (i) companies are purchasing, on a secondary market, tax credit investor interests in affordable housing communities developed under the LIHTC program, often in bulk,

and (ii) then exploiting those business interests to pursue outcomes not intended by the LIHTC program or the original parties, including tax credit investors, who developed the communities and contracted for a well-understood set of financial benefits. The *Amici* believe this trend: (i) has already negatively impacted the LIHTC program overall and continues to do so; (ii) disrupts the delicate balance struck by the program's incentives that facilitate the important public-private relationships foundational to the program's historic success; and (iii) ultimately deprives organizations providing affordable housing of resources designed expressly for them by Congress after the tax benefits central to the LIHTC program have been delivered to investors. The *Amici* request the Court affirm the District Court's dismissal of Plaintiffs-Appellants' Complaint with Prejudice so that the Transfer Policy can be implemented and utilized to safeguard future affordable housing.

REPRESENTATION STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(E)(i) through (iii), the *Amici* state that BC Davenport, LLC, through undersigned counsel, is authorized to file the brief, funded all aspects of it, and no other party contributed money to fund the brief.

ARGUMENT

I. INTRODUCTION

This *Amicus* Brief will aid the Court's resolution of this appeal by providing context illuminating the backdrop upon which the Transfer Policy was developed. The *Amici* believe the Court will benefit from insight into the (i) LIHTC program, (ii) the important property interest transfer rights negotiated in connection with entities created to develop and operate affordable housing under the LIHTC program, (iii) the detrimental impact that has increasingly arisen to disrupt these property interest transfer rights when businesses like Alden Torch Financial, LLC ("**Alden Torch**") purchase entities possessing some interest or control in entities operating under the LIHTC program through the secondary market addressed by the Transfer Policy, and (iv) how housing authorities like the Commission are best poised to address these problems, and are doing so around the county by utilizing rules similar to the Transfer Policy.

Plaintiffs-Appellants (the "**Alden Parties**") filed their appeal to prevent the Commission from implementing important policy measures designed to ensure the continued success and future sustainability of affordable housing communities developed under the LIHTC program in Washington state. The Alden Parties' opening brief, which the *Amici* believe consistently mischaracterizes the Commission's third iteration of a policy rule meant to safeguard the LIHTC

community in Washington, fails to offer insight into the root cause which led to the Transfer Policy. The Alden Parties similarly omit that the Transfer Policy is designed to address a troubling trend currently threatening affordable housing communities across the nation due to "**Aggregators**" now operating within and recognized by the LIHTC industry.

As discussed in greater detail below, the term "Aggregator" has been coined to refer to firms (like the Alden Parties) working systematically to (i) collect or control limited partner or non-managing member interests in entities formed to develop, own, and operate affordable housing under the LIHTC program ("**LIHTC entities**"); (ii) leverage those passive ownership interests against the sponsors who initially formed and have stewarded the LIHTC entity, typically as general partners or managing members; and (iii) generate previously unintended cash windfalls that are inconsistent with the negotiated agreements between the original parties and contrary to the legislative intent underlying the LIHTC program. (*See infra*, Section III)

Aggregators employ a myriad of disruptive outside-of-litigation strategies through what one court recognized as an "Aggregator Playbook" that employs negative tactics designed to usurp the carefully bargained-for exchanges that incentivize developers or sponsors to build affordable housing communities and participate in the LIHTC program in the first instance, thereby violating the LIHTC

program's intent and purpose. *See Hidden Hills Mgt., LLC v. Amtax Holdings, 114, LLC*, 2019 WL 3297251 at *10 (W.D. Wa. 2019) (noting Alden Torch "instructed two … forensic accountants to do a 'deep dive'" into partnership financials dating back nine years before Alden Torch's involvement) *aff'd,* No. 19-35861, 2021 WL 1116269 (9th Cir. 2021) (hereinafter, "***Hidden Hills***"); *CED Capital Holdings 2000 EB, L.L.C. v. CTCW Berkshire Club, L.L.C.* No. 2018-CA-013886-O, 2020 WL 6537072, at *6 ¶ 40, *11 ¶ 3 (Fla. Cir. Ct. Nov. 3, 2020) (recognizing party's actions were "[c]onsistent with … the Aggregator's playbook" that pursued "bad faith financial motivations"; also concluding that an increasing number of parties "come into LIHTC partnership agreements and attempt[] to extract value or proceeds that is not otherwise permitted under the operative contracts"—citing cases), *affirmed per curiam*, No. 5D20-2531, 2021 WL 5142108 (Fla. 5th DCA Nov. 5, 2021) (hereinafter "***CED Capital Holdings***").

The unavoidable effect of these efforts strips LIHTC participants from resources and benefits designed for them by Congress through their successful operation and management, including the residual value that may accumulate over time through real estate appreciation. Consequently, Aggregators deprive communities of built-up equity carefully stewarded by such developers or sponsors for well over a decade, thus threatening the incentives for future developer, sponsor, and actual investor participation which has been foundational to the public-private

relationships underpinning the LIHTC program's historic success. This is detrimental to the public interest, the LIHTC program, and its participants.

Moreover, Aggregators generally acquire their ownership interests or control through the secondary market *after* these federally subsidized affordable housing communities have been developed and operated under IRS and state-specific regulatory and compliance standards, but *before* the developments reach a critical milestone (the fifteen year "**Compliance Period**"). *See Hidden Hills*, 2019 WL 3297251 at *1 (Federal District Court's trial order noting that Aggregators are "not involved in the original structuring or financings of [LIHTC] projects[,]" *but* are nonetheless able to "purchase[] the right to manage the interests of [limited partners] … in the secondary market" and will pursue "foot fault[s]" if it could secure a windfall). Investors originally join LIHTC entities expressly for the tax credit exchanges at the heart of the LIHTC program, not the LIHTC project's residual value or cash flow, but Aggregators purchase LIHTC entity interests for the opposite purpose, in contradiction to the LIHTC program's design. (*See infra*, Section II.B) Further, Aggregators (i) do *not* invest any capital in or contribute any benefits to the affordable housing and, (ii) *have not been* subject to the regulatory scrutiny, oversight, or compliance otherwise required to receive a tax credit allocation by state agencies (like the Commission) who administer and safeguard the LIHTC program. Aggregators hope to continue to avoid regulatory oversight like the Transfer Policy

because it prevents them from improperly extracting residual value from affordable housing communities that the LIHTC program never intended to provide them (and it does so with precision, cutting off the problem at its source).

But state agencies across the country (like the Commission) are beginning to use their regulatory authority to address the Aggregator problem. The Transfer Policy modulates the secondary market to preserve the public interest by, for instance, preventing affordable housing and attendant ownership interests from being treated like derivative portfolios. *See AMTAX Holdings 260, LLC v. Washington State Housing Finance Commission*, 2021 WL 3738987, at *2 (W.D. Wash. 2021) (noting that the Transfer Policy "reserves the Commission's right to disallow a LIHTC transfer based on" many considerations aimed at preserving the LIHTC program's continued integrity) ("***WSHFC***"). Additionally, the Transfer Policy allows the Commission— who Congress empowered to regulate and administer the LIHTC program in Washington state, subject to its own policy objectives, priorities, and affordable housing needs—to objectively evaluate those who desire to enter and participate in existing LIHTC ownership entities that (i) were formed because the Commission had previously awarded tax benefits to them, and (ii) are already operating under the Commission's oversight.

Respectfully, the *Amici* believe that the District Court should be affirmed because the Commission's measures are reasonable, non-punitive, and aimed to

protect Washington's affordable housing communities, stakeholders, and participants. Moreover, the Commission's policy is in line with the federal requirement that the Commission issue a Qualified Allocation Plan ("QAP") and associated application and oversight requirements and procedures.

The *Amici* respectfully submit this brief to offer insight into the LIHTC program, Aggregators, and the Aggregator Playbook because they believe it may help inform the Court about the context and environment in which the Commission developed the Transfer Policy.

II. THE LIHTC PROGRAM

The LIHTC program's purpose is to fill an important gap in available housing by connecting investors with developers, non-profits, or other project sponsors to join in private enterprise enabled by the public through tax credit syndication. State housing authorities are essential in ensuring the LIHTC program is adequately administered, that the tax credits are appropriately dispersed, and that the LIHTC program is robust, healthy, and sustainable. Through this complex process, investors exchange money for the right to utilize tax credits and other tax benefits only available because a project sponsor secured them through a LIHTC entity via an extremely competitive process. Thus, investors participate precisely because of the available tax benefits, while project sponsors wishing to create and operate

affordable housing benefit through their time, effort, and skill in securing tax credits and putting investment exchanges to use by developing LIHTC housing.

These exchanges necessarily involve negotiations around when the LIHTC entity admits an investor, and nearly always involve lengthy agreements through which the applicable project sponsor bargains for an important property transfer right that becomes ripe after the Compliance Period. The post-Compliance Period property interest transfer is essential to freeing equity for needed repairs or improvements that has been built-up by project sponsors who successfully operate affordable housing, since the housing itself generates limited or even negative cash flow. The LIHTC program is thus designed to reward project sponsors' diligent stewardship over the LIHTC entity's development, operation, and maintenance of affordable housing with these post-Compliance and create a system that incentivizes reinvestment into LIHTC projects.

A. The Affordable Housing Shortage.

According to the National Low Income Housing Coalition ("**NLIHC**"), an *amicus curiae*, affordable housing is "key to reducing intergenerational poverty and increasing economic mobility." NLIHC, *Why We Care: The Problem*.[1] But there is a national shortage of more than 7 million affordable rental homes for the lowest-

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[1] https://nlihc.org/explore-issues/why-we-care/problem.

income households and the problem plagues every state. *Id.*; *see also* NLIHC, *The Gap: A Shortage of Affordable Homes*, at 1–2, Appendix A (March 2021) (hereinafter "**Gap Report**").[2] Worse still, the gap between affordability and availability is only increasing. According to the President of the National Council of State Housing Agencies, "[i]f current rent and income trends continue, the number of severely cost-burdened renters, those paying 50 percent or more of their income for rent, will reach nearly 15 million nationwide by 2025"—a "25-percent increase." *America's Affordable Housing Crisis: Challenges and Solutions: Senate Hearing 115-288 on S. 548 Before the S. Comm. on Finance*, 115th Cong. (2017) (hereinafter "**S. Hrg. 115-288**")[3] (Statement of Grant Whitaker, President, National Council of State Housing Agencies). Meanwhile, the United States also stands to "lose countless affordable homes to [market-rate] conversion and obsolescence." *Id.*

In Washington, the gap is among the most severe in the nation, with only 29 affordable and available rental homes for every 100 extremely low-income households. *See* Gap Report, at 1–2, Appendix A. At the same time, rent in Washington is rising much faster than wages—to afford a modest two-bedroom apartment in Washington as of January 1, 2021, an individual needs to make $29.31

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[2] https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2021.pdf.

[3] https://www.govinfo.gov/content/pkg/CHRG-115shrg30902/html/CHRG-115shrg30902.htm.

per hour or work 86 hours at the 2021 minimum wage of $13.69 (the minimum wage is now $14.49).[4]

The LIHTC program, however, has successfully placed over 3.2 million units in service since 1987 and is the federal government's primary and longest-running tool for the development of affordable rental housing. *See* Mark P. Keightley, *An Introduction to the Low-Income Housing Tax Credit*, CONGRESSIONAL RESEARCH SERVICE, at Summary and 1 (Jan. 26, 2021) (hereinafter, "**CRS Report RS22389**");[5] Mark P. Keightley, *The LIHTC Credit: Policy Issues*, CONGRESSIONAL RESEARCH SERVICE (Oct. 17, 2019);[6] HOUSING AND URBAN DEVELOPMENT, *LIHTC Credit Dataset*;[7] URBAN INSTITUTE, *The LIHTC Credit, How It Works and Who It Serves* (July 2018).[8] In Washington, the LIHTC program has led to the creation of over 78,000 units, housing over 158,000 people.[9]

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[4] NLIHC, *Out of Reach 2021: Washington*, https://reports.nlihc.org/oor/washington.

[5] https://sgp.fas.org/crs/misc/RS22389.pdf.

[6] https://sgp.fas.org/crs/misc/IF11335.pdf.

[7] https://www.huduser.gov/portal/datasets/lihtc.html.

[8] https://www.urban.org/sites/default/files/publication/98758/lithc_how_it_works_and_who_it_serves_final_2.pdf.

[9] https://wshfc.org/admin/30yearsLIHTC.pdf.

B. How the LIHTC Program Works and the Importance of State Housing Finance Agencies (like the Commission).

The LIHTC program, enacted in 1986 and implemented in 1987, was created to help alleviate this "severe shortage" of quality affordable housing. S. Hrg. 115-288 (Whitaker Statement); *see also* H.R. Rep. No. 101-247, 101st Cong., 1st Sess., at 1188 (1989) ("The committee believes that encouraging the provision of low-income housing is an important goal of national housing policy [and] that providing tax incentives to private investors to invest in low-income housing projects is the most appropriate way to achieve this aim."). It is the "largest [affordable housing] program in U.S. history …." Jill Khadduri *et al.*, *What Happens to Low-income housing Tax Credit Properties at Year 15 and Beyond?*, U.S. Department of Housing and Urban Development ("**HUD**"), at 2 (August 2012) (hereinafter, "**Year 15 HUD Report**").[10]

The LIHTC program is governed by §42 of the Internal Revenue Code ("**§42**"), certain Treasury Regulations, guidance from the U.S. Department of Treasury and the Internal Revenue Service (the "**IRS**"), and state-specific rules by designated housing agencies, like the Commission, in each state (collectively, the "**Tax Credit Rules**"). The program's key feature is the Low-Income Housing Tax Credit (the "**Housing Credit**"), which provides a dollar-for-dollar tax liability offset,

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[10] https://www.huduser.gov/publications/pdf/what_happens_lihtc_v2.pdf.

thus incentivizing institutional investors with large tax liabilities to invest capital in exchange for Housing Credits, and in turn, the development of affordable housing. *See, e.g.*, H.R. Rep. No. 101-247, 101st Cong., 1st Sess., at 1188 (1989) ("providing tax incentives to private investors to invest in low-income housing projects is the most appropriate way to achieve this aim.").

The Housing Credit is core to the program because Housing Credits are only useful to investors, who have sufficiently large, predictable tax liabilities to make use of them. The program thus facilitates investor participation since investors can only receive the benefit of Housing Credits by acquiring an ownership interest in the LIHTC entity in exchange for capital contributions that can then be used for project development. *Low-Income Housing Tax Credits: Affordable Housing Investment Opportunities for Banks*, Office of the Comptroller of the Currency (hereinafter "**Comptroller Report**"), at 3, 23 (March 2014)[11]; CRS Report RS22389 at Summary, 1, and 5; Year 15 HUD Report at 25.[12]

In a typical affordable housing project (a "**project**"), the owner of the project is organized as a limited partnership or limited liability company (the "**owner**

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[11] https://www.novoco.com/sites/default/files/atoms/files/occ_insights_lihtc_affordable_housing_investments_banks_032614.pdf.

[12] https://www.huduser.gov/publications/pdf/what_happens_lihtc_v2.pdf.

entity" or "**LIHTC entity**"),[13] in which one or more "**project sponsors**" act as the general partner or managing member of the owner entity and/or developer of the project. Comptroller Report at 3 and n.11, 16, 21; CRS Report RS22389 at 6; Year 15 HUD Report at 25. The project sponsor first obtains the right to claim the Housing Credits on behalf of the owner entity by engaging in a complex, "extremely competitive" application process administered by state housing finance agencies ("**HFAs**") or LIHTC allocating agencies ("**State Allocators**"), like the Commission. Comptroller Report at 24, CRS Report RS22389 at 4; Year 15 HUD Report at 56.

The federal government tasks HFAs or State Allocators with administering the LIHTC program according to federal law by, *inter alia*, funneling Housing Credits allocated to their state for LIHTC projects. CRS Report RS22389 at 4. In fulfilling their role, HFAs or State Allocators "have flexibility" to do so, and to ensure the LIHTC program's principles are preserved. *Id.* This requires developing "qualified allocation plans" ("**QAPs**") through which HFAs or State Allocators must, among other things, "set their own allocation priorities" or "place additional

[13] Projects are next most often structured through limited liability companies.

requirements on awardees," such as requiring developers to have certain experience and qualifications. *Id.*

HFAs or State Allocators also have a continuing responsibility to monitor and manage LIHTC participants during a LIHTC project's "Extended Use Period." *See* 26 U.S.C. §42(h)(6)(A)–(D); Comptroller Report at 3, 14. The Extended Use Period obligates compliance with low-income housing rent restrictions for fifteen additional years after the Compliance Period, and all LIHTC entities using Housing Credits secured after Congressional amendments to the LIHTC program in 1989 and 1990 must make this commitment. *See id*; *see also* H.R. Rep. 101-247, at 1187. The United States Government Accountability Office ("**GAO**") recognizes that HFAs or State Allocators are uniquely tasked to ensure compliance during the Extended Use Period. *See* GAO, *Low-Income Housing Tax Credit: Some Agency Practices Raise Concerns and IRS Could Improve Noncompliance Reporting and Data Collection*, at 32 (May 2015).[14] Moreover, the GAO has approved of nine HFAs or State Allocators who have "established criteria that deduct points from or affect a developer's future application if prior LIHTC developments had noncompliance issues during and beyond the 15-year compliance period"—calling such practice "a

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[14] https://www.gao.gov/assets/gao-16-360.pdf.

useful tool for promoting compliance as long as developers were interested in future projects." *Id.*

Similarly, the Commission's Transfer Policy is another "useful tool" for maintaining the health and well-being of the LIHTC program and affordable housing in Washington. The Transfer Policy provides flexibility, whereby it merely "reserves the Commission's right to disallow a LIHTC transfer" (*i.e.*, the secondary market exchange of investor interests) based on a holistic examination of the transferee, similar to the point system commended by GAO. *WSHFC*, 2021 WL 3738987 at *2 (noting also, that the Transfer Policy explicitly states that the Commission would not penalize anyone for exercising their legal rights, including through litigation). Accordingly, the Transfer Policy is also an important measure enabling the Commission to safeguard the LIHTC program in Washington and ensure participants continue to maintain affordability and other requirements mandated under the Extended Use Period.

Once Housing Credits are awarded, the owner entity claims them for a ten-year period following a "placed in service" date (the "**Credit Period**"); however, to avoid IRS recapture, the owner must comply with the applicable Tax Credit Rules for an additional five years (the Compliance Period). Comptroller Report at 3, 23; CRS Report RS22389 at 4; Year 15 HUD Report at xiii, 29. The project sponsor enters into an agreement with a tax credit investor offering the best available terms,

to admit the investor as a limited partner or investor member in the LIHTC entity, enabling the investor to benefit from Housing Credits awarded to the LIHTC entity, and other tax benefits in exchange for capital contributions. *See* Comptroller Report at 17 ("Direct investors—or syndicators, in the case of LIHTC funds—are responsible for negotiating rights and responsibilities in the partnership agreement with the general partner."). At the end of the Compliance Period, the Housing Credits are fully secured and the risk of Housing Credit recapture ceases. *Id.*

Ultimately, the amount of capital invested is based on the amount of Housing Credits and other tax benefits forecasted—*not* cash flow and resale profits (*i.e.*, residual value). Comptroller Report at 23; *see also id.* at 22 ("LIHTC investors receive financial benefits on their investments through the [Housing Credits], as well as the additional deductions from real estate losses."), at 24 (noting investors also "negotiate so-called tax credit adjusters … so investors can reduce their … capital contributions in the event that the general partner fails to meet certain benchmarks that affect the amount or timing of the tax credits"); CRS Report RS22389 at 6 ("Typically, investors do not expect their equity investment in a project to produce income. Instead, investors look to the credits, which will be used to offset their income tax liabilities, as their return on investment …. The larger the difference between the market price of the credits and their face value ($1.00), the larger the return to investors …. The right to claim [other] tax benefits … will [also] affect the

price investors are willing to pay."); Year 15 HUD Report at 25 ("LPs [(limited partners)] get financial returns primarily from tax benefits, including both tax credits and tax losses.").

Because a LIHTC entity's governing agreements virtually always allocate the benefit of Housing Credits and tax benefits in proportion to an investor's interest in the owner entity (typically 99.9%), which is based on its capital contributions, the tax credit investor virtually always receives a ninety-nine percent-plus passive ownership stake in the LIHTC entity—these are the benefit of the tax credit investor's bargain (not residual value or cash flow). *See* Comptroller Report at 3; CRS Report RS22389 at 5; Year 15 HUD Report at 25, 32. However, tax credit investors are merely passive (assuming zero liability or responsibility for the day-to-day goings on), while the project sponsors or developers (typically general partners or managing members) are accountable for the day-to-day management and operations of the owner entity controlling LIHTC project. *AMTAX Holdings 227, LLC v. Tenants' Dev. II Corp.*, 15 F.4th 551, 553 (1st Cir. 2021) ("large ownership percentage with an otherwise passive role"); CRS Report RS22389 at 6; Comptroller Report at 3; Year 15 HUD Report at 25. Thus, project sponsors or developers *assume virtually all risk and responsibility* for a project's development, operation, management, and compliance with the LIHTC program throughout the Compliance Period; they also secure and deliver the Housing Credits and other tax benefits for

which the investor bargained. Year 15 HUD Report at 25; *see also* Comptroller Report at 3, 16 ("The general partner of the LIHTC partnership plays a key role in the investment decision. The investor is entering into a 15-year partnership with the general partner, and it is important that the general partner has the capacity and expertise to develop and manage LIHTC properties throughout the life of the investment."); CRS Report RS22389 at 6.

Indeed, in the vast majority of cases the investors' return is pre-ordained, with *virtually zero risk*, since project sponsors or developers almost always provide investors with completion, operating, and tax credit delivery guarantees. Comptroller Report at 17, 24. Such agreements act as "guarantees on investment yields" for the tax credit investor—their benefit return is built in. *Id.*[15]

At the end of the Compliance Period ("**Year 15**" or "**back end**"), the owner entity has received all Housing Credits and no longer risks IRS recapture. Accordingly, the LIHTC program envisions tax credit investors exit the partnership around this time because "the greatest benefits of ownership" are "both gone and

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[15] Special LIHTC-specific IRS rules recognize and account for the tax consequences that would normally arises where there is "little or no residual value or return of capital" to tax credit investors. For example, 26 C.F.R. § 1.42-4 expressly excepts Housing Credit investments from section 183 of the Internal Revenue Code, which would otherwise disallow tax deductions and tax credits when an individual (or entity subject to pass-through taxation) engages in activity with no intent to profit but only to mitigate tax obligations.

safeguarded," leaving "little economic motivation to stay in the deal"—especially when "tax reporting and other administrative burdens" remain. Year 15 HUD Report at 25, 29 ("[I]t is in the interest of limited partners (LPs) to end their ownership role quickly after the compliance period ends. They have used up the tax credits by Year 10, and after Year 15 they no longer are at risk of IRS penalties …. [A]s a matter of policy, [investors] work to engineer an investor exit as quickly as possible after [Year 15]."); Comptroller Report at 3 ("Most often, investors exit between year 11 and 16, having collected [the Housing Credits]."); *accord AMTAX Holdings 227*, 15 F.4th at 553–54 ("At the end of the compliance period, the time may be ripe for the investor to bid farewell").

Simply put, "investors typically do not expect to receive their returns from cash flows, but rather from tax-related events," because that is what the tax credit investor bargains for—Housing Credits and all tax-related benefits that follow the Housing Credits (notably, property depreciation deductions). *See* Year 15 HUD Report at 11, 29, 82. In exchange, project sponsors, whether a qualified non-profit or profit-based developer, may be granted the right to receive a development fee, management fee, a portion of cash flow available from operations, and *crucially*, the right to acquire full control and ownership of the affordable housing community after

the Compliance Period so that they may continue operating and sustaining the community thereafter.

C. Buyouts at Year 15: Options and Rights of First Refusal Unique to LIHTC Partnerships.

To facilitate an investor's exit after the Compliance Period, governing agreements typically grant a property transfer right to the applicable project sponsor as a: (i) a buyout option (an "**option**"), wherein the project sponsor may purchase (a) the tax credit investor's limited partner interests in the owner entity (*i.e.*, personal property), *or* (b) the affordable housing property itself; and/or (ii) a right of first refusal (a "**ROFR**"), wherein a qualifying organization (typically a non-profit) holds a below-market purchase right provided the ROFR complies with safe harbor requirements established by Congress (the "**§42 ROFR**").

The §42 ROFR is a special ROFR that was created by the 1989 and 1990 amendments to the LIHTC program, which allows for a "minimum purchase price" based upon the assumption of debt on the property plus the payment of any associated taxes. *See* H.R. Rep. 101-247, at 1187; 26 U.S.C. §§ 42(h)(5)(C)(iii), (m)(1)(A)-(C). The §42 ROFR is also referred to as the "**debt-plus-taxes**" or "**$1 ROFR**" due to its unique below-market rate, nearly always well-below a property's fair market value. *Accord CommonBond Inv. Corp. v. Heartland Properties Equity Inv. Fund IV LLC*, 2014 WL 8266277, at *2 (Minn. Dist. Ct. Nov. 14, 2014) ("The ROFR is one of the primary economic incentives for the developer in a typical low-

income housing project"; "It would seem apparent that the LIHTC program provides a right of first refusal as an incentive for non-profit participation in a project.").

For purposes of this *amicus* brief, it is sufficient to note that Year 15 Buyouts are vital to the bargain wherein tax credit investors are admitted to the LIHTC entity, since this Year 15 transition frees up significant built-up equity due to real estate appreciation that can be utilized through loans used for needed repairs and improvements to the property, and further community reinvestment. *See* Year 15 HUD Report at 25, 29, 44–45, 76, and n.25 (describing investor entity exits and the related economics demonstrating that Housing Credits and tax benefits are the primary source of tax credit investor interest); *CommonBond Inv. Corp.*, 2014 WL 8266277 at *2.

However, Year 15 has become a fracture point for LIHTC entities because Aggregators have emerged with the effect of disrupting these Year 15 transition periods, thereby diverting appreciation, preventing reinvestment, and depriving bargained-for exchanges when due and needed—all in conflict with the intent of original participants' and the LIHTC program.

III. AGGREGATORS AND THE AGGREGATOR PLAYBOOK

Notwithstanding the purposefully designed balance orchestrated by lawmakers and the original participants in these unique "private-public partnership[s]," S. Hrg. 115-288 (Whitaker Statement), certain firms (Aggregators)

have emerged to frustrate post-Compliance Period property transfer rights by seeking unbargained-for windfalls; and the LIHTC industry and others have taken notice. *See* Beth Healy & Christine Willemsen, *Investors Mine for Profits In Affordable Housing; Leaving Thousands Of Tenants At Risk*, WBUR, April 29, 2021[16]; *Local Officials And Congressional Leaders Decry Investors Who Put Affordable Housing At Risk*, WBUR, May 7, 2021.[17] The Aggregator Playbook causes project sponsors to lose their carefully built-up equity, which has often been stewarded over fifteen-plus years, and Aggregators demand excessive payoffs in the process, directly contradicting the LIHTC program's design. *Id.*; Brandon Duong, *Losing Non-profit Control of Tax Credit Housing?*, Shelterforce (Oct. 16, 2020)[18]; Peter J. Reilly, *After The Low Income Housing Tax Credits Are Done Investors Want More*, Forbes (Jan. 13, 2021)[19]; Peter J. Reilly, *Low Income Housing Tax Credit – Aggregators Fight Sponsors In Year 15*, Forbes (Feb. 16, 2021).[20]

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[16] https://www.wbur.org/investigations/2021/04/29/investors-low-income-housing-boston-south-end.

[17] https://www.wbur.org/investigations/2021/05/07/low-income-housing-massachusetts-investor-washington-law-affordable-housing.

[18] https://shelterforce.org/2020/10/16/refusing-the-right-to-refuse/.

[19] https://www.forbes.com/sites/peterjreilly/2021/01/13/after-the-low-income-housing-tax-credits-are-done-investors-want-more/?sh=2d521f974765.

[20] https://www.forbes.com/sites/peterjreilly/2021/02/16/low-income-housing-tax-creditaggregators-fight-sponsors-in-year-15/?sh=59cb707f1dd5.

The *Amici* do not suggest that accessing courts to resolve good faith disputes through litigation should be punishable, but the Transfer Policy does not do this, and, as noted below, many courts have observed that Aggregators' business tactics violate the intentions and agreements of the original parties, contrary to the LIHTC program's goals and objectives. The cases below provide a window into this troubling outside-of-litigation conduct. Aggregator actions detrimentally impact state HFAs' or State Allocators' interest in ensuring the long-term sustainability and affordability of low-income housing generated through the program. These state regulators are accordingly authorized to take such conduct into account when awarding LIHTC or consenting to secondary transfers of LIHTC entity interests.

For instance, in *CED Capital Holdings*, a Florida Circuit Court addressed an Aggregator's attempt to extract a windfall from a general partner's Year 15 option. 2020 WL 6537072, at *5–6, 10. After the original limited partners sold their partnership interests to Hunt Capital Partners[21] ("**Hunt**"), Hunt was able to engage in what the Court concluded were "bad faith" removal efforts that "were intended to deprive" the general partner of its post-Compliance Period option rights. *Id.* More

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[21] Alden Torch spun off from Hunt in 2015, acquiring a portion of its housing platform in the process. *See* HUNT CAPITAL PARTNERS, *Back to Their* Roots, https://huntcapitalpartners.com/wp-content/uploads/2019/03/AHN-Fall-2018-Issue_Back-to-Their-Roots_2.pdf (Fall 2018).

specifically, after the general partner had shepherded "[a]ll tax credits awarded to the Project" to the investor limited partner, as intended by the original partners to the LIHTC partnership and which totaled nearly $14 million, Hunt used its secondary control to withhold consent to refinance the partnership's approaching $9.6 million loan maturity—all to leverage a higher buyout price for the general partner's Year 15 option or to defeat it. *Id.* at *2–3. The Aggregator pursued this course, despite having "never [been] involved in the original transaction establishing the Partnership or the construction of the Project, and [having] contributed no capital to the Project …." *Id.* The general partner and the partnership were effectively held hostage, risking default and potential foreclosure. *Id.* at *6. This is not an uncommon Aggregator tactic. *See*, *e.g.*, *Cottages of Stewartville L.P. v. American Tax Credit Corp. Fund, LP*, 55-CV-14-5113 (Minn. Dist. Ct. Dec. 22, 2016) (unreasonable and in violation of duty of good faith and fair dealing to withhold consent to refinance for the purpose of securing benefits not provided by the partnership agreement); *Pelican Rapids Leased Housing Assocs. I, LLC v. Broadway/Pelican Rapids, L.P.*, 56-CV-16-372 (Minn. Dist. Ct. Aug. 29, 2016) (vacated upon stipulation) (unreasonable to withhold consent for refinance to leverage benefits not intended under the operative LIHTC agreements).

Moreover, the court further concluded that this type of activity has become more common in the LIHTC industry, noting specifically that its decision was in

accord with no less than *nine* cases from other jurisdictions across the country in recent years. *CED Capital Holdings*, 2020 WL 6537072, at *10, ¶ 3 (citing cases after concluding "that this type of activity has become more common in the LIHTC industry…."); *see also id.* at *5–6 (noting that the Aggregator forced the general partner into a "Hobson's Choice" through its outside-of-litigation conduct).

Likewise, *Opa-Locka Community Development Corporation, Inc. v. HK Aswan, LLC* ("***Opa-Locka***")[22] also showcases the outside-of-court practices employed by Aggregators.[23] 2020 WL 4381624 (Fla. Cir. Ct. July 7, 2020), *affirmed per curiam*, No. 3D20-1651, 2021 WL 4190914 (Fla. 3d DCA Sept. 15, 2021). In *Opa-Locka*, a qualifying, non-profit ("**OLCDC**")—with a mission to "to transform under-resourced Florida communities into desirable, engaged neighborhoods by improving access to, among other things, affordable housing"—originally secured Housing Credits under the LIHTC program's 10% set-aside amendment.[24] *Opa-*

[22] The *CED Capital Holdings* Court found the Aggregator's conduct in *Opa-Locka* indicative of the larger Aggregator trend. *Id.* at *10, ¶ 3.

[23] Again, the §42 ROFR is an important property right that empowers qualifying, mission-driven non-profits to assume ownership of LIHTC property after Year 15, often for a modest debt-plus-taxes price enabled only by LIHTC-specific IRS rules. (*See supra*, Section II.C)

[24] Under the set-aside amendment, 10% of all Housing Credits *must* be awarded each year to projects sponsored by a 501(c)(3) "qualified non-profit" with a purpose-driven mission to foster low-income housing without for-profit interest involvement. 26 U.S.C. § 42(h)(5).

Locka, 2020 WL 4381624 at *1–3. OLCDC was then able to exchange such Housing Credits for a §42 ROFR in the LIHTC property. *Id.* During the Compliance Period, Hallkeen Management, Inc. ("**HKM**") purchased the LIHTC entity's investor position on a secondary market "for between $250,000 - $400,000"—thereby taking control of the non-managing member interests through an affiliate it created ("**HKA**") *Id.* Then, around Year 15, HKM "engaged in a sequence of events to execute their [plan] … [to accomplish] the ultimate fee simple sale of, or transfer of ownership interests in" the LIHTC property "to a new ownership entity." *Id.* at *2–4.

More specifically, HKM "solicit[ed] proposals from third parties to" sell the property and secured a letter of intent ("**LOI**") that offered "$21,000,000" for it—all without informing OLCDC, and despite HKM having "no real equity" in the LIHTC entity or its property "except through operating cash flow." *Id.* at *5 (internal citations omitted). It was only then that HKM notified OLCDC, who refused to consent to the sale and elected to exercise its §42 ROFR. *Id.* However, HKM, through its affiliate, then "refused to permit OLCDC" to acquire the property under its §42 ROFR. *Id.* at *6. Here, HKM's outside-of-litigation plan included (i) denying that OLCDC's §42 ROFR was triggered and (ii) claiming that the LOI did not constitute a binding offer capable of acceptance since no sale was actually set to occur, thus making the Congressionally sanctioned right meaningless. *Id.* The

trial court's comprehensive order rightly rejected HKM's scheme and empowered OLCDC's §42 ROFR. *Id.* at *8; *see also id.* at *9, *11 (noting that the court's conclusion to affirm OLCDC's §42 ROFR is in accord with "Florida common law" regarding traditional ROFRs, "or any common law for that matter," and that "common law across the nation undermines [HKM's] interpretation").

In sum, the outside-of-litigation tactics described above violate the intent and purpose of the LIHTC program and the role it has created for project sponsors. The knock-on effect hurts LIHTC entities, the willingness of project sponsors to continue to participate in the program, and therefore the overall affordable housing stock across the country. Thus, the LIHTC program's goals, and, ultimately, the residents who benefit from this important federal program are detrimentally impacted. And, as a Federal District Court from the Commonwealth of Virginia recently observed, this produces "bewildering and incorrect argument[s]" that are simply contrary to the LIHTC program. *Wesley Hous. Dev. Corp. of N. Virginia v. SunAmerica Hous. Fund 1171*, No. 1:21-CV-1011, 2021 WL 6061890, at *5 (E.D. Va. Dec. 22, 2021).

The *Amici* believe the Commission's well-designed Transfer Policy allows for modest regulatory oversight into the secondary market that is the source of Aggregator activity (which has been recognized across the country as detrimental to the LIHTC industry). The Transfer Policy simply provides a fair, narrowly tailored layer to the already-regulated LIHTC entities who have been awarded and are

utilizing Housing Credits as an important finance tool. Thus, the Transfer Policy fits squarely within the Commission's role, as empowered by Congress, to administer, monitor, and safeguard the LIHTC program in Washington state. *See* 26 U.S.C. § 42; IRS, *Market Segment Specialization Program Guideline: Low-Income Housing Credit*, 1999 WL 33458386, at *116 (Oct. 1999) ("**IRS LIHTC Guide**") ("a major portion of the administration has been delegated to the state housing credit agencies" who have "broad general authority").

IV. State Agencies' Efforts to Curtail Aggregators

Recognizing these hazards and the detriment Aggregators pose to the LIHTC program, its participants, and those in need of affordable housing across the nation, other HFAs or State Allocators are also working to preserve affordable housing, promote the public interest, and secure the future viability of the LIHTC system as envisioned by Congress and implemented by states like Washington via the Transfer Policy. The Commission is *not alone* in its effort to address the root cause facilitating Aggregators' accumulation of investor interests in affordable housing communities. *See, e.g.*, City of New York Department of Housing Preservation and Development, *2021 Low Income Housing Tax Credit Qualified Allocation Plan* (Sept. 2021)[25] (at pp. 19-20 of .pdf, noting that non-profit applicants

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[25] https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/2021-official-qualified-allocation-plan.pdf.

"must submit a letter of intent from a tax credit investor that clearly grants" a ROFR and that "the operation or partnership agreement … will … provide that the general partner may elect to do any of" three options that protect the non-profit from having its ROFR "unreasonably withheld, conditioned or delayed," where the tax credit investor's consent is required, or that bypass the tax credit investor's consent altogether); VIRGINIA HOUSING DEVELOPMENT AUTHORITY, *The Plan of the Virginia Housing Development Authority for the Allocation of Low-Income Housing Tax Credits*)[26] (at p. 10, noting that "the executive director is hereby authorized to require … limiting transfers of partnership or member interests or other actions detrimental to the continued provision of affordable housing …. A designated form of [ROFR] …. Debarment from the program of principals having demonstrated a history of conduct detrimental to long-term compliance with extended use agreements [in any state] ….").

Manifesting before the Court is Alden Torch's last-ditch effort to prevent the Commission's Transfer Policy despite that: (1) the Commission is empowered to administer and protect the LIHTC program in Washington to ensure its future sustainability (*see* 26 U.S.C. § 42; IRS LIHTC Guide, 1999 WL 33458386, at *116);

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26 https://www.vhda.com/BusinessPartners/MFDevelopers/LIHTCProgram/LowIncome%20Housing%20Tax%20Credit%20Program/2022-QAP.pdf.

(2) the Transfer Policy fairly addresses the Aggregator problem currently interfering with the LIHTC program's statutory framework—which was designed to ensure project sponsors benefit from the role provided to them by Congress—and thereby threatening the long-term affordability of low-income housing in Washington; and (3) the Transfer Policy is narrowly tailored to address this source, wherein investor interests are purchased, often in bulk like derivative investments, *after* the Commission has awarded Housing Credits. Aggregators affect not only the project sponsors whose expectations are uprooted, they also impact the affordable housing stock the Commission is charged to regulate, monitor, and ensure comply with IRS rules and regulations.

CONCLUSION

The *Amici* respectfully submit this *Amicus* Brief and thank this Court for its attention to these important issues.

Dated: March 22, 2022

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, *Amici* are not aware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document was served on all parties registered for electronic notification via the Court's electronic filing system on March 22, 2022.

/s/ David A. Davenport
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