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No. 96063-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE HOUSING FINANCE COMMISSION,

Petitioner,

v.

NATIONAL HOMEBUYERS FUND, INC., et al.,

Respondents.

**PETITIONER
WASHINGTON STATE HOUSING FINANCE COMMISSION'S
SUPPLEMENTAL BRIEF**

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I. INTRODUCTION

Petitioner the Washington State Housing Finance Commission (the “Commission”) is a public entity that the Washington Legislature has authorized to invoke special governmental privileges within the federal mortgage insurance program in Washington. The Commission exercises this authority to benefit Washington’s citizens, providing supportive loan terms and services for eligible low-income borrowers. Respondent National Homebuyers Fund, Inc. (“NHF”) is a California nonprofit corporation that has been invoking the same governmental privileges in Washington, but without any delegation of such authority. Based on this pretense, NHF has generated and sold over \$688 million in Washington mortgages, profiting from inflated rates and fees charged to unsuspecting low-income borrowers, to support lobbying efforts in California while putting Washington’s mortgage market at risk. The Commission brought this suit to challenge NHF’s lack of authority to operate in this state.

NHF has argued, and the Court of Appeals held, that the Commission lacks standing. As this Court’s cases make clear, however, an authorized state or local entity has standing to challenge an unauthorized competitor in its territory. Such authorization need not be exclusive or regulatory, as the Court of Appeals incorrectly reasoned. Rather, the inherent injury from NHF’s unauthorized competition is sufficient, in itself,

to confer standing. NHF has also caused many additional, discrete harms to the Commission, including diverting significant public revenues, further confirming the Commission's standing. Standing is also met here because the issue is one of public importance. As the Great Recession made clear, the need for responsible mortgage lending cannot be understated. Further, this Court is the best forum to resolve such a dispute over the allocation of state authority for purposes of a cooperative federal program.

On the merits, NHF has no defense for its conduct. Within the federal mortgage insurance program, governmental authority is required to provide down-payment assistance as a financially interested party. NHF has no such authority but has been claiming its down-payment funds are governmental, so the resulting mortgages receive federal insurance and can be sold for profit. NHF not only lacks any delegated authority from the Washington Legislature, it is barred under California law from operating in Washington in any capacity. The Commission respectfully requests this Court reverse the Court of Appeals and uphold the trial court's order declaring NHF's housing finance activities prohibited by law.

II. STATEMENT OF THE CASE

A. The Commission Acts as an Authorized Entity in the Federal Mortgage Insurance Program to Aid Low-Income Borrowers.

The Commission is a "public body" exercising "essential government functions" in Washington. RCW 43.180.040(1). It was created

to help make “affordable and decent housing available throughout the state.” RCW 43.180.010. One of its primary purposes is to address problems in the mortgage market “the private sector [cannot] correct,” including common “high interest rates” many citizens cannot afford. *Wash. State Hous. Fin. Comm’n v. O’Brien*, 100 Wn.2d 491, 496, 671 P.2d 247 (1983). The Commission thus focuses on special populations in need of assistance, such as first-time, low-income borrowers. CP 376.

The Commission is authorized to “[p]articipate fully in federal . . . governmental programs . . . to secure to itself and the people of the state the benefits of those programs,” including federal “housing programs” in particular. RCW 43.180.050(1)(e), .010. A key theme across such programs is the cooperative involvement of states, with a federal goal of vesting utmost “responsibility and flexibility” in state and local agencies like the Commission with “accountability” to the public. 42 U.S.C. § 1437(a); *see also, e.g.*, 42 U.S.C. § 1440; 12 U.S.C. § 1735f-6; *Res. Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 429, 327 P.3d 600 (2013).

This case concerns one particular federal housing program within this established cooperative framework: the mortgage insurance program. Under that program, the Federal Housing Administration (“FHA”), a part of the U.S. Department of Housing and Urban Development (“HUD”), “provides mortgage insurance on loans made by FHA-approved lenders” to

homebuyers in need of assistance. HUD, *The FHA*, HUD.Gov (2018).¹ This insurance gives lenders “protection against losses” so long as the loans meet certain FHA requirements. *Id.* One such requirement is that the homebuyer pay a minimum 3.5 percent down-payment, decreasing risk and promoting responsible lending. *See* 12 U.S.C. § 1709(b)(9)(A).

To prevent circumvention of the minimum down-payment rule, restrictions are also placed on the financial assistance a borrower may receive. For one thing, a “person or entity that financially benefits from the transaction” is not allowed to fund any portion of the minimum down-payment. *FHA: Proh’d Sources of Min. Cash Inv. Under NHA—Interp. Rule*, 77 Fed. Reg. 72219, 72221 (Dec. 5, 2012) (“FHA Rule”) (quoting 12 U.S.C. § 1709(b)(9)(C)). More broadly, gifts of down-payment funds are prohibited except from a specified list of acceptable sources. *See* Resp.’s Br., App. (“Resp.’s App.”) at 16-17 (HUD Handbook 4000.1 (2016)).²

Importantly, these restrictions on assistance do not apply to state or local government entities. *See* FHA Rule at 72220; Resp.’s App. at 17. That is because, unlike private nonprofits, some of which contributed to the Great Recession with abusive down-payment assistance schemes, state and local

¹ Available at https://www.hud.gov/program_offices/housing/fhahistory.

² HUD’s Handbook is “a consolidated, consistent, and comprehensive source of FHA Single Family Housing policy.” HUD, *Single Family Housing Policy Handbook*, HUD.Gov, https://www.hud.gov/program_offices/housing/sfh/handbook_4000-1.

governments have a strong track record of providing “various services to assist citizens within their jurisdictions in attaining affordable housing options.” FHA Rule at 72220-22. Thus, authorized state and local entities are at liberty to fund minimum down-payments “when acting in their governmental capacity” Resp.’s App. at 17.

The Commission is such an authorized state entity and offers numerous programs that help with the down-payment and closing costs of a home purchase. CP 376-77. These programs offer low- or no-interest loans to eligible borrowers, with payment deferred until the primary mortgage is paid off or the home is sold or refinanced. CP 386-87. The programs include prescreening, borrower education and counseling, and caps on lender fees. CP 374-75, 378-81. The Commission generates program revenues by selling the primary loans as securities. CP 404-06. All revenues are used to support Commission programs and provide more loans and services for Washington residents. CP 402-03, 409-11, 1347-50.

B. NHF Has Been Invoking Government Authority in this State to Generate and Sell Federally-Insured Mortgages for Profit.

NHF is a California nonprofit corporation that was created by Respondents Rural County Representatives of California (“RCRC”) and Golden State Finance Authority (“GSFA”) to sell federally insured mortgages nationwide at a profit. *See* CP 423, 434, 480-81, 530-39, 541. RCRC lobbies for its members, which are California rural counties, while

GSFA is a joint authority made up of the same counties that offers down-payment assistance to California borrowers. *See, e.g.*, CP 423-25, 435. NHF substantially funds RCRC's activities. *See* CP 425-27, 457-59, 1511.

To operate nationwide, NHF initially sought approval from HUD. CP 553, 566-69. HUD rejected NHF's proposal, noting it was unsure it even had "the authority to allow NHF to do business outside the physical jurisdictions of the Governmental entities that created NHF." CP 580, 471-73. HUD suggested that NHF consider partnering with authorized entities in other jurisdictions. *See, e.g.*, CP 594. NHF came to realize HUD has no procedures in place to adjudicate disputes over the allocation of state authority within the mortgage insurance program. CP 1425-34.

NHF proceeded to expand nationwide without HUD approval. *See* CP 486, 521-22. In 2014, NHF began offering down-payment assistance in a number of states outside California, including Washington. CP 486-87, 496. NHF's assistance is in the form of a gift, or what it has called a "grant," which covers the low-income borrower's minimum down-payment. CP 485-87, 630. NHF's "grant" funds are generated by setting high interest rates on the underlying mortgage loans, a fact NHF has actively kept hidden. *See* CP 1443-46; Resp.'s Br. at 16-17. NHF does not cap the fees lenders can charge and provides no education or other services for the borrowers. CP 510-11, 717. A higher rate means greater monthly payments for the life

of the loan, while larger fees give lenders an incentive to refer unsuspecting borrowers to NHF's program regardless of terms. CP 354, 623, 1317-19, 1321-22, 1326, 1328-29, 1381-82. NHF bundles and sells the subsidized mortgages as securities to generate revenues. CP 453-54, 502-07, 516-17.

When lenders originally indicated on HUD forms that the down-payment assistance NHF provided came from a nonprofit, the mortgages were not approved for federal insurance. CP 613-18. Without federal insurance backing, NHF could not bundle and sell the mortgages for a substantial profit. *See* CP 453-56, 469, 499-507, 510, 516-17, 523. NHF thus began telling lenders to indicate its funds come from an instrumentality of government. CP 613-18. NHF also actively marketed itself as governmental. *See, e.g.*, CP 630. NHF's marketing has confused many lenders and borrowers, some of whom misunderstood NHF to be a partner of the Commission. *See* CP 388-89, 415. In short, NHF is falsely claiming government authority in Washington to operate its program.

In 2014 and 2015, NHF generated and sold \$688,030,091 in Washington mortgages, making millions in profits. CP 633, 698. (The Court of Appeals incorrectly reported this figure as \$688 **thousand**. Op. at 9.) NHF's revenues are diverted from the Commission's programs, which provide supportive services for borrowers and additional aid for Washington residents. *See, e.g.*, CP 680-86. NHF, in contrast, sends its

revenues to California to fund RCRC's lobbying efforts and hefty officer salaries. *See* CP 423-30, 457-66, 526-27, 544, 671-72, 703-04, 1511.

C. After Learning NHF Was Pretending to Be a Governmental Program in Washington, the Commission Filed this Lawsuit.

The Commission filed this lawsuit in 2015, arguing that NHF was unlawfully invoking governmental authority in this state and interfering with the Commission's mission and programs. CP 1-2, 8-11. Based on NHF's lack of authority, the trial court declared that NHF's housing activities in Washington are prohibited by law. CP 1287. NHF appealed, and the Court of Appeals reversed solely on the basis that the Commission lacks standing, reasoning that the Commission is merely a participant in the mortgage insurance program and did not provide specific evidence of economic loss. *Op.* at 1-2, 6-10. This Court granted the Commission's petition for discretionary review on October 31, 2018.

III. ARGUMENT

A. The Commission Has Standing to Challenge NHF.

NHF's primary defense is that the Commission has no right to challenge its activities in court. As this Court's precedents make clear, however, the Commission's legislative authorization gives it standing to challenge NHF's lack of equivalent authority. NHF's conduct has also harmed the Commission in numerous discrete ways, any one of which is sufficient to establish injury for standing. Review on the merits is also

warranted because this case presents an issue of substantial public importance that would otherwise evade review.

1. As an authorized state entity, the Commission has standing to challenge NHF's unauthorized competition.

The purpose of standing is to ensure each case is “brought and defended by the parties whose rights and interests are at stake.” *Riverview Comm’y Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 893, 337 P.3d 1076 (2014). Typically, this means a claimant must show that it (1) falls within the “zone of interests” of a relevant law, and (2) has suffered “injury.” *State v. Johnson*, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014). This test is “not meant to be especially demanding.” *Seattle Bldg. & Constr. Trades Council v. Appr’ship & Trng. Council*, 129 Wn.2d 787, 797, 920 P.2d 581 (1996).

This Court repeatedly has held that authorized actors have standing, as a matter of law, to enjoin competitors lacking the same requisite authority. *See Puget Sound Traction, Light & Pwr. Co. v. Grassmeyer*, 102 Wash. 482, 489-91, 173 P. 504 (1918) (noting someone authorized to conduct a regulated business “is entitled to injunctive relief” against anyone “who assumes to exercise the privilege . . . in the absence of authority”); *Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 416-17, 456 P.2d 1011 (1969) (holding “licensed members of a . . . trade . . . may [] utilize the courts to prevent unlicensed persons from engaging in the . . . trade”). In

such cases, the claimant falls within the zone of interests of the laws authorizing its activities, while the presence of an allegedly unauthorized competitor qualifies as injury. *See Day*, 76 Wn.2d at 417 (explaining that authorized actor had a legal “right” to enjoin others and that presence of allegedly unauthorized competitor was “actual and substantial injury”).

Here, the Washington Legislature has authorized the Commission to participate as a government entity in the federal mortgage insurance program in this state. *See* RCW 43.180.010, .040 (creating Commission to perform “recognized governmental function” of assisting with affordable housing and providing “affordable rates” through federal programs); RCW 43.180.050(1)(d)-(e), .900 (empowering Commission to “[p]articipate fully” in federal housing programs for the state and to provide “loans for down payment assistance”). As in *Puget Sound* and *Day*, the Commission’s authorization to operate in a restricted market—here, as an authorized government entity in the mortgage insurance program—gives it standing to challenge a competitor as unauthorized. In particular, the Commission falls in the zone of interests of its authorizing statutes, and NHF’s invocation of competing authority qualifies as a cognizable injury. The Court of Appeals’ opinion did not even address this controlling authority. *See Op.* at 7-8.³

³ In addition to its authorizing statutes, the Commission also falls within the zone of interests protected by both federal and California law. *See Resp.’s Br.* at 42-46.

In a parallel line of cases, this Court has also made clear that an authorized government agency may challenge another entity for engaging in unauthorized governmental competition in its territory. *See Skagit Cty. Pub. Hosp. Dist. No. 304 v. Skagit Cty. Pub. Hosp. Dist. No. 1*, 177 Wn.2d 718, 723-27, 305 P.3d 1079 (2013) (public hospital district); *Alderwood Water Dist. v. Pope & Talbot, Inc.*, 62 Wn.2d 319, 321, 382 P.2d 639 (1963) (water district). The Court of Appeals distinguished these cases on the basis that they involved competition by other public entities, whereas NHF is a nonprofit. *Op.* at 9 n.4. But this misses the point: NHF is engaging in activities that require governmental authority and is claiming the mantle of being an instrumentality of government. *Skagit* and *Alderwood* reinforce that the Commission, which has been delegated government authority, has standing to challenge the interference of NHF, which is feigning equivalent authority to legitimize its operations.

The Court of Appeals also reasoned that the Commission cannot satisfy the zone-of-interests requirement because it lacks a monopoly or regulatory authority in the mortgage insurance program. *Op.* at 7-8. But neither type of authority is required to establish standing. First, the mere fact that the legislature has delegated similar authority to local Washington government agencies does not bar the Commission from challenging **NHF's** lack of authority. An authorized actor has standing whether its

authority is singular or shared—in either case, it falls within the zone of interests and may challenge an unauthorized competitor. *See Puget Sound*, 102 Wash. at 490 (explaining that sole authority is not required). Second, a claimant’s authority need not be regulatory either. The Commission does not seek to regulate NHF, but instead to exclude it from a restricted domain in which the Commission, and not NHF, has been authorized to operate. This Court’s cases confirm the Commission’s delegated authority, standing alone, is sufficient for this purpose. *See, e.g., Day*, 76 Wn.2d at 414-16.

Finally, the Court of Appeals wrongly concluded the Commission’s basis for standing improperly depends on the merits. Op. at 8-9 (citing *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)). To begin with, *To-Ro* does not indicate standing cannot overlap with the merits. *See* 144 Wn.2d at 411 (requiring only that claimant’s “interests” be “direct and substantial”). Moreover, this Court has held that when standing and the merits overlap, the merits should be adjudicated. *See Wash. Ed. Ass’n v. Shelton Sch. Dist. No 309*, 93 Wn.2d 783, 790-91, 613 P.2d 769 (1980) (holding plaintiffs were “presumably” injured if claim was valid and thus had a “right to a decision . . . on the merits”). In any case, the Commission’s standing here is based on its own delegated authority, which is undisputed and distinct from the merits of NHF’s lack of equivalent authority.

2. NHF's housing finance activities actually and prospectively harm both the Commission and the public interest.

Beyond the inherent injury to the Commission from NHF's competition as recognized in *Puget Sound and Day*, the Commission has identified numerous additional and discrete harms that only confirm the Commission's standing in this case. The injury requirement is not a demanding evidentiary burden—even a mere “potential threat” qualifies. *City of Burlington v. Wash. State Liquor Ctrl. Bd.*, 187 Wn. App. 853, 874, 351 P.3d 875 (2015); *see also United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973) (noting even an “identifiable trifle is enough”). Here, the Commission has identified numerous qualifying injuries.

First, NHF is diverting revenues from the Commission's public programs. The record shows that when NHF previously suspended its program, lenders switched to the Commission's programs in direct response. CP 680-86. This direct correlation “supports an inference” that NHF diverted revenues, which is more than enough for standing. *City of Burlington*, 187 Wn. App. at 868-73. Unlike the Commission, which directs all of its revenues to support Washington residents, NHF instead spends its millions of dollars in revenues on RCRC's special-interest lobbying and hefty salaries in California. *See, e.g.*, CP 457-66, 526-27, 671-72, 703-04.

Second, NHF's activities generate confusion among borrowers and lenders regarding NHF's status and relationship to the Commission. *See* CP 388-89, 415, 512-13, 521-22, 649-51, 875 (at 66:1-21).

Third, NHF is harming low-income borrowers in Washington with disadvantageous terms and no homebuyer education, thus increasing the risk of defaults. *See, e.g.*, CP 389, 511, 1317-19, 1321-22, 1326, 1361-64; Resp.'s Br. at 17 n.4. As a public agency, the Commission suffers a representative injury when the citizens and residents it serves are harmed. *See* Pet. for Rev. at 19 (citing cases).

Fourth, NHF is thwarting the express preference of the Commission and the Washington Legislature for loans, rather than gifts or 'grants', to low-income borrowers receiving aid. *See* RCW 43.180.050(1)(d) (directing Commission to "[m]ake **loans** for down payment assistance to home buyers" (emphasis added)). The Commission has explained why loans are deemed superior in this context for numerous policy reasons. *See* Pet. for Rev. at 17-18; CP 402-03, 409-11, 575. NHF's conflicting approach is sufficient in itself to show injury to the Commission. *See Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 653, 278 P.3d 632 (2012) (claimant had standing even though it had "not suffered economic loss" because its stated "goals" could "reasonably be impacted").

Finally, NHF's harmful conduct risks serious disruption in Washington's housing market, given the sheer volume of mortgages at issue (\$688 million in 2014 and 2015 alone). CP 633, 698; Ruling Denying Em. Mot. at 3 (Mar. 22, 2017) (denying NHF's motion for emergency stay due to "harm" to the Commission from NHF's continuing operations, including "diversion of revenues" and resulting disruption to the mortgage market).

Ignoring these multiple injuries to the Commission, the Court of Appeals held the Commission failed to show sufficient injury for standing because it did not offer "specific evidence of economic loss" and suffered only a "little loss of market share" from NHF's activities. Op. at 10. The court's singular focus on "economic loss" was incorrect. *See Substance Abuse*, 174 Wn.2d at 653 (noting "the challenged action must have caused the challenger an injury in fact, economic **or otherwise**" (emphasis added)). And even as to economic loss, the court ignored that mere potential loss is sufficient to show injury, as long as the claimant has a "distinct pecuniary interest" at risk. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 25, 978 P.2d 481 (1999); *Substance Abuse*, 174 Wn.2d at 653; *City of Burlington*, 187 Wn. App. at 874. Here, the Commission has a distinct financial interest at risk, given NHF's directly competing mortgage finance activities. And though not required for standing, the record shows that the Commission has already suffered actual economic loss as a result of NHF's

unauthorized operations. *See* CP 680-86. The economic loss at issue here is particularly compelling in that it directly hinders the Commission's ability to provide ongoing benefits and services to Washington residents.

3. This dispute presents an issue of substantial public importance that would otherwise evade review.

Standing is also met here because this case presents an issue of substantial public importance. Not only is the standing inquiry far more "liberal" when an "important issue is at stake," but importance alone can provide a basis for standing where such issues would otherwise evade review. *See, e.g., State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005) (internal quotes omitted). Washington courts will resolve a dispute if the public interest sufficiently inheres in "the subject matter" and "would be enhanced by reviewing the case." *Kitsap Cty. v. Smith*, 143 Wn. App. 893, 908 & n.18, 180 P.3d 834 (2008) (internal quotes omitted).

Here, NHF is jeopardizing a statutory scheme that provides safe and affordable housing for Washingtonians, harming low-income borrowers and risking substantial disruption to Washington's housing market. CP 633, 698, 1317-19, 1321-22, 1326. This has serious implications for the public interest. *See* RCW 43.180.010 (finding that "[d]ecent housing for the people of our state is a most important public concern"); *Wash. State Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 914,

917-18, 949 P.2d 1291 (1997) (noting provision of housing has “major public importance”). The 2008 housing crisis and ensuing Great Recession, which resulted in part from irresponsible and improper down-payment schemes, show why misconduct in this area must be addressed promptly. *See* FHA Rule; *O’Brien*, 100 Wn.2d at 493 (noting Commission programs help prevent a “downward spiral effect on the state’s economy”).

Moreover, this Court is the most appropriate and only forum available to resolve this dispute. The allocation of state and local government authority in Washington is an issue “peculiarly within the province of the courts of this state,” even when that authority intersects with a federal program. *City of Tacoma v. Taxpayers of Tacoma*, 49 Wn.2d 781, 791, 307 P.2d 567 (1957); *Pet. for Rev.* at 15 & n.3. The Court of Appeals was incorrect in stating that HUD’s Mortgagee Review Board provides an alternate forum for review. *Op.* at 8. That body oversees lenders only, does not have jurisdiction over entities like NHF or the Commission, and is not equipped to adjudicate disputes over state authority. *See* 12 U.S.C. §§ 1707(b), 1708(c)(1); *see also* *Resp.’s Supp. Br. to Ct. App.* at 9-12. Indeed, the very reason NHF was emboldened to expand into Washington was because HUD has no procedures in place to adjudicate NHF’s lack of authority. CP 580, 1425-27, 1430-34. HUD officials have expressed agreement with the Commission and are monitoring the outcome of this

suit. CP 1345-46, 1388-90, 1394-95, 1450-51. The public importance of this case is an independent basis for this Court to decide the merits.

B. NHF Lacks the Requisite Governmental Authority It Has Invoked for its Operations in Washington.

NHF has no defense on the merits for its unlawful conduct. Within the mortgage insurance program, state or local governmental authority is required to provide down-payment assistance as a financially interested party. Resp.'s Br. at 22-26. Washington has authorized the Commission and local authorities, not NHF, to exercise such authority in Washington. Resp.'s Br. at 26-31. It is undisputed that NHF has no such authority but has been telling lenders in this state that its down-payment funds are governmental, so that the resulting mortgages receive federal insurance and can be bundled and sold for profit. *See* CP 613-18. The trial court properly declared NHF's operations to be unlawful.

NHF has argued it does not qualify as "financially interested" in the mortgage transactions it generates, because it profits only on the secondary market. NHF says that this means it does not need state or local authority for its operations. But the memo NHF cites on this point stands only for the proposition that "a **governmental** entity" may sell mortgages on the secondary market to support its programs. Apps.' Reply Br., App. at 14, 15 (emphasis added); *see also* Resp.'s Supp. Br. to Ct. App. at 13-15. HUD has separately emphasized that any non-governmental party that financially

benefits “directly **or indirectly**” may not subsidize minimum down-payments. Resp.’s App. at 17 (emphasis added). In any case, NHF also has a direct interest in the mortgage transactions it generates, given that it secures the primary loans for itself at the outset. CP 453-54. More importantly, NHF’s entire argument is belied by the undisputed fact that it has designated its funds as governmental to generate its revenues. CP 613-18. This alone is sufficient to entitle the Commission to a declaration that NHF lacks appropriate authority.

NHF has argued it is “not acting in a governmental capacity.” Ans. to Pet. at 12. The problem is that NHF is claiming its down-payment funds are governmental. Again, the reason NHF has done this is that only authorized entities may subsidize minimum down-payments as financially interested parties, specifically “within their jurisdictions,” FHA Rule at 72220, and only “when acting **in their governmental capacity**,” Resp.’s App. at 17 (emphasis added). Previously, NHF indicated it relies “on its status as a governmental or public entity” to provide down-payment assistance in Washington, and admitted its allegedly governmental status is what “renders it a permissible source of gift assistance.” CP 776, 781. Yet NHF has no such status in Washington.

NHF not only lacks the requisite delegation of authority from the Washington Legislature for its operations here, it is also separately

prohibited under California law from operating in Washington in any capacity. Resp.'s Br. at 31-39. Under California law, the counties underlying NHF are barred from conducting housing finance activities outside California, even in a proprietary capacity, and thus cannot authorize NHF to do so. *See id.* (detailing California statutory and case law). Simply put, a scheme among counties to generate revenues from extraterritorial activities entirely unrelated to any of their own municipal purposes is inherently unlawful. *See id.* For this additional reason, the trial court rightly declared NHF's activities in Washington prohibited by law.

IV. CONCLUSION

As a state body authorized to exercise governmental privileges within the federal mortgage insurance program in Washington, the Commission has standing to challenge NHF's unauthorized interference. On that basis, and to protect the Commission and Washington citizens from numerous harms, including potential disruption to Washington's mortgage market, this Court should adjudicate the merits of this dispute. On the merits, NHF has no leg to stand on. NHF's operations in Washington require governmental authority, which NHF has claimed to have. But NHF has none. Accordingly, the Commission respectfully requests that this Court reverse the Court of Appeals and affirm the trial court's declaration that NHF's operations in Washington are prohibited by law.

RESPECTFULLY SUBMITTED this 14th day of January, 2019.

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PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to this action. On the 14th day of January, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of January, 2019.



Tricia O'Konek

RCW 43.180.010**Declaration of public policies—Purpose.**

It is declared to be the public policy of the state and a recognized governmental function to assist in making affordable and decent housing available throughout the state and by so doing to contribute to the general welfare. Decent housing for the people of our state is a most important public concern. Interest rates and construction costs have made it impossible for many Washington citizens to purchase their own homes. Older people, disabled persons, and low and moderate-income families often cannot afford to rent decent housing. There exists throughout the state a serious shortage of safe, sanitary and energy efficient housing available at prices within the financial means of our citizens. General economic development within the state is also impeded by a lack of affordable housing. The state's economy, which is dependent on the timber, wood products, and construction industries, has been damaged by inadequate investment in housing construction and rehabilitation. The result has been high unemployment and economic hardship affecting the prosperity of all the people of the state, particularly those in the wood products industry.

It is the purpose of this chapter to establish a state housing finance commission to act as a financial conduit which, without using public funds or lending the credit of the state or local government, can issue nonrecourse revenue bonds and participate in federal, state, and local housing programs and thereby make additional funds available at affordable rates to help provide housing throughout the state. It is also a primary purpose of this chapter to encourage the use of Washington state forest products in residential construction. This chapter is enacted to accomplish these and related purposes and shall be liberally construed to carry out its purposes and objectives.

[1983 c 161 § 1.]

RCW 43.180.040

Commission created.

(1) There is hereby established a public body corporate and politic, with perpetual corporate succession, to be known as the Washington state housing finance commission. The commission is an instrumentality of the state exercising essential government functions and, for purposes of the code, acts as a constituted authority on behalf of the state when it issues bonds pursuant to this chapter. The commission is a "public body" within the meaning of RCW 39.53.010.

(2) The commission shall consist of the following voting members:

(a) The state treasurer, ex officio;

(b) The *director of community, trade, and economic development, ex officio;

(c) An elected local government official, ex officio, with experience in local housing programs, who shall be appointed by the governor with the consent of the senate;

(d) A representative of housing consumer interests, appointed by the governor with the consent of the senate;

(e) A representative of labor interests, appointed by the governor, with the consent of the senate, after consultation with representatives of organized labor;

(f) A representative of low-income persons, appointed by the governor with the consent of the senate;

(g) Five members of the public appointed by the governor, with the consent of the senate, on the basis of geographic distribution and their expertise in housing, real estate, finance, energy efficiency, or construction, one of whom shall be appointed by the governor as chair of the commission and who shall serve on the commission and as chair of the commission at the pleasure of the governor.

The term of the persons appointed by the governor, other than the chair, shall be four years from the date of their appointment, except that the terms of three of the initial appointees shall be for two years from the date of their appointment. The governor shall designate the appointees who will serve the two-year terms. An appointee may be removed by the governor for cause pursuant to RCW 43.06.070 and 43.06.080. The governor shall fill any vacancy in an appointed position by appointment for the remainder of the unexpired term. If the **department of community development is abolished, the resulting vacancy shall be filled by a state official who shall be appointed to the commission by the governor. If this official occupies an office or position for which senate confirmation is not required, then his or her appointment to the commission shall be subject to the consent of the senate. The members of the commission shall be compensated in accordance with RCW 43.03.240 and may be reimbursed, solely from the funds of the commission, for expenses incurred in the discharge of their duties under this chapter, subject to the provisions of RCW 43.03.050 and 43.03.060. A majority of the commission constitutes a quorum. Designees shall be appointed in such manner and shall exercise such powers as are specified by the rules of the commission.

(3) The commission may adopt an official seal and may select from its membership a vice chair, a secretary, and a treasurer. The commission shall establish rules concerning its exercise of the powers authorized by this chapter. The rules shall be adopted in conformance with chapter 34.05 RCW.

[1995 c 399 § 98; 1985 c 6 § 14; 1984 c 287 § 90; 1983 c 161 § 4.]

NOTES:

Reviser's note: *(1) The "director of community, trade, and economic development" was changed to the "director of commerce" by 2009 c 565.

******(2) Powers, duties, and functions of the department of community development and the department of trade and economic development were transferred to the department of community, trade, and economic development by 1993 c 280, effective July 1, 1994. The department of community, trade, and economic development was renamed the department of commerce by 2009 c 565.

Legislative findings—Severability—Effective date—1984 c 287: See notes following RCW **43.03.220**.

RCW 43.180.050**Housing financing powers—Annual audit.**

(1) In addition to other powers and duties prescribed in this chapter, and in furtherance of the purposes of this chapter to provide decent, safe, sanitary, and affordable housing for eligible persons, the commission is empowered to:

- (a) Issue bonds in accordance with this chapter;
- (b) Invest in, purchase, or make commitments to purchase or take assignments from mortgage lenders of mortgages or mortgage loans;
- (c) Make loans to or deposits with mortgage lenders for the purpose of making mortgage loans;
- (d) Make loans for down payment assistance to home buyers in conjunction with other commission programs; and
- (e) Participate fully in federal and other governmental programs and to take such actions as are necessary and consistent with this chapter to secure to itself and the people of the state the benefits of those programs and to meet their requirements, including such actions as the commission considers appropriate in order to have the interest payments on its bonds and other obligations treated as tax exempt under the code.

(2) The commission shall establish eligibility standards for eligible persons, considering at least the following factors:

- (a) Income;
- (b) Family size;
- (c) Cost, condition, and energy efficiency of available residential housing;
- (d) Availability of decent, safe, and sanitary housing;
- (e) Age or infirmity; and
- (f) Applicable federal, state, and local requirements.

The state auditor shall audit the books, records, and affairs of the commission annually to determine, among other things, if the use of bond proceeds complies with the general plan of housing finance objectives including compliance with the objective for the use of financing assistance for implementation of cost-effective energy efficiency measures in dwellings.

[**2013 c 13 § 1**; **1986 c 264 § 1**; **1983 c 161 § 5**.]

NOTES:

Effective date—2013 c 13: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 17, 2013]." [**2013 c 13 § 2**.]

RCW 43.180.900**Conflict with federal requirements.**

If any part of this chapter is found to be in conflict with federal requirements which are a prescribed condition to the allocation of federal funds to the state, the conflicting part of this chapter is hereby declared to be inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and such finding or determination shall not affect the operation of the remainder of this chapter in its application to the agencies concerned. The rules under this chapter shall meet federal requirements which are a necessary condition to the receipt of federal funds by the state.

[1983 c 161 § 21.]

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