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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.

**SUPPLEMENTAL BRIEF OF RESPONDENTS
NATIONAL HOMEBUYERS FUND, INC., GOLDEN STATE
FINANCE AUTHORITY, AND RURAL COUNTY
REPRESENTATIVES OF CALIFORNIA**

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. SUPPLEMENTAL STATEMENT OF THE CASE..... 2

III. SUMMARY OF SUPPLEMENTAL ARGUMENT 5

IV. SUPPLEMENTAL ARGUMENT 6

 A. HUD’s Underwriting of Private Loans Does Not
 Involve a System of Cooperative Federalism 6

 B. A Zone of Interest Analysis Must Be Based on
 a Law the Defendant Is Allegedly Violating 9

 C. Loss of Potential Business to Competition Is Not
 a Legally Protected Interest That Creates Standing 14

 D. The Court Should Decline to Issue an
 Advisory Opinion..... 19

V. CONCLUSION..... 20

APPENDIX

TABLE OF AUTHORITIES

Cases

Bankhead v. Tacoma,
23 Wn. App. 631, 597 P.2d 920 (1979)..... 14

Burns v. State,
20 Wn. App. 585, 581 P. 2d 1069 (1978)..... 7

Burroughs v. Hills,
741 F.2d 1525 (7th Cir. 1984) 12

Day v. Inland Empire Optical, Inc.,
76 Wn.2d 407, 456 P.2d 1011 (1969)..... 17, 18

*Dir., Office of Workers’ Comp. Programs, Dep’t of Labor v.
Newport News Shipbuilding & Dry Dock Co.*,
514 U.S. 122, 115 S. Ct. 1278, 131 L. Ed. 2d 160 (1995)..... 11

Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake,
150 Wn.2d 791, 83 P.3d 419 (2004)..... 5, 10, 13

Hardin v. Kentucky Utilities Co.,
390 U.S. 1, 88 S. Ct. 651, 19 L. Ed. 2d 787 (1968)..... 15

Hayes v. M & T Mortg. Corp.,
389 Ill. App. 3d 388, 329 Ill. Dec. 440,
906 N.E.2d 638 (2009) 12

King v. Smith,
392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968)..... 7

Lankford v. Sherman,
451 F.3d 496 (8th Cir. 2006) 7

Lea Cty. Elec. Co-op., Inc. v. City of Plains,
373 S.W.2d 90 (Tex. Civ. App. 1963)..... 16

League of Educ. Voters v. State,
176 Wn.2d 808, 295 P.3d 743 (2013)..... 19

<i>Pac. Marine Ins. Co. v. Dep't of Revenue</i> , 181 Wn. App. 730, 329 P.3d 101 (2014).....	14
<i>Puget Sound Traction, Light & Pwr. Co. v. Grassmeyer</i> , 102 Wash. 482, 173 P. 504 (1918)	18
<i>Resident Action Council v. Seattle Housing Auth.</i> , 177 Wn.2d 417, 327 P.3d 600 (2013).....	7
<i>Seattle Bldg. & Constr. Trades Council v.</i> <i>Apprenticeship & Training Council</i> , 129 Wn.2d 787, 920 P.2d 581 (1996).....	16, 17
<i>Snohomish County v. Anderson</i> , 124 Wn.2d 834, 881 P.2d 240 (1994).....	19
<i>State of Utah v. Babbitt</i> , 137 F.3d 1193 (10th Cir. 1998)	14
<i>Tallahatchie Valley Elec. Power Ass'n v.</i> <i>Mississippi Propane Gas Ass'n, Inc.</i> , 812 So. 2d 912 (Miss. 2002).....	15
<i>Talton v. BAC Home Loans Servicing LP</i> , 839 F. Supp. 2d 896 (E.D. Mich. 2012).....	12
<i>Three Rivers Ctr. for Indep. Living, Inc. v. Hous. Auth.</i> , 382 F.3d 412 (3d Cir. 2004)	12
<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403, 27 P.3d 1149 (2001).....	19
<i>United States v. Hauck</i> , 980 F.2d 611 (10th Cir. 1992)	12
<i>Washington State Human Rights Comm'n ex rel. Spangenberg v.</i> <i>Cheney Sch. Dist. No. 30</i> , 97 Wn.2d 118, 641 P.2d 163 (1982).....	11
<i>Wells Fargo Home Mortg., Inc. v. Neal</i> , 398 Md. 705, 922 A.2d 538 (2007)	12

Statutes

12 U.S.C. § 1708..... 2, 3, 8

12 U.S.C. § 1709..... 2

26 U.S.C. § 115..... 3

Chapter RCW 7.24..... 19

RCW 43.180.010 10, 11, 16

RCW 43.180.050(1)(d)..... 11

Other Authorities

HUD Policy Handbook 4000.1 (issued Dec. 30, 2016)..... 3, 4, 5

Mortgagee Letter 2012-24 3

Regulations

24 C.F.R. Part 203..... 3, 8

I. INTRODUCTION

This appeal asks whether the Washington State Housing Finance Commission (the “Commission”), despite having no authority to regulate those who provide down payment assistance, can sue to prevent others from offering such assistance in Washington. As the Court of Appeals correctly concluded, the answer is no. The Commission lacks standing because it has no legal right at stake. Indeed, after more than three years of litigation, the Commission still cannot identify any law that Respondent National Homebuyers’ Fund (“NHF”) is allegedly violating—much less a law intended to protect the Commission—when it gifts money to low and moderate income homebuyers who qualify for federally insured mortgages. Neither Washington nor California prohibit gift-giving. And the underwriting guidance issued by the Department of Housing and Urban Development (“HUD”), which the Commission has repeatedly invoked, not only permits NHF’s program, but provides no private right of action to the Commission.

In concluding that the Commission lacks standing, the Court of Appeals appropriately rejected the notion that the Legislature tasked the Commission with policing those whom it perceives as a threat to its business model. Ruling otherwise would contravene the Commission’s enabling statute and, more broadly, would invite anticompetitive litigation that ultimately harms consumers—here, homebuyers seeking down payment

assistance. The appellate court correctly rejected the Commission's argument that down payment assistance involves "cooperative federalism," as the federal government does not cooperate with, regulate, or provide funding to NHF or the Commission in connection with down payment assistance.

Similarly, the appellate court acknowledged NHF does not purport to exercise governmental authority when it provides down payment assistance to Washington homebuyers. The Commission and NHF are simply two of dozens of entities that provide down payment assistance to individuals in Washington. None of these entities has the power to exclude others from providing such assistance. Because the Court of Appeals held correctly that the Commission lacks standing to bring this suit, this Court should affirm.

II. SUPPLEMENTAL STATEMENT OF THE CASE

The National Housing Act creates a fund which HUD uses to issue insurance to private banks on mortgage loans those banks make to individual homebuyers, protecting the banks from default. 12 U.S.C. § 1708-1709. Insured loans must come from an approved lender and meet eligibility requirements including, generally, a requirement that the buyer put at least 3.5 percent down. 12 U.S.C. § 1709(b)(9)(A).

HUD has created publicly available underwriting guidelines that lenders must follow to obtain federal insurance. As these guidelines explain, FHA will insure a loan when the borrower's down payment is comprised of a

gift which may be provided by family, friends, charitable organizations, employers, labor unions, government agencies, or public entities. Single Family Housing Policy Handbook (“HUD Handbook ”)¹ at 230. As an entity exempt from taxation under Internal Revenue Code § 115, NHF qualifies under HUD’s guidelines as a governmental agency.² HUD Handbook at 73; Mortgagee Letter 2012-24. The lender is responsible for ensuring that a down payment is properly sourced. 24 C.F.R. § 203.5(a). If HUD determines that a lender is issuing loans in conjunction with improperly sourced down payments, HUD’s Mortgagee Review Board has explicit legislative authority—in stark contrast to the Commission—to regulate and to seek penalties against the offending lender, including the withdrawal of federal insurance for its loans. *See* 12 U.S.C. § 1708(c).

NHF is a nonprofit public benefit corporation based in California that provides gift-based down payment assistance to low and moderate income homebuyers throughout the United States, including Washington State. CP 859, 863-64. NHF works with private lending institutions that offer

¹ References to the “HUD Handbook” refer to the FHA Single Family Housing Policy Handbook 4000.1, portions of which are in the Appendix to this brief, and available at <https://www.hud.gov/sites/documents/40001HSGH.PDF> (last visited Jan. 14, 2019).

² Internal Revenue Code § 115 provides that certain governmental entities—which like NHF may also be nonprofit public benefit corporations—are exempt from federal taxation. 26 U.S.C. § 115. The Internal Revenue Service has determined that NHF is a § 115 entity. CP 995-99.

loans to qualified homebuyers, with NHF providing a non-repayable gift of up to five percent of the purchase price to assist with the down payment. CP 1001. NHF has no direct contact with the homebuyers, and the homebuyers have no obligation to repay NHF. CP 669-70, 992, 1128. The lenders bundle the loans into mortgage-backed securities, which NHF purchases and then resells on the open market, with the resulting profit used in part to fund NHF's operations and provide future down payment assistance. *Id.*

Like NHF, the Commission helps qualified homebuyers obtain mortgages by providing down payment assistance. The Commission does not provide gift assistance; instead, it provides a second loan that the homeowner must ultimately repay. CP 404-05, 841. In addition to requiring repayment, the Commission, like NHF, generates revenue for its activities by selling securities based on the underlying mortgage loans. CP 140-45, 382-87.

NHF and the Commission are only two of many down payment assistance providers in Washington. At least 25 other organizations do so, CP 835-36, in addition to innumerable individual family members or friends who help with down payments. HUD does *not* preapprove or regulate the ability of these entities and individuals to provide down payment assistance in the form of gifts. There is no HUD approval process for the source of down payment gifts. And while HUD pre-approves non-profits that make secondary loans, *see* Handbook at 71-101, that process does not apply to

§ 115 entities like the Commission, *see* Handbook at 74. Ultimately HUD's regulation of which loans it will insure is between HUD and the lender.

III. SUMMARY OF SUPPLEMENTAL ARGUMENT

To establish standing, a plaintiff must show that “the interest sought to be protected” is ‘arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question’” and that “the challenged action has caused ‘injury in fact,’ economic or otherwise, to the party seeking standing.” *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). “Both tests must be met by the party seeking standing.” *Id.*

NHF's prior briefing explains why, as the Court of Appeals agreed, the Commission lacks standing to challenge NHF's down payment assistance gifts to Washington residents. This supplemental brief emphasizes three critical points discussed in that more voluminous briefing.

First, down payment assistance does not involve any “cooperative federalism” through which the Commission, NHF, or any other provider is distributing federal funds or administering a federal program. There simply is no exercise of state or local governmental authority at issue in this case.

Second, the Commission fails to tie its “zone of interest” argument to any statute that it claims NHF is violating. It is not enough for the Commission to argue that some statute gives it some generic interest in its

own business operations or in the general welfare of Washington homebuyers. The Commission must show that its claims fall within the zone of interest of a law that prohibits NHF's conduct and protects against the Commission's claimed injury. It has wholly failed to do so.

Third, the Commission cannot show standing by claiming a competitive injury. A loss of business through competition only provides standing in two circumstances: (1) when challenging a government regulation that changes the market to cause competitive injury or (2) when the statute at issue creates a legally protected interest against such competition. Neither exists here. The Commission's financial interest in avoiding competition from NHF is not legally protected.

IV. SUPPLEMENTAL ARGUMENT

A. HUD's Underwriting of Private Loans Does Not Involve a System of Cooperative Federalism

A primary fallacy in the Commission's arguments is its insistence that federal mortgage loan insurance, and in particular the underwriting requirements HUD has established for insuring loans paired with down payment assistance, is a restricted system of federal-state cooperation (which the Commission calls "cooperative federalism"). The Commission repeatedly refers to NHF as asserting "governmental authority" in Washington or as exercising "competing governmental authority" in Washington that challenges the Commission's purported authority. None of these

characterizations are accurate.

Cooperative federalism describes a system in which the federal government depends on designated state or local governments to deliver federal funds or to administer federal services. Thus, “[t]he [Aid to Families with Dependent Children] program is based on a scheme of cooperative federalism. It is financed largely by the Federal Government, on a matching funds basis, and is administered by the States.” *King v. Smith*, 392 U.S. 309, 316-17, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968) (internal citations omitted). Medicaid is another such program. *Lankford v. Sherman*, 451 F.3d 496, 500-10 (8th Cir. 2006). Similarly, this Court has noted that federal financial assistance to state and local housing authorities under the Housing Act of 1937 involves cooperative federalism because the state agencies “are given broad responsibility and latitude in administering” the federal program. *Resident Action Council v. Seattle Housing Auth.*, 177 Wn.2d 417, 429, 327 P.3d 600 (2013).³ Other examples of cooperative federalism involve this same pattern of the federal government financing welfare programs that state governments then administer under federal regulations. *See Burns v. State Dept. of Soc. & Health Servs.*, 20 Wn. App. 585, 591-92, 581 P.2d 1069 (1978) (AFDC). This

³ The issue before the Court in *Resident Action Council* was whether a local housing authority remained subject to the state Public Records Act, despite its concurrent obligation as a recipient of federal housing funds to comply with federal regulations. *Id.* at 431-44. No similar issue is presented here.

sharing of money and oversight constitutes “cooperative federalism” because states and the federal government work together to administer a federal program and to distribute funds.

By contrast with programs like Medicaid or federally subsidized public housing, federally insured mortgages do not involve a federal-state partnership of any kind. HUD does not rely on state agencies to issue or underwrite loans, but instead relies on approved lenders and its own internal processes. 12 U.S.C. § 1708; 24 C.F.R. §§ 203.1 – 203.7. HUD has not “specially authorized” the Commission to do *anything*, much less exercise any governmental functions. Neither the Commission nor NHF receives any funds from HUD in connection with federally insured mortgage loans, and neither entity performs any services for HUD. There is no joint federal-state effort that is in any way analogous to a local housing authority’s use of federal housing funds or the administration by a state welfare agency of federally subsidized benefits.

HUD allows *lenders*—not down payment assistance providers—to certify that certain loans are eligible for federal insurance. Just like private entities, public entities that provide down payment assistance to homebuyers are not “administering” federal mortgage loan insurance. They are simply providing homeowners with down payments. HUD’s recognition of these entities as appropriate sources of down payment funds for federally insured

home loans does not come close to qualifying as “cooperative federalism.”

The Commission’s gross mischaracterization of cooperative federalism undermines its entire argument—properly rejected by the Court of Appeals—that NHF is “exercising governmental authority” when it works with private lenders to give money to low and moderate income Washington homebuyers. The fact that NHF is an Internal Revenue Code § 115 entity, CP 995-999, does not make its gifts an exercise of governmental authority, any more than a church giving down payment assistance would be an exercise of ecclesiastical authority. Nothing in the applicable HUD underwriting guidelines regulates NHF’s conduct (or, for that matter, the conduct of any provider of down payment gift assistance). Giving gifts through private lenders to Washington residents so they can purchase homes is not an exercise of any sovereign power—much less Washington’s sovereign power. The appellate court’s conclusion that “NHF does not purport to act as a government entity in Washington” is entirely correct. *Wash. State Housing Finance Comm’n v. Nat’s Homebuyers Fund*, No. 76510-8-I, slip op. at 9 n.4 (Jun. 11, 2018).

B. A Zone of Interest Analysis Must Be Based on a Law the Defendant Is Allegedly Violating

The Commission’s zone of interest analysis is flawed because the Commission (1) never identifies what law NHF is supposedly breaking by giving down payment gifts to Washington residents and (2) fails to show that

the Commission’s claimed injuries are protected by the zone of interest of *that* law. Any “zone of interest” analysis must obviously start with what law is allegedly being violated. The question is whether the asserted interest is “arguably within the zone of interests to be protected or regulated by *the statute or constitutional guarantee in question.*” *Grant Cty*, 150 Wn. 2d at 802 (emphasis added). One cannot answer that question without specifying the “statute or constitutional guarantee in question.” For example, in *Grant County*, this Court found that fire districts had no standing to challenge a statutory method of annexation because “the [annexation] statutes in question were not designed to protect their interests[.]” *Id.* at 803.

Here, the Commission has consistently failed to demonstrate that its claims against NHF are based on any law that was designed to protect the Commission from NHF’s challenged conduct. The Commission makes two more attempts in its most recent briefs. Both fail.

First, the Commission argues that it is within the zone of interest of its authorizing act, chapter 43.180 RCW. While RCW 43.180.010 empowers the Commission to act as “a” conduit for down payment assistance, nothing enables the Commission to police down payment assistance or provides the Commission with a monopoly over providing such assistance.⁴ The

⁴ “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

Commission has not charged NHF with any violation of chapter 43.180 RCW. Indeed, that chapter does not regulate *any* conduct other than the Commission's. In more than three years of litigation, the Commission has never demonstrated otherwise.

The Commission makes the related argument that chapter 43.180 RCW expresses a legislative preference that homeowners obtain secondary loans instead of down payment gifts. Even if such a "preference" could be divined, it would not confer standing. Moreover, nothing in the law even hints at such a preference. The Legislature has not prohibited anyone from providing gifts or grants of down payment assistance, and has regulated only what *the Commission* does, not what any other entity should do. *See, e.g.*, RCW 43.180.050(1)(d). The Legislature's decision to require the Commission to make loans instead of gifts does not in any way demonstrate a policy precluding family, friends, or entities like NHF from providing gifts.⁵

Because chapter 43.180 RCW does not regulate NHF, it does not provide a zone of interest protecting the Commission against any conduct by NHF.

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." RCW 43.180.010.

⁵ Nor do public agencies have a free-standing power to sue any private party acting in a manner the agency claims is inconsistent with its "goals." *See Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132, 115 S. Ct. 1278, 131 L. Ed. 2d 160 (1995) ("Agencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes."); *Wash. State Human Rights Comm'n ex rel. Spangenberg v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 126, 641 P.2d 163 (1982).

Second, the Commission argues that it falls within the zone of interests of the HUD underwriting guidelines that it claims (inaccurately) NHF fails to satisfy. This argument is also flawed on many levels. The HUD underwriting guidelines are neither statutes nor regulations, and the Commission presents no authority that it can judicially enforce such guidelines. *See United States v. Hauck*, 980 F.2d 611, 614 (10th Cir. 1992) (HUD handbook “is not law”); *Burroughs v. Hills*, 741 F.2d 1525, 1529 (7th Cir. 1984) (HUD handbook “intended for internal use for the information and guidance of HUD officials” and “has no binding force”). Indeed, it is firmly established that there is no private right of action to enforce HUD regulations or guidelines. *See, e.g., Talton v. BAC Home Loans Servicing LP*, 839 F. Supp. 2d 896, 911 (E.D. Mich. 2012) (noting “there is no private right of action for breach of HUD’s mortgage servicing policies”); *Three Rivers Ctr. for Indep. Living, Inc. v. Hous. Auth. of City of Pittsburgh*, 382 F.3d 412, 431 (3d Cir. 2004) (HUD accessibility regulations do not provide a private right of action); *Hayes v. M & T Mortg. Corp.*, 389 Ill. App. 3d 388, 329 Ill. Dec. 440, 906 N.E.2d 638, 642 (2009) (HUD FHA-insured mortgage regulations do not create a private right of action); *Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 922 A.2d 538, 543 (2007) (FHA and HUD regulations do not create private right of action; *citing 12 more cases*).

Moreover, the HUD guidelines do not regulate the conduct of those

who provide down payment assistance. They only regulate *HUD's* conduct in insuring loans and *the lenders'* conduct in certifying which loans are eligible for federal insurance. Any challenge to a loan's eligibility for insurance must be resolved between HUD and the lender.⁶

Finally, even if one could construe the HUD underwriting guidelines as somehow enforceable against entities like NHF (despite those guidelines not being a statute or regulation, and despite not even purporting to be enforceable in that manner), the Commission makes no showing it falls within the zone of interest of those guidelines. HUD's insurance underwriting guidelines are plainly intended to protect HUD from insuring bad loans, not to provide the Commission or anyone else a leg up in the secondary mortgage backed securities market. As *Grant* found with respect to annexation statutes, because the HUD underwriting guidelines "were not designed to protect [the Commission's] interest" they cannot provide the Commission with standing. *Grant Cty.*, 150 Wn.2d at 803.

Satisfying the zone of interests aspect of standing requires the Commission to demonstrate that NHF is violating some law designed to protect the Commission. As the Court of Appeals found, the Commission wholly failed to do so. It has no standing to sue NHF for allegedly acting

⁶ The Commission has notably not sued any lender or HUD for making or insuring loans where NHF provided down payment assistance. Obviously, those lenders working with NHF are satisfied that NHF is a proper source for that assistance.

outside of underwriting guidelines that were not designed to protect the Commission in the first place.⁷

C. Loss of Potential Business to Competition Is Not a Legally Protected Interest That Creates Standing

Standing also requires injury in fact. That does not simply mean showing any type of injury; the injury must be to “a legally protected right.” *Pac. Marine Ins. Co. v. Dep’t of Revenue*, 181 Wn. App. 730, 740, 329 P.3d 101 (2014). The mere fact that an allegedly unlawful action has occurred does not suffice to confer standing. *Bankhead v. Tacoma*, 23 Wn. App. 631, 635, 597 P.2d 920 (1979) (“The presence of some violation of law is not sufficient if the party challenging an action lacks standing to challenge the violation.”); *see also State of Utah v. Babbitt*, 137 F.3d 1193, 1205 (10th Cir. 1998) (“[T]he mere allegation that Defendants are acting without authority or in violation of the law is insufficient to establish standing.”).

As a threshold matter, the Court need not reach this question unless the Commission can demonstrate that it falls within the zone of interests of some law NHF is purportedly violating. Indeed, the injury requirement cannot be analyzed without such a showing because, without an applicable “zone of interests,” there is no “legally protected right” at stake.

⁷ As discussed in detail in the briefing below, there is no law restricting NHF’s ability to give money to Washington residents, and NHF’s actions in Washington are entirely lawful. Opening Br. at 22-41, Reply Br. at 15-25. The opinion did not reach those issues given the Commission’s lack of standing.

The Commission's primary theory of injury is competitive; i.e., that lenders that would have otherwise worked with the Commission instead worked with NHF, and thus the Commission earned less on the mortgage-backed securities market. That theory, if accepted, would authorize the Commission to sue anyone providing down payment assistance. More generally, it would allow competitors to sue each other whenever, for example, one restaurant believed another was not paying overtime correctly or was failing to keep its kitchen clean enough. The law does not recognize such a broad notion of competitor standing. Rather, to avoid competition, a plaintiff like the Commission must point to a specific law protecting it from competition. No such law exists here.

Where there is no monopoly or other right to be free from competition, black letter law dictates that a plaintiff cannot bring suit to challenge the way its competitor does business. *See Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 5-6, 88 S. Ct. 651, 19 L. Ed. 2d 787 (1968) (“This Court has . . . repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor’s operations.”); *Tallahatchie Valley Elec. Power Ass’n v. Mississippi Propane Gas Ass’n, Inc.*, 812 So. 2d 912, 925 (Miss. 2002) (even where a court determined that a company had, in fact, exceeded its corporate authority under statute and its corporate

charter, the company’s competitor could not enjoin its continued operation because competitive injury is not a cognizable one allowing it to bring suit).⁸

Here, no law gives the Commission protection from competition, much less a monopoly on down payment assistance in Washington. The Legislature created the Commission “to act as *a* financial conduit which . . . can . . . *participate* in federal, state, and local housing programs and thereby make *additional* funds available at affordable rates to help provide housing throughout the state.” RCW 43.180.010 (emphasis added). Nothing about the statute suggests that Washington intended to create a monopoly or otherwise protect the Commission from competition by other entities providing down payment assistance.

The Commission argues that it has standing to assert a competitive injury under two lines of authority, both of which are inapposite. The first provides that a person can challenge a regulation applicable to her business if the regulation creates a competitive injury. *See Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 795, 920 P.2d 581 (1996). In that case, this Court held that a regulated party can sue the agency regulating it and that “[t]he United States Supreme Court ‘routinely

⁸ *See also Lea Cty. Elec. Co-op., Inc. v. City of Plains*, 373 S.W.2d 90, 93 (Tex. Civ. App. 1963) (nonprofit electric cooperative from a foreign state allegedly conducting unauthorized business within the state could not obtain an injunction to shut the company down because the domestic corporation did not have an “exclusive franchise” to provide electricity with its territory, and thus no right to be free from competition).

recognizes probable economic injury resulting from agency actions that alter competitive conditions as sufficient to satisfy’ the injury-in-fact requirement.” *Id.* at 795 (citation omitted). This specific rule allowing a party subject to agency regulation to challenge that regulation as anti-competitive has no application here. Certainly it in no way suggests that *competitors* can sue *each other* whenever “competitive conditions” change.

The Commission’s second line of authority provides that a person can sue for competitive injury under a law that was *designed* to protect that person from such competition—which ties back to the zone of interest analysis. Thus, in cases where there is a monopoly, a franchise, or a professional licensing system regulating who is allowed to participate in a market, authorized persons can sue unauthorized competitors to enforce those restrictions. In *Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 456 P.2d 1011 (1969), for example, this Court held that licensed ophthalmologists and opticians have standing under Washington law to challenge competition from unlicensed persons. *Id.* at 416-17. The Court described this special standing rule as resting on the “precise grounds” that “[a]s licensed members of a profession, calling or trade which is subject to reasonable regulation by the state and without which license no one of them could lawfully practice or carry on the profession, trade or calling, each plaintiff could properly resort to the courts to require others so licensed to abide by the laws and

regulations governing the practice or carrying on of the licensed profession, calling or trade.” *Id.* at 416; *Puget Sound Traction, Light & Pwr. Co. v. Grassmeyer*, 102 Wash. 482, 173 P. 504 (1918) (owner of state issued franchise to run street railways had standing to sue and enforce a prohibition on privately operated buses which risked injury to the licensed street cars).

Here, no monopoly, franchise, or professional licensing scheme exists. Despite the Commission’s attempt to depict it as such, this case does not involve a restricted market with highly regulated participants. As discussed above, HUD does not regulate the persons or entities that provide down payment assistance gifts. It regulates lenders. Nor does the Commission hold any special power from the state or federal government as part of a system of “cooperative federalism.” The Commission does not hold any franchise or special license, and this suit is in no way analogous to dentists or lawyers policing their own professions. The Commission is no more empowered to sue NHF than it is to sue a grandmother who gives her grandchild money to use toward a down payment.

Where an injury is legally protected, standing sets a low bar. In other words, the quantum of protected injury can be small. But the injury must still be of a type that is protected (and within the zone of interest of the allegedly violated law). The Commission’s claim that it could make more loans—and thereby sell more mortgage backed securities on Wall Street—if NHF is

barred from giving gifts to homeowners in Washington who might otherwise borrow money from the Commission asserts no such *protected* interest. For this reason too, the Commission lacks standing.

D. The Court Should Decline to Issue an Advisory Opinion

The danger of issuing advisory opinions is heightened where, as here, the action is brought pursuant to the Uniform Declaratory Judgment Act (“UDJA”), chapter 7.24 RCW. As a result, this Court insists that a justiciable controversy—which encompasses traditional standing concepts—must exist before the Court’s jurisdiction under the UDJA may be involved, unless the “dispute involves issues of major public importance.” *League of Educ. Voters v. State*, 176 Wn.2d 808, 816 & n.2, 295 P.3d 743 (2013) (internal quotation marks and citation omitted). Justiciability requirements will be relaxed “only on those rare occasions where the interest of the public in the resolution of an issue is overwhelming.” *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416, 27 P.3d 1149 (2001). The Commission incorrectly claims this dispute meets that standard because it involves the public interest in affordable housing.

While affordable housing is of course important to the public, this Court has instructed that an issue is not one of “major public importance” simply because *the general subject matter of the lawsuit* is important to the public interest. *Snohomish County v. Anderson*, 124 Wn.2d 834, 841, 881 P.2d 240 (1994) (“[T]he existence of a statute implicating the public interest is not

sufficient to support the examination of an issue which is not otherwise justiciable.”). Instead, review of the case must enhance the public interest. *Id.* Because this case implicates only the Commission’s *commercial* interest in shutting down NHF, this case does not present any extraordinary interest that warrants relaxing traditional justiciability requirements.

V. CONCLUSION

NHF and the Commission both work with lenders to assist low and moderate income homebuyers. NHF provides non-repayable down payment gifts, while the Commission provides down payment loans. Each sells mortgage-backed securities based on the underlying loans. NHF is not usurping or intruding on any of the Commission’s governmental powers. Nor is NHF violating any law by making gifts to Washington homebuyers, much less a law intended to protect the Commission from competition. Because the Commission’s desire to avoid competition from NHF is not legally protected, this Court should affirm.

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Respectfully submitted this 14th day of January, 2019.

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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.

**APPENDIX TO SUPPLEMENTAL BRIEF OF RESPONDENTS
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FINANCE AUTHORITY, AND RURAL COUNTY
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INDEX TO APPENDIX

<u>APPENDIX PAGES</u>	<u>TITLE</u>
APP. 1-7	FHA Single Family Housing Policy Handbook 4000.1 (selected pages)



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

Special Attention of:

All FHA Approved Mortgagees
All Direct Endorsement Underwriters
All FHA Roster Appraisers
All FHA Roster Inspectors
All FHA Approved 203(k) Consultants
All HUD Approved Housing Counselors
All HUD Approved Nonprofit Organizations
All Governmental Entity Participants
All Real Estate Brokers
All Closing Agents

Transmittal: Handbook 4000.1

Issued: December 30, 2016

Effective Date: Multiple; See Below

1. This Transmits:

The incorporation of previously published updates to Handbook 4000.1, FHA Single Family Housing Policy Handbook.

2. Explanation of Materials Transmitted:

This revision to the FHA Single Family Housing Policy Handbook, or Handbook 4000.1 (Handbook), is being published to update existing sections.

I. DOING BUSINESS WITH FHA
B. Other Participants
4. Nonprofits and Governmental Entities

Financial Control refers to the requirement that the government body provides funds through direct appropriations, grants, or Loans, with related controls applicable to all activities of the Entity.

HUD-approved NPIOGs will be included on FHA's Nonprofit Organization Roster.

(2) Permitted Level of Secondary Financing Assistance

FHA may approve an NPIOG to provide secondary financing for as much as 100 percent of the Borrower's Minimum Required Investment (MRI). If approved, FHA will issue the NPIOG an approval letter, and this approval will be reflected on the FHA Nonprofit Organization Roster and in FHAC. Interested Parties should check the Roster to ensure the approval status of an NPIOG.

(C) Section 115 Entities with 501(c)(3) Status

Section 115 Entities with 501(c)(3) status must meet the eligibility and application requirements for the HUD Homes and FHA Mortgagor programs.

iii. Entities Not Requiring FHA Approval to Participate in FHA Nonprofit Programs

FHA approval and placement on the HUD Nonprofit Roster are not required for federal, state, or local government agencies or their instrumentalities, provided those Entities are not organized as 501(c)(3) nonprofits.

(A) Governmental Entities and their Instrumentalities of Government

Governmental Entity refers to any federal, state, or local government agency or instrumentality. To be considered an Instrumentality of Government, the Entity must be established by a governmental body or with governmental approval or under special law to serve a particular public purpose or designated by law (statute or court opinion). HUD deems Section 115 Entities, as identified in Section 115 of the Internal Revenue Code, to be Instrumentalities of Government for the purpose of providing secondary financing.

FHA does not maintain a list of Governmental Entity program participants.

(B) Nonprofits with a Documented Agreement to Support Secondary Financing

When a Governmental Entity uses a nonprofit to assist in the operation of the Governmental Entity's secondary financing assistance programs, FHA approval and placement on the HUD Nonprofit Roster are not required so long as there is a documented agreement indicating (1) the functions performed include the Governmental Entity's secondary financing program and (2) the secondary financing

II. ORIGINATION THROUGH POST-CLOSING/ENDORSEMENT

A. Title II Insured Housing Programs Forward Mortgages

4. Underwriting the Borrower Using the TOTAL Mortgage Scorecard (TOTAL)

(2) Standard

The Mortgagee may consider Private Savings Club funds that are distributed to and received by the Borrower as an acceptable source of funds.

The Mortgagee must verify and document the establishment and duration of the club, and the Borrower's receipt of funds from the club. The Mortgagee must also determine that the received funds were reasonably accumulated, and not borrowed.

(3) Required Documentation

The Mortgagee must obtain the club's account ledgers and receipts, and a verification from the club treasurer that the club is still active.

(F) Gifts (Personal and Equity) (TOTAL)

(1) Definition

Gifts refer to the contributions of cash or equity with no expectation of repayment.

(2) Standards for Gifts

(a) Acceptable Sources of Gifts Funds

Gifts may be provided by:

- the Borrower's Family Member;
- the Borrower's employer or labor union;
- a close friend with a clearly defined and documented interest in the Borrower;
- a charitable organization;
- a governmental agency or public Entity that has a program providing homeownership assistance to:
 - low or moderate income families; or
 - first-time homebuyers.

Any gift of the Borrower's MRI must also comply with the additional requirements set forth in [Source Requirements for the Borrower's MRI](#).

(b) Donor's Source of Funds

Cash on Hand is not an acceptable source of donor gift funds.

II. ORIGINATION THROUGH POST-CLOSING/ENDORSEMENT

A. Title II Insured Housing Programs Forward Mortgages

4. Underwriting the Borrower Using the TOTAL Mortgage Scorecard (TOTAL)

(3) Required Documentation

The Mortgagee must obtain a gift letter signed and dated by the donor and Borrower that includes the following:

- the donor's name, address, and telephone number;
- the donor's relationship to the Borrower;
- the dollar amount of the gift; and
- a statement that no repayment is required.

Documenting the Transfer of Gifts

The Mortgagee must verify and document the transfer of gift funds from the donor to the Borrower in accordance with the requirements below.

- a. If the gift funds have been verified in the Borrower's account, obtain the donor's bank statement showing the withdrawal and evidence of the deposit into the Borrower's account.
- b. If the gift funds are not verified in the Borrower's account, obtain the certified check or money order or cashier's check or wire transfer or other official check, and a bank statement showing the withdrawal from the donor's account.

If the gift funds are paid directly to the settlement agent, the Mortgagee must verify that the settlement agent received the funds from the donor for the amount of the gift, and that the funds were from an acceptable source.

If the gift funds are being borrowed by the donor and documentation from the bank or other savings account is not available, the Mortgagee must have the donor provide written evidence that the funds were borrowed from an acceptable source, not from a party to the transaction.

The Mortgagee and its Affiliates are prohibited from providing the loan of gift funds to the donor unless the terms of the loan are equivalent to those available to the general public.

Regardless of when gift funds are made available to a Borrower, the Mortgagee must be able to make a reasonable determination that the gift funds were not provided by an unacceptable source.

(4) Standards for Gifts of Equity

(a) Who May Provide Gifts of Equity

Only Family Members may provide equity credit as a gift on Property being sold to other Family Members.

FHA Single Family Housing Policy Handbook

GLOSSARY

30-Day Account

A 30-Day Account refers to a credit arrangement that requires the Borrower to pay off the outstanding balance on the account every month.

30-Day Advance Prepayment Notice Period

The 30-Day Advance Prepayment Notice Period refers to the time requirement for the Borrower to provide advance notice to the Mortgagee for prepayment of an FHA-insured Mortgage insured prior to August 2, 1985.

90-Day Review

The 90-Day Review is a Mortgagee's required evaluation, occurring before four monthly installments are due and unpaid, of a Defaulted Mortgage for appropriate Loss Mitigation Options.

Acceptable Conveyance Condition

An Acceptable Conveyance Condition refers to how at the time of conveyance to HUD, the Mortgagee must ensure that the Property meets all of the following conditions:

- The Property is undamaged by fire, flood, earthquake, hurricane, tornado, boiler explosion (if a condominium) or Mortgagee Neglect.
- The Property is secured and, if applicable, winterized.
- All insured damages including theft and vandalism, if any, are repaired per the scope of work indicated on the insurance documents.
- Interior and exterior debris is removed, with the Property's interior maintained in Broom-swept Condition, the lawn is maintained, and all vehicles and any other personal property are removed in accordance with state and local requirements.
- The Mortgagee has good and marketable title.

Accessory Dwelling Unit (ADU)

An Accessory Dwelling Unit (ADU) refers to a habitable living unit added to, created within, or detached from a primary one-unit Single Family dwelling, which together constitute a single interest in real estate. It is a separate additional living unit, including kitchen, sleeping, and bathroom facilities.

Acquisition Cost

The Acquisition Cost is the purchase price of the Property, including closing costs, prepaid costs, and commissions, if paid by the purchaser, but not including the cost of any repairs that the purchaser makes to the Property subsequent to acquisition.

Active Duty

Active Duty refers to a status where a person has a full-time military occupation.

Federal Tax Debt

Federal Tax Debt refers to tax debt owed to the federal government for which regular payments are required.

Fee Simple

Fee Simple refers to an absolute ownership unencumbered by any other interest or estate.

FHA-HAMP

The FHA-HAMP Option is a Loss Mitigation Option using a Loan Modification and/or Partial Claim to allow the Mortgage to be reinstated, by establishing an affordable monthly payment and providing for principal deferment as needed.

Final Reconciliation

Final Reconciliation refers to the process by which an Appraiser evaluates and selects from among alternative conclusions to reach a final value estimate, and reports the results of the analysis.

Finding

A Finding refers to a final determination of defect by the lender (for Title I), Mortgagee (for Title II), or other participants, as applicable.

Forbearance Plans

Forbearance Plans are arrangements between a Mortgagee and Borrower that may allow for a period of reduced or suspended payments and may provide specific terms for repayment.

Formal Forbearance Plans

Formal Forbearance Plans are written agreements executed by one or more of the Borrowers, allowing for reduced or suspended payments for a period greater than three months, but not more than six months, unless otherwise authorized by HUD, and such plans may include specific terms for repayment.

Funding Date

The Funding Date is the date the proceeds of the Mortgage are made available to the borrower.

Government Mortgagee

A Government Mortgagee is a federal, state, or municipal governmental agency, a Federal Reserve Bank, a Federal Home Loan Bank, the Federal Home Loan Mortgage Corporation (FHLMC, or Freddie Mac), or the Federal National Mortgage Association (FNMA, or Fannie Mae).

Governmental Entity

A Governmental Entity refers to any federal, state, or local government agency or instrumentality. To be considered an instrumentality of the government, the Entity must be established by a governmental body or with governmental approval or under special law to serve a particular public purpose or designated by law (statute or court opinion). HUD deems Section

115 Entities to be instrumentalities of government for the purpose of providing secondary financing.

Grass Cuts

Grass Cuts are the Property P&P actions of mowing, weeding, edge trimming, sweeping of all paved areas, and removing all lawn clippings, related cuttings, and debris.

Gross Living Area

Gross Living Area (GLA) refers to the total area of finished, above-grade residential space calculated by measuring the outside perimeter of the Structure. It includes only finished, habitable, above-grade living space.

Grossing Up

Grossing Up refers to the process of adjusting tax-exempt income upward by the effective tax rate to compute an equivalent taxable income amount.

Ground Rent

Ground Rent refers to the rent paid for the right to use and occupy the land. Improvements made by the ground lessee typically revert to the ground lessor at the end of the lease term.

Home Disposition Option

Home Disposition Options are the Loss Mitigation Options of Pre-Foreclosure Sales (PFS) and Deed-in-Lieu (DIL).

Home Retention Option

Home Retention Options are the Loss Mitigation Options of Informal and Formal Forbearances, SFB-Unemployment, Loan Modification, and FHA-HAMP.

Homeowners' Association/Condominium Assessment

A Homeowners' Association (HOA)/Condominium Assessment is a periodic payment required of property owners by an HOA or condominium association.

Homeowners' Association /Condominium Fees

Homeowners' Association (HOA)/Condominium Fees are HOA/Condominium Assessments plus interest, Late Charges, collection/attorney fees, and other penalties.

Homeownership and Opportunity for People Everywhere (HOPE) Grantee

Homeownership and Opportunity for People Everywhere (HOPE) Grantee refers to an Entity designated in the homeownership plan submitted by an applicant for an implementation grant under the HOPE program.

Housing Development Experience

Housing Development Experience is defined as acquisition, rehabilitation, and sale to low-to-moderate income persons.

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on January 14, 2019, I caused a copy of the foregoing **Supplemental Brief of Respondents** to be served on the following via the Washington Courts E-Portal:

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