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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH SOUTHERN DIVISION

CEDAR BAND OF PAIUTES; CEDAR
BAND CORPORATION; and CBC
MORTGAGE AGENCY;

Plaintiffs,

v.

U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT; DR.
BENJAMIN S. CARSON, SR., in his
official capacity as Secretary of the U.S.
Department of Housing and Urban
Development; FEDERAL HOUSING
ADMINISTRATION; and BRIAN D.
MONTGOMERY, in his official
capacity as Acting Deputy Assistant
Secretary and Assistant Secretary of
Housing and Urban Development for
Housing-Federal Housing
Commissioner;

Defendants.

Case No. 4:19-cv-30-DN-PK

AMICI CURIAE BRIEF OF THE
HOUSING FINANCE AGENCIES
OF ALASKA, IDAHO,
PENNSYLVANIA, TENNESSEE,
VIRGINIA, WASHINGTON,
AND WYOMING IN
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION

Hon. Judge David Nuffer

Hon. Magistrate Judge Paul Kohler

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I. INTRODUCTION

When provided responsibly, downpayment assistance is one of the most important tools available today for increasing access to homeownership in underprivileged populations. Amici are authorized state agencies with programs designed to promote affordable and sustainable homeownership in their particular jurisdictions. For years, pursuant to federal law and HUD policy, these programs have funded mandatory downpayments for low-income borrowers obtaining federally insured mortgages, while generating revenues from the resulting mortgages (often by selling them as securities) to provide supportive services for the borrowers and promote housing policy. Only authorized governmental programs have been allowed this special privilege, due to the high potential for abuse and in light of past downpayment schemes that contributed to the Great Recession of 2008. Whereas governmental programs are politically accountable, operate within limited territories, and use their revenues to support borrowers and housing, other programs are designed to make a profit, often at the expense of unsuspecting borrowers, and have the potential to cause serious harm.

In this case, the Chenoa Fund seeks to fund mandatory downpayments nationwide, as a way of generating revenues that do not benefit low-income borrowers but instead go to certain executives whose prior downpayment scheme contributed to the Great Recession and whose activities were the very reason this

type of assistance was limited to governmental entities in the first place. The Chenoa Fund achieves this profit by operating outside the Cedar Band's reservation, where it has no governmental authority. Whereas Amici and other downpayment providers—including tribal providers—have understood and respected HUD's policy limiting this type of assistance to authorized governmental activity, the Chenoa Fund has flouted it, reporting to lenders everywhere that its funds are governmental and hoping HUD would not intervene to thwart its scheme. In response, HUD adopted Mortgagee Letter 19-06, clarifying documentation requirements for lenders when an entity provides such funds in a governmental capacity. The Chenoa Fund's argument that this is a sudden break from HUD's prior position is unsupported. Instead, HUD has simply detailed how it will ensure that its pre-existing policy is followed. Because HUD's policy is well-established and serves numerous important purposes, the Chenoa Fund's Motion for a Preliminary Injunction should be denied.

II. IDENTITY AND INTEREST OF AMICI

A. Amici Operate Governmental Downpayment Assistance Programs for the Benefit of Borrowers and Housing Policy in Their Jurisdictions.

Amici are state authorities, called "Housing Finance Agencies" ("HFAs"), operating governmental housing programs within their respective jurisdictions. The HFAs are specifically authorized in their own states to serve a number of designated roles within the cooperative framework between federal, state, and local

governments that defines national housing policy.¹ This includes issuing bonds exempt from federal taxation, allocating federal tax credits for the development of low-income housing, and funding mandatory downpayments on federally insured mortgage loans.² As government entities, HFAs are politically accountable and mission-driven, with a long-term interest in promoting affordable and sustainable housing in their respective territories through these activities and programs.³

In furtherance of their missions, the HFAs have developed various downpayment assistance programs offered in conjunction with federal mortgage insurance that are designed to provide underprivileged persons access to homeownership on affordable, sustainable, and fair terms. In each state, an HFA and various other public agencies have been authorized to provide such services in a governmental capacity.⁴ In some cases, specific requirements for the programs have been specified under state law.⁵ These public programs historically have

¹ See 42 U.S.C. § 1437(a); Nat'l Council of State Housing Fin. Agencies, [About HFAs](#), NCSHA.ORG (2019) (Flevaris Decl. Ex. 1). See also, e.g., Alaska Stat. § 18.56.010; [Idaho Code § 67-6201](#); 35 Pa. Stat. Ann. §§ 1680.101 *et seq.*; [Tenn. Code Ann. §§ 13-23-101 et seq.](#); [Va. Code Ann. § 36-55.25](#); [Wash. Rev. Code § 43.180.010](#); [Wyo. Stat. §§ 9-7-101 et seq.](#)

² See 42 U.S.C. § 1440; 26 U.S.C. § 42; 12 U.S.C. § 1735f-6; Nat'l Council of State Housing Fin. Agencies, [About HFAs](#), *supra* n.1.

³ See *supra* n.1; Nat'l Council of State Housing Fin. Agencies, [State Housing Finance Agencies: At the Center of the Affordable Housing System](#), NCSHA.ORG (Sept. 7, 2018) (“HFA Report”) (Flevaris Decl. Ex. 2).

⁴ See, e.g., Alaska Stat. § 18.56.010, .090; [Idaho Code § 67-6201](#), -6206; 35 Pa. Stat. Ann. § 1680.205(7); [Tenn. Code Ann. § 13-23-115](#); [Va. Code Ann. § 36-55.25](#), .30:3; [Wash. Rev. Code § 43.180.010](#), .050; [Wyo. Stat. §§ 9-7-105](#), -106.

⁵ See, e.g., 15 Alaska Admin. Code § 151.850(4) (referencing “minimum construction standards” under state law as precondition for closing cost assistance program eligibility); [Wash. Rev. Code](#)

been successful and share certain key characteristics, including political accountability, limited territories of operation, mission-driven design, recycling of revenues to promote housing policy, and supportive services for borrowers such as special caps on lender fees, prescreening, homebuyer education, and counseling.⁶

B. Downpayment Assistance Is Subject to Abusive Profit-Seeking that Can Harm Borrowers and Cause Significant Economic Disruption.

As demonstrated by the Great Recession of 2008, and well known to Amici, mortgage financing—including downpayment assistance in particular—is ripe for abuse due to the nature of the relevant market.⁷ The detailed terms of mortgage loans are often too complex and difficult for borrowers to understand or negotiate.⁸ Further, borrowers tend not to shop around and compare terms.⁹ Most are also under the false impression that their broker or lender is obligated to protect and promote their interests, which is incorrect.¹⁰ In contrast, other market participants are “professionals who are well informed about prevailing prices and facile with

§ 43.180.050(1)(d) (authorizing Washington’s HFA to “[m]ake **loans** for down payment assistance to home buyers” (emphasis added)).

⁶ See, e.g., [Fed. Hsg. Admin.: Proh’d Sources of Min. Cash Inv. Under Nat’l Hsg. Act—Interp. Rule, 77 Fed. Reg. 72219, 72220 \(Dec. 5, 2012\)](#) (“FHA Rule”); HFA Report, *supra* n.3, at 5, 7; Compl., *Wash. State Housing Fin. Comm’n v. Nat’l Homebuyers Fund, Inc., et al.*, Case No. 15-2-12454-4 SEA at 4, 6-7 (King Cnty. Super. Ct. May 21, 2015) (Flevaris Decl. Ex. 10).

⁷ See Financial Crisis Inquiry Comm’n, [The Financial Crisis Inquiry Report](#) at 171 (2011) (“Crisis Report”) (Flevaris Decl. Ex. 3) (noting mortgage crisis in 2008 was caused in part by “the [widespread] mistaken belief that ‘markets will always self-correct’”).

⁸ See *id.* at 90 (finding “many borrowers do not understand the most basic aspects of their mortgage” and “borrowers [may be] particularly ill equipped to challenge the more experienced person across the desk”).

⁹ *Id.*

¹⁰ *Id.*

the numbers and vocabulary.”¹¹ These factors can contribute to a culture in which brokers and lenders maximize profits at the expense of borrowers’ interests.¹² And these risks are all heightened in the context of low-income, first-time borrowers.¹³

The provision of downpayment assistance has been misused in the past for private gain, at the expense of low-income borrowers and the economy. As a precondition to federal mortgage insurance, borrowers are generally required to pay a modest downpayment of 3.5 percent to help ensure they are committed, responsible, and can afford the loan.¹⁴ Leading up to the Great Recession of 2008, several allegedly nonprofit organizations devised a scheme to fund mandatory downpayments in exchange for fee payments from sellers, artificially inflating home prices and increasing default risk on the underlying loans.¹⁵ Two of the most well-known of these purported nonprofits were the “Nehemiah Corporation” and “The Buyers Fund.”¹⁶ This abusive scheme was profitable for the executives who

¹¹ Susan E. Woodward & Robert E. Hall, *Consumer Confusion in the Mortgage Market*, 100 AM. ECON. REV. 511, 511 (2010) (Flevaris Decl. Ex. 4).

¹² See Crisis Report, *supra* n.7, at 90-91; Jared Ruiz Bybee, *In Defense of Low-Income Homeownership*, 5 ALA. C.R. & C.L. L. REV. 107, 112 (2013).

¹³ See, e.g., Brian Bucks & Karen Pence, *Do Homeowners Know Their House Values and Mortgage Terms?*, FEDERALRESERVE.GOV at 22 (2006) (Flevaris Decl. Ex. 5); Crisis Report, *supra* n.7, at 90-91.

¹⁴ See 12 U.S.C. § 1709(b)(9)(A).

¹⁵ See FHA Rule, 77 Fed. Reg. at 72220-22.

¹⁶ See FHA Rule, 77 Fed. Reg. at 72220-22 & n.23; U.S. Gov’t Accountability Office, GAO-06-24, *Mortgage Financing: Additional Action Needed to Manage Risks of FHA-Insured Loans with Down Payment Assistance* at 10 (2005) (naming Nehemiah Corporation and The Buyers Fund as significant providers of seller-funded downpayment assistance); *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 834 (E.D. Cal. 2008).

devised it but ultimately caused severe market disruption and contributed to the ensuing national economic downturn.¹⁷

In response and at HUD's request, in 2008, Congress expressly prohibited financially interested parties from funding mandatory downpayments on federally insured mortgage loans.¹⁸ In 2012, HUD issued an interpretive rule clarifying the scope of the prohibition, explaining that it does not extend to "governments" or their "agencies"—most notably HFAs—providing funds "as part of their respective homeownership programs."¹⁹ HUD reasoned that entities such as HFAs "provide various services to assist citizens within their jurisdictions in attaining affordable housing options," that the "beneficiaries" of such programs "are usually low- and moderate-income individuals and families" who are provided with counseling and other interconnected services, and that numerous related statutory provisions and the legislative history made clear Congress did not intend to restrict downpayment assistance from the authorized programs of these types of government entities.²⁰

¹⁷ FHA Rule, 77 Fed. Reg. at 72220-22; *see also, e.g.*, Jeff Hortwitz & Dave Jamieson, [*Home loans brokered by nonprofits helped fuel the housing crisis*](#), PUBLICINTEGRITY.ORG (Oct. 1, 2009) (Flevaris Decl. Ex. 6).

¹⁸ *See* Housing and Economic Recovery Act of 2008, Pub. L. 110-289, Div. B, Title I, § 2113 (July 30, 2008); *see also* 12 U.S.C. § 1709(b)(9)(C); FHA Rule, 77 Fed. Reg. at 72221.

¹⁹ FHA Rule, 77 Fed. Reg. at 72220, 72222, 72223.

²⁰ *Id.* at 72222.

C. The Chenoa Fund Is a National Program Funding Mandatory Downpayments for Profit.

Amici are aware of two distinct entities that have been funding mandatory downpayments nationwide for profit in recent years: the National Homebuyers Fund, Inc. (“NHF”), a nonprofit corporation of certain California counties, and the “Chenoa Fund,” the program of Plaintiffs CBC Mortgage Agency, the Cedar Band Corporation, and the Cedar Band of Paiutes. Both programs have generically marketed themselves across the country as governmental, represented to lenders that their funds are governmental, placed no special caps on lender fees, and diverted borrowers and millions of dollars in revenues from the authorized governmental programs of the HFAs and other public agencies.²¹

In 2015, Washington State’s HFA sued NHF in Washington state court, seeking a declaratory judgment that NHF lacked governmental authority to conduct its operations there as required under state and federal law and HUD policy.²² The lawsuit is currently pending before the Washington Supreme Court.²³

²¹ See Chenoa Fund, *Correspondent Lending Guide* at 13, 26 (Aug. 23, 2018) (Flevaris Decl. Ex. 7); Chenoa Fund, *Chenoa Fund FHA No-Down and Conventional Home Loans* (Flevaris Decl. Ex. 8); eml. from Richard Ferguson, Chenoa Fund President, to Kim Herman, Exec. Dir. of the Wash. State Housing Fin. Comm’n, Aug. 28, 2018, at 2 (Flevaris Decl. Ex. 9); see also Compl., *Wash. State Housing Fin. Comm’n v. Nat’l Homebuyers Fund, Inc., et al.*, Case No. 15-2-12454-4 SEA at 6-9 (King Cnty. Super. Ct. May 21, 2015) (“NHF Complaint”) (Flevaris Decl. Ex. 10); *id.*, Wash. State Housing Fin. Comm’n’s Pet. for Review at 6-9 (July 11, 2018) (“NHF Petition”) (Flevaris Decl. Ex. 11).

²² NHF Complaint, *supra* n.21.

²³ See *Wash. State Housing Fin. Comm’n v. Nat’l Homebuyers Fund, Inc.*, No. 96063-1, 2018 WL 2949490 (Wash. Ct. App. June 11, 2018), *rev. granted*, 191 Wash.2d 1018 (Oct. 31, 2018).

While the Chenoa Fund suggests to this Court that its operations date back to 2013, its own published materials disclose it did not begin providing downpayment assistance until 2016 or later.²⁴ In 2017, aware of the dispute over NHF's similar program, the Chenoa Fund reached out to numerous HFAs to introduce itself and offer to collaborate.²⁵ The executives who reached out on behalf of the Chenoa Fund were the very individuals who had devised and operated the Nehemiah Corporation and The Buyers Fund prior to the 2008 economic collapse.²⁶

In subsequent correspondence, well before Mortgagee Letter 19-06 and this lawsuit, multiple HFAs expressed concern to the Chenoa Fund over its direct competition with their governmental programs and the absence of any apparent benefit to borrowers or housing.²⁷ One of the HFAs also objected to the Chenoa Fund's lack of authority or transparency, and expressed concern over public reports suggesting its revenues were not even benefiting Cedar Band members and that a staff member had been the subject of a prior federal investigation for

²⁴ Chenoa Fund, [*CBCMA – Chenoa Fund White Paper*](#) at 13 (Apr. 2019) (Flevaris Decl. Ex. 12).

²⁵ See eml. from Don Harris, Special Counsel to CBCMA, to Kim Herman, Exec. Dir. of the Wash. State Housing Fin. Comm'n, Aug. 22, 2017 (Flevaris Decl. Ex. 13).

²⁶ Compare *id.*, with Mark Anderson, [*Housing group sues founder*](#), SACRAMENTO BUSINESS J. (May 29, 2003) (Flevaris Decl. Ex. 14); Paul Beebe, [*Is it a charity or a gold mine?: Nonprofit's ex-chief, founders in high-stakes dispute*](#), THE SALT LAKE TRIBUNE (Dec. 11, 2005) (Flevaris Decl. Ex. 15); Hortwitz & Jamieson, *supra* n.17.

²⁷ See, e.g., ltr. from Scott Hoversland, Exec. Dir. of Wyoming Comm'y Dev't Auth., to Richard Ferguson, Pres. of CBCMA, Aug. 27, 2018 (Flevaris Decl. Ex. 16); ltr. from Kim Herman, Exec. Dir. of Wash. State Hsg. Fin. Comm'n, to Richard Ferguson, Sept. 28, 2018 (Flev. Decl. Ex. 18).

malfeasance.²⁸ The Chenoa Fund disregarded these concerns and proceeded with its program.

III. ARGUMENT

A. From Its Inception, the Chenoa Fund Has Violated HUD's Longstanding Policy on Mandatory Downpayments.

The Chenoa Fund's entire case for a preliminary injunction is built on the false premise that Mortgagee Letter 19-06 represents a sudden reversal of HUD policy. Instead, the relevant portions of that letter reflect what Amici and other participants in the federal mortgage insurance program have long understood: that only an entity acting in a governmental capacity—i.e., having governmental authority within a relevant jurisdiction—is allowed to fund mandatory downpayments with a financial interest. In this regard, Mortgagee Letter 19-06 simply represents an effort to clarify the documentation necessary for an entity to claim governmental status. The Chenoa Fund's and NHF's violation of HUD's longstanding policy was the reason HUD issued this guidance. Because the Chenoa Fund's program has always been contrary to HUD's policy, it has no legitimate reliance interests and its claims fail.

²⁸ See ltrs. from Kim Herman to Richard Ferguson, Sept. 5, Sept. 28, and Dec. 20, 2018 (Flevaris Decl. Exs. 17-19); *see also* Prashant Gopal, [Am. Indian Tribe Becomes a Player in the No-Money Mortgage Business](#), BLOOMBERG BUSINESSWEEK (Sept. 21, 2018) (Flevaris Decl. Ex. 20); Chenoa Fund, *Summary*, CHENOAFUND.ORG (2018) (Flevaris Decl. Ex. 39).

Since 2012, HUD’s policy on this issue has been consistent as reflected in its published rules and guidance. In its 2012 interpretive rule published in the Federal Register, HUD stated that the statutory prohibition against financially interested parties funding mandatory downpayments does not apply to “**governments**” or their agencies, such as HFAs, that provide funds “as part of their **respective** homeownership programs,” as one of “various services” such entities provide “to assist citizens **within their jurisdictions** in attaining affordable housing options,” who are the “**beneficiaries**” of these programs.²⁹ By no later than 2016, HUD also added language to its official Handbook incorporating its interpretive rule by reference and stating that the statutory restriction on financially interested parties does not apply to governmental entities “**when acting in their governmental capacity**” through one of their homeownership programs.³⁰

For years, Amici and the vast majority of other providers of downpayment assistance, both public and private, have understood and respected HUD’s policy. HFAs have limited their downpayment programs to their own states.³¹ Local

²⁹ FHA Rule, [77 Fed. Reg. at 72220, 72222, 72223](#) (emphases added).

³⁰ Fed. Housing Admin., *Handbook 4000.1: FHA [Single Family Housing Policy Handbook](#)* at 226, 300-01 (Dec. 30, 2016) (“Handbook 4000.1”) (Flevaris Decl. Ex. 21). HUD’s Handbook is “a consolidated, consistent, and comprehensive source of FHA Single Family Housing Policy.” HUD, *Single Family Housing Policy Handbook*, HUD.GOV (Flevaris Decl. Ex. 22).

³¹ See, e.g., Penn. Housing Fin. Agency, [Homebuyers Start Here](#), PHFA.ORG (noting assistance programs are offered to “qualified borrowers throughout the Commonwealth”), Tenn. Housing Dev’t Agency, [Down Payment Assistance](#), THDA.ORG (providing downpayment assistance options “Available Statewide” and “in Targeted ZIP Codes” within the state), and Virginia

housing authorities and other local governments have operated downpayment programs limited to their respective territories.³² The same has been true of tribal programs.³³ Indeed, the National American Indian Housing Council’s model policy for tribal downpayment programs expressly contemplates that assistance will be provided only for properties “located within [the Tribe’s] Indian area” and only to tribal members.³⁴ Finally, private providers generally have not funded mandatory downpayments for profit or claimed to be government programs.

As noted above, Amici are aware of only two entities that have disregarded HUD’s established policy in recent years, in an attempt to generate revenues for their own financial benefit: NHF and the Chenoa Fund. Washington’s HFA sued

Housing Dev’t Auth., [*Down Payment Assistance Program Guidelines*](#) at 5 (Apr. 2019) (stating that subject property “must be located in Virginia”) (Flevaris Decl. Exs. 23-25).

³² See, e.g., City of Portsmouth, *HomeTown: Portsmouth’s First Time Homebuyer Program Information & Guidelines* (Apr. 2018) (offering assistance “to qualified households who wish to purchase a home within Portsmouth City limits”), New Castle County, [*First Time Homebuyer Program: Down Payment Settlement \(DPS\) Program*](#) at 2 (Apr. 2018) (designating eligible properties as residences “located in New Castle County”), and City of Tacoma, [*Downpayment Assistance*](#) (2017) (noting program is “for people who are buying a home within the eligible Tacoma city limits”) (Flevaris Decl. Exs. 26-28).

³³ See, e.g., Nez Perce Tribal Housing Authority, [*Mortgage Financing Assistance Final Policy*](#) at 3 (Feb. 17, 2005) (limiting program to homebuyers who qualify as an “Enrolled Nez Perce Tribe Member” and property on “the Nez Perce Reservation”), Confederated Tribes of Siletz Indians, [*Down Payment Assistance*](#) (requiring applicant to be “an enrolled member of the Confederated Tribes of Siletz Indians”), Choctaw Nation, [*Home Finance*](#) (stating that downpayment assistance is “Available to Choctaw Tribal Members”), Gun Lake Tribe, [*Housing Assistance Programs*](#) (2017) (downpayment program available to “Gun Lake Tribal Citizens”), and Pokagon Band of Potawatomi, [*Down Payment Assistance Program*](#) (2019) (requiring that applicant be “an enrolled Pokagon Band citizen” and purchasing a home “located within the Ten County Service Area”) (Flevaris Decl. Ex. 29-33).

³⁴ Nat’l Am. Indian Housing Council, [*Model Down Payment Assistance Program Policy*](#) at §§ 3.A, 7.B (Aug. 2009) (Flevaris Decl. Ex. 34).

NHF in 2015, on the basis that federal law and HUD policy—already established at that time—required governmental authority in a given jurisdiction to fund mandatory downpayments with a financial interest at stake.³⁵

The Chenoa Fund was aware of the dispute over NHF’s activities but pursued a similar program anyway, generically marketing itself as a “federally chartered government agency” across the country.³⁶ Yet much like NHF, the Chenoa Fund has no governmental authority outside the jurisdiction of the Cedar Band of the Paiute Tribe. The federally approved Constitution of the Paiute Tribe specifies that the “governmental powers” of the Tribe extend only to persons and property “within the exterior boundaries” of the Tribe’s Reservation.³⁷ Likewise, the federally approved charter of the Tribe’s Cedar Band Corporation (“CBC”) authorizes it to engage in “commerce” and to conduct “any lawful business,” but only “in ways consistent with the Tribe’s Constitution,” i.e., without exercising governmental authority outside the Tribe’s Reservation.³⁸ The charter also states that CBC may “transact business in . . . Utah or any other state or jurisdiction as a foreign corporation,” but in doing so must “comply with applicable state law

³⁵ See NHF Complaint, *supra* n.21, at 6-9; NHF Petition, *supra* n.21, at 3-9.

³⁶ Chenoa Fund, *Chenoa Fund FHA No-Down and Conventional Home Loans*, *supra* n.21; see also eml. from Don Harris to Kim Herman, *supra* n.25 (acknowledging dispute over NHF).

³⁷ Const. of the Paiute Indian Tribe of Utah, Art. I, §§ 1-2 (1991) (Flevaris Decl. Ex. 35).

³⁸ ECF No. 2-4 at 5.

governing foreign corporations”³⁹ Consistent with these governing documents, the federal cases the Chenoa Fund cites only confirm that the inherent governmental authority of a tribe does not go beyond its reservation and members, notwithstanding the ability to engage in commercial activities elsewhere.⁴⁰

The Chenoa Fund’s briefing simply ignores HUD’s prior policy and written guidance establishing that only authorized government programs, acting in a governmental capacity, are allowed to fund mandatory downpayments with a financial interest.⁴¹ The Chenoa Fund also fails to identify any conflicting guidance or interpretation from HUD on this point. To the contrary, all the communications it submitted and described to the Court reflect a consistent interpretation by HUD of its longstanding policy, including after the Chenoa Fund commenced its downpayment activities in 2016.⁴²

The Chenoa Fund insists its program must have been consistent with prior HUD policy, because HUD previously approved CBC Mortgage Agency as a

³⁹ ECF No. 2-4 at 6-7.

⁴⁰ See, e.g., *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (noting that tribes have “sovereign authority over their members and territories”). A tribe’s commercial activities remain distinct from its governmental activities, notwithstanding the potential ability of a tribe to invoke sovereign immunity for its commercial activities outside its own territory. See, e.g., *Breakthrough Mgmt. Group, Inc. v. Chuckchansi Gold Casino and Resort*, 629 F.3d 1173, 1191 n.13 (10th Cir. 2010) (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998) (“Tribal sovereign immunity extends to off-reservation activities of the tribe and applies to both **governmental and commercial** activities.” (emphasis altered))).

⁴¹ See ECF No. 6 at 18-21.

⁴² See *id.* at 20-21; ECF No. 2-7 at 8, 10; ECF No. 2-8 at 4; ECF No. 2-9 at 4.

“Governmental Mortgagee.”⁴³ But that is a generic HUD designation not specific to the provision of downpayment assistance, and more importantly, it does not suggest approval of governmental authority outside the Cedar Band’s territory and members.⁴⁴ No one disputes that the Chenoa Fund can exercise governmental authority within the Cedar Band’s territory, or operate nationally on the same terms as any private provider of downpayment assistance. What it cannot do is fund mandatory downpayments for profit in territories where it has no governmental authority or status.⁴⁵

The Chenoa Fund also argues that its program was compliant with prior HUD policy because the downpayment funding restriction applies only to parties financially interested in the primary mortgage “transaction,” not those who profit on the secondary securities market.⁴⁶ But the Chenoa Fund has a direct financial interest in each primary mortgage transaction, given that it admittedly “purchases the mortgages” as part of the deal.⁴⁷ Moreover, HUD’s Handbook has long

⁴³ ECF No. 6 at 20.

⁴⁴ See, e.g., HUD, [HUD-Approved Nonprofit Organizations and Government Entities](#), HUD.GOV (2019) (Flevaris Decl. Ex. 36).

⁴⁵ The Chenoa Fund similarly insists that because at some point CBC Mortgage Agency provided its charter to HUD, it should have been obvious to HUD that the Chenoa Fund would operate nationally. ECF No. 6 at 20. But the charter was provided in a different context and the supposed implication simply does not follow. Further, as explained above, CBC Mortgage Agency’s charter could only authorize the Chenoa Fund to engage in commercial activities nationwide, not to exercise governmental authority outside the Cedar Band’s boundaries.

⁴⁶ ECF No. 6 at 34 (quoting 12 U.S.C. § 1709(b)(9)(A)).

⁴⁷ ECF No. 6 at 18.

clarified that the funding prohibition applies to any party that financially benefits from the mortgage transaction “directly **or indirectly**.”⁴⁸ This is consistent with the language, purpose, and history of the prohibition, which was designed to prevent abusive profit-seeking by opportunistic providers of downpayment assistance.⁴⁹ The only HUD document the Chenoa Fund cites in support of its contrary position is a staff memorandum concerning “the manner in which a **governmental entity** may raise funds for its downpayment assistance program,” which includes the sale of mortgages on the secondary market.⁵⁰ HUD has never indicated that this memorandum applies to non-governmental programs.

The only other basis the Chenoa Fund identifies for its supposed compliance with prior HUD policy is the bare fact that mortgages generated via its program in the past received federal insurance.⁵¹ This confuses a prior lapse in enforcement with an official change in agency policy.⁵² HUD generally relied on lenders to

⁴⁸ Handbook 4000.1, *supra* n.30, at 300 (emphasis added).

⁴⁹ See FHA Rule, [77 Fed. Reg. at 72220-22](#).

⁵⁰ ECF No. 2-10 at 3 (emphasis added).

⁵¹ ECF No. 6 at 20.

⁵² See [Knutzen v. Eben Ezer Lutheran Housing Ctr.](#), 815 F.2d 1343, 1350, 1351-52 & n.7 (10th Cir. 1987) (noting mere fact that “regional HUD offices may have contradicted” HUD’s official policy did not “affect the substance of the national policy” and that HUD could issue guidance memoranda “for the purpose of correcting some misconceptions” without notice-and-comment rulemaking); [Warshauer v. Solis](#), 577 F.3d 1330, 1339-40 (11th Cir. 2009) (noting that agency’s prior choice not to enforce requirements did “not rise to the level of a well-established, definitive, and authoritative interpretation” and that “mere acquiescence” is “not sufficient to trigger notice and comment rulemaking” prior to an agency ramping up enforcement); [Moran Maritime Assocs. V. U.S. Coast Guard](#), 526 F. Supp. 335, 338-43 (D.D.C. 1981) (holding that agency’s lack of past enforcement was not an “interpretation” or “official [agency] policy” and that “enforcement efforts” did not require notice-and-comment rulemaking).

document compliance with downpayment requirements.⁵³ The Chenoa Fund represented to lenders nationwide that its funds were governmental.⁵⁴ The funds were thus reported as governmental in HUD's system. And the insurance was approved despite HUD policy. This was merely an enforcement gap, not a change in official policy.⁵⁵ This reliance on self-reporting to lenders without adequate supporting documentation is exactly why HUD adopted Mortgagee Letter 19-06.

In an attempt to use its evasion of the rules to bind HUD, the Chenoa Fund goes on to argue that approval of federal insurance for any given mortgage loan is "conclusive evidence" of eligibility, citing 12 U.S.C. § 1709(e).⁵⁶ But that provision merely ensures that once mortgage insurance is provided, "~~the~~ loan or mortgage" in that specific case will not be invalidated after the fact, absent "fraud or misrepresentation" on the part of a financial institution or lender.⁵⁷ While mortgages previously originated using the Chenoa Fund's program are likely not at risk of losing federal insurance, such previous approvals do not mean that HUD's prior policy was invalid, ceased to exist, or is unenforceable going forward.

⁵³ See Handbook 4000.1, *supra* n.30, at 226 (directing lenders to "obtain documentation to support the permissible nature" of any source of downpayment assistance).

⁵⁴ See, e.g., Chenoa Fund, *Correspondent Lending Guide*, *supra* n.21, at 13, 26.

⁵⁵ See *supra*, n.52.

⁵⁶ ECF No. 6 at 20 (citing 12 U.S.C. § 1709(e)).

⁵⁷ 12 U.S.C. § 1709(e) (emphasis added).

The Chenoa Fund's real target is HUD's underlying and longstanding policy prohibiting non-governmental actors from funding mandatory downpayments for a profit. As shown above, under the applicable statutory provisions and pre-existing HUD policy, the Chenoa Fund was not allowed to engage in this activity outside of the Cedar Band's jurisdiction. Thus, the Chenoa Fund's program has been unlawful and invalid from its inception, regardless of Mortgagee Letter 19-06. The Chenoa Fund has no legitimate reliance interests at stake, and it is not entitled to a preliminary injunction.

Viewed in light of HUD's pre-existing policy, the Chenoa Fund's claims against Mortgagee Letter 19-06 are meritless. Because HUD's letter merely specifies documentation for lenders to ensure compliance with an existing policy, the letter is both "interpretative" and "procedural" in this regard, rather than a substantive and legislative rule requiring formal notice-and-comment procedures under the Administrative Procedures Act.⁵⁸ For the same reason, HUD was not obligated to reexamine or justify its policy, to acknowledge a change in policy, or

⁵⁸ 5 U.S.C. § 553(b)(A) (exempting interpretative and procedural rules from formal rulemaking requirements); *see, e.g., Knutzen*, 815 F.2d at 1351-52 (holding that HUD memoranda "merely reiterate[d]" a "statutory and regulatory rule," thus did "not constitute a change" in policy, and did not require notice-and-comment rulemaking); *Goodnight v. Chater*, 960 F. Supp. 1538, 1542-44 & nn.3-4 (D. Utah. 1997) (holding that change in procedure for completing forms to determine eligibility for benefits was "a change from prior practice" but did not "change the law or standards for determining who is entitled" and was thus a rule of "procedure" exempt from notice-and-comment rulemaking); *Erringer v. Thompson*, 371 F.3d 625, 633 n.15 (9th Cir. 2004) (noting that exempt "'procedural' rules are those that are legitimate means of structuring the agency's enforcement authority" (internal marks omitted))).

to credit the Chenoa Fund’s alleged reliance interests.⁵⁹ Nor was HUD required to consult with tribal authorities in advance, which the Chenoa Fund would have no standing to enforce in any event.⁶⁰ Finally, HUD was not required to pay the Chenoa Fund compensation, given that its business interests were illegitimate and not the type of property that could trigger constitutional scrutiny regardless.⁶¹

B. HUD’s Policy Promotes Sustainable Homeownership Within Amici’s Respective Jurisdictions and Mitigates Overall Mortgage Risk.

In attacking Mortgagee Letter 19-06, the Chenoa Fund complains that HUD did not justify its policy and suggests that the policy is arbitrary and capricious.⁶² As explained above, Mortgagee Letter 19-06 was not a change in policy, and thus, HUD was not required to revisit or justify its stance. Regardless, HUD’s policy—that only government programs, when acting in a governmental capacity, may fund mandatory downpayments while generating revenues—is not only well established

⁵⁹ *See id.*

⁶⁰ HUD, *Tribal Government-to-Government Consultation Policy*, 81 Fed. Reg. 40893, 40895, 40897 (June 23, 2016) (contemplating consultation over “policy statements or actions that have substantial direct effects” and clarifying that the consultation policy “is not intended do, and does not, create any right to administrative or judicial review”); *see also* Executive Order No. 13175, 65 Fed. Reg. 67249, 67249, 67252 (Nov. 6, 2000) (same).

⁶¹ *See, e.g., Andrus v. Allard*, 444 U.S. 51, 66, 67-68 (1979) (“[L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim”); *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55-56 (1986) (noting that mere economic loss from adjustments to a “regulatory program” do not constitute a taking); *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (emphasizing government’s “traditionally high degree of control over commercial dealings”).

⁶² ECF No. 6 at 30-31.

but also furthers significant public interests by protecting borrowers from abusive practices and mitigating overall risk in the mortgage market.

In short, HUD's policy helps promote affordable, sustainable housing while avoiding abusive downpayment schemes, as Congress intended. As explained above and seen in the Great Recession, this market is ripe for manipulation, and downpayment programs can significantly increase interest rates and fees without attendant benefit, resulting in risky loans, overburdened borrowers, rising defaults, and economic downturn.⁶³ Government entities such as Amici are politically accountable to the communities they serve and committed to furthering the public interest and avoiding such harms.⁶⁴ Their authorized programs are designed to support borrowers and promote housing policy in their respective jurisdictions.⁶⁵ The revenues they generate are recycled and go toward supportive services for the borrowers and other efforts to promote affordable and sustainable housing, rather than unrelated special interests.⁶⁶ Their programs also serve limited territories, which further prevents any provider from generating undue risk on a national scale.

⁶³ See *supra*, at Section II.B.

⁶⁴ See *supra*, at Section II.A.

⁶⁵ See, e.g., HFA Report, *supra* n.3, at 5 (referencing Fannie Mae-sanctioned study finding "HFA loans were 20 percent less likely to experience a long-term default" and that HFAs are "more likely to require full documentation and careful underwriting" and "serve as a third-party monitor on the partner lenders . . . creating an additional incentive for careful screening" (internal quotes omitted)).

⁶⁶ See, e.g., *id.* at 7 ("HFAs often reinvest their earnings in new products and services to meet their states' housing needs.").

In contrast, non-governmental programs are unmoored from the communities in which they operate, lack accountability, and are designed to line the pockets of program executives and owners for unrelated purposes. This is true of the Chenoa Fund. The executives behind the program were also behind the Nehemiah Corporation and The Buyers Fund, and have a track record of maximizing profits at the expense of borrowers.⁶⁷ To whatever extent they are also meaningfully sharing revenues with the Cedar Band—which some tribal members have publicly called into question⁶⁸—those revenues are being used for unrelated tribal projects that have nothing to do with the borrowers or housing policies of the originating jurisdictions.⁶⁹ In addition, notwithstanding the very small size of the Cedar Band, the Chenoa Fund is generating mortgages nationwide, which means its program presents a heightened risk to the national economy.

HUD is not required to wait until the Chenoa Fund causes serious damage to borrowers or the economy before taking action to ensure compliance with federal law and policy. Nor is HUD required, before applying the law, to evaluate the precise extent to which the Chenoa Fund's particular program threatens to inflict

⁶⁷ See *supra*, at nn.25-26.

⁶⁸ See Gopal, *supra* n.28.

⁶⁹ See ECF No. 6 at 25.

such harms.⁷⁰ Indeed, because the Chenoa Fund has only been funding downpayments since 2016 or later, its portfolio may be too young for a complete evaluation.⁷¹ Nevertheless, there are already indications that the Chenoa Fund is harmful, given its low credit requirements, lack of any special caps on lender fees, and demonstrated propensity to defy legal requirements.⁷²

The Chenoa Fund argues that its program is beneficial and should be allowed to continue because it assists low-income borrowers.⁷³ But as explained above, the Chenoa Fund is funding mandatory downpayments for a profit, without authority or accountability, which is unlawful and has the potential to cause serious harm. Further, authorized government programs in each jurisdiction are already providing this service. Accordingly, low-income borrowers have other, legitimate options. And to the extent any given state or tribe deems competition in this

⁷⁰ See, e.g., *Knutzen*, 815 F.2d at 1352 (noting that “generalizations are bound to be under- and over-inclusive in certain situations” but are “sufficiently accurate” and “reasonable” to support agency policymaking).

⁷¹ See, e.g., Ken Lam *et al.*, *Impacts of Down Payment Underwriting Standards*, FHFA Working Papers at 5 (2013) (noting loans from a few years earlier lacked enough “performance history” for proper evaluation) (Flevaris Decl. Ex. 37).

⁷² See, e.g., eml. from Richard Ferguson to Kim Herman, Aug. 28, 2018, *supra* n.21, at 2; ltr. from Kim Herman to Richard Ferguson, Sept. 28, 2018, *supra* n.27, at 3-4; see also Phillip Molnar, *Zero down payment option available for San Diego*, THE SAN DIEGO UNION-TRIBUNE at 3 (Sept. 5, 2017) (Flevaris Decl. Ex. 38).

⁷³ ECF No. 6 at 35-36.

context beneficial and desired, it can authorize multiple governmental providers within its territory for this purpose, as many states have done.⁷⁴

The only other benefit the Chenoa Fund identifies from its program is its funding of various projects for the Cedar Band, for which it allegedly serves as “a substantial source” of revenues.⁷⁵ Amici applaud and respect tribal efforts at economic development and self-sufficiency, and have undertaken substantial initiatives in support of tribal housing and in collaboration with tribal authorities over the years.⁷⁶ But the Chenoa Fund is not an appropriate or lawful vehicle for a tribe to raise general revenues. The Cedar Band has many other, lawful avenues available to generate funds for its community, some of which it reportedly has already been pursuing and can continue to pursue.⁷⁷

C. HUD’s Policy Lawfully Applies to the Chenoa Fund.

In a final attempt to avoid HUD’s underlying policy, the Chenoa Fund presents a number of arguments for why the policy cannot be applied to it as a tribal entity. None of these arguments has any merit.

⁷⁴ See, e.g., Alaska Stat. § 18.55.997; [35 Pa. Stat. Ann. § 1709\(aa\)](#); [Wash. Rev. Code § 35.82.070\(17\)](#).

⁷⁵ ECF No. 6 at 17, 25.

⁷⁶ See HFA Report, *supra* n.3, at 4 (noting HFAs providing housing financing in a variety of areas, including “tribal lands”).

⁷⁷ See Molnar, *supra* n.72, at 3 (reporting that Cedar Band Corporation “has a beverage company, retail store, staffing company and other services”).

First, the Chenoa Fund argues that because it is a tribal entity, HUD has no statutory authority to restrict its mortgage financing activities.⁷⁸ But HUD is not restricting the Chenoa Fund's general financing activities. It is only applying the law on equal terms and fulfilling Congressional intent regarding which entities may qualify to fund mandatory downpayments for loans with federal mortgage insurance. Congress and HUD have broad authority to set the terms on which federal mortgage insurance is provided and to protect the solvency of the federal mortgage insurance fund.⁷⁹

Second, the Chenoa Fund points to 12 U.S.C. § 1735f-6 as proof that it is entitled to fund downpayments unencumbered.⁸⁰ But that statute only says that HUD “may not deny” mortgage insurance “solely because” a “[s]tate or local” government has provided a secondary loan to the borrower “under terms and conditions approved by [HUD].”⁸¹ Here, far from discriminating against governmental programs, HUD has acknowledged a special privilege that only governments may exercise, and allows them to do so on equal terms, i.e., within their respective jurisdictions. If insurance is denied under this policy, it is only

⁷⁸ ECF No. 6 at 33.

⁷⁹ 12 U.S.C. § 1709(a) (authorizing HUD to provide mortgage insurance “upon such terms” as it “may prescribe”); 12 U.S.C. § 1709(r) (requiring HUD to take action to reduce losses under its mortgage insurance program).

⁸⁰ ECF No. 6 at 34 (citing 12 U.S.C. § 1735f-6).

⁸¹ 12 U.S.C. § 1735f-6.

because of the absence of authority and an impermissible financial interest—not “solely because” of a secondary loan from a state or local government.

Third and finally, the Chenoa Fund suggests that applying HUD’s policy to its operations would “potentially violate” the Fair Housing Act because its lenders are forced to discriminate based on race.⁸² To the contrary, the lenders must simply document that the subject home is located within the Tribe’s territory or the borrower is an enrolled member of the Tribe. These are valid, objective criteria reflecting the scope of a tribe’s governmental authority. The same conditions are in related statutes authorizing federal mortgage insurance and similar guarantees for tribal properties, and they may lawfully be considered.⁸³ This is a far cry from the enforcement actions the Chenoa Fund references, which involved lenders who simply refused to provide services to Native Americans for no legitimate reason.⁸⁴

IV. CONCLUSION

Under HUD’s longstanding policy, only authorized government programs such as those of Amici may fund mandatory downpayments with a financial interest at stake. From its inception, the Chenoa Fund has flouted this rule, which serves the important purposes of protecting low-income borrowers from abusive

⁸² ECF No. 6 at 34-35.

⁸³ See 12 U.S.C. § 1715z-13(a), 1715z-13a(b)(1)-(2).

⁸⁴ See ECF No. 6 at 35 (citing HUD Title VIII Conciliation Agreements in Case Nos. 08-13-0299-8, 08-17-5267-8 and 08-6949-8).

practices and mitigating overall mortgage risk. Because the Chenoa Fund's program was invalid at the outset, HUD was not required to engage in formal rulemaking or consultation before adopting Mortgagee Letter 19-06 as a mechanism for ensuring compliance. For all these reasons, Amici respectfully submit the Chenoa Fund's request for a preliminary injunction should be denied.

Respectfully submitted this 20th day of May, 2019.

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