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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

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;	Case No. 4:19-cv-30-DN PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION **HEARING REQUESTED**

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.	Judge David Nuffer

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INTRODUCTION

Defendant U.S. Department of Housing and Urban Development ("HUD") does not deny that if its Mortgagee Letter announced a new legislative rule or changed agency policy, the Letter lacked the necessary notice-and-comment rulemaking and must be vacated. The Mortgagee Letter did just that, dramatically changing the rules by which governmental entities provide downpayment assistance ("DPA") for homebuyers who obtain loans insured by Defendant Federal Housing Administration ("FHA"). For the first time, HUD imposed a restrictive new definition of "governmental capacity," placed new requirements on mortgages originated "as part of" a governmental entity's DPA program, and purported to regulate the secondary mortgage market contrary to prior HUD policy. There could be no clearer example of a substantive, legislative rule. The swift and decisive reaction of participants in the DPA market—such as lenders that *terminated* their relationship with Plaintiff CBC Mortgage Agency ("CBCMA") within a *day* of the Letter issuing—starkly illustrates the Letter's real-world status as a major change in policy and refutes HUD's effort to downplay it as a mere ministerial instruction regarding loan documentation.

HUD announced this dramatic policy shift in a new rule without notice or opportunity to comment, as the Administrative Procedure Act ("APA") and HUD's own regulations require. The Letter sets forth *no* interpretation of the National Housing Act ("NHA") that could command deference, nor any reasoned explanation for HUD's sudden policy change. And it takes no account of the fact that, for years, FHA knowingly insured thousands of loans supported by DPA provided by CBCMA, when it was no secret that CBCMA was an arm of Plaintiff Cedar Band of Paiutes, a federally recognized American Indian tribe. Most egregious of all, HUD's new policy would drive Indian tribes out of the national marketplace, force CBCMA out of business, and

disproportionately deprive minority borrowers of meaningful options for obtaining DPA to achieve the dream of homeownership. If ever there were arbitrary and capricious agency action, this is it.

HUD and its *amici*—seven state housing finance agencies ("State HFAs") that compete with CBCMA in the DPA market and apparently would prefer that lower-income borrowers have fewer options for purchasing homes—argue that the Mortgagee Letter merely applies existing law, but the record shows otherwise. Further, there is no legal support for their extreme position that a federally recognized Indian Tribe loses its "governmental capacity" when it steps outside the boundaries of its reservation. In contrast, the lender *amici* provide further evidence in support of Plaintiffs' position, including that the Mortgagee Letter is a significant departure from HUD's longtime process and practice and will drastically impact their ability to lend as well as their borrowers' ability to become homeowners. Plaintiffs respectfully, and urgently, request that the Court grant their motion for a preliminary injunction. CBCMA's very existence depends on it.

BACKGROUND

Since Plaintiffs' Motion was filed, there have been several noteworthy developments.

First, during recent testimony before the House Financial Services Committee, Defendant Secretary Carson said in response to questions from Representative Ben McAdams of Utah that the "point is well taken" that HUD should have acted through the normal rulemaking process and "agree[d]" with the statement that HUD should support its new policy with data before "moving forward."[1] Even if HUD collected and published such data, it would support Plaintiffs' position that its loans, in many cases, perform better than loans supported by HFA-provided DPA.[2]

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[1] *See* Ex. A at 53 (Bloomberg Gov't, *Housing in America: Oversight of the U.S. Department of Housing and Urban Development* (May 21, 2019) (transcript)).

[2] Dkt. 2-3, ¶¶ 12–14.

Second, HUD is preparing a notice of proposed rulemaking that would seek comment on "whether downpayment assistance programs operated by government entities are being operated in a fashion that would render such assistance prohibited" by statute and "would define through rulemaking the circumstances in which governmental entities are deriving a prohibited financial benefit."[3] This is the third time since Spring 2018 that HUD has proposed a notice-and-comment rulemaking concerning DPA programs. The Mortgagee Letter's departure is inexplicable.

Third, the State HFAs assert (at 8–9 & nn. 25–28) that CBCMA "disregarded" certain concerns communicated by them. This one-sided account by *amici* is highly misleading. CBCMA proactively reached out to various HFAs on August 1, 2018 to provide information on CBCMA's program and to request feedback on certain features of the program prior to consulting with HUD on an anticipated rulemaking regarding DPA programs.[4] When the Pennsylvania Housing Finance Agency sent a questionnaire to lenders regarding CBCMA, CBCMA again reached out to the agency to provide additional data regarding its program in Pennsylvania.[5] CBCMA also provided at least *three* separate written responses to follow-up questions from the Washington State Housing Finance Commission ("WSHFC"), including detailed documentation and analysis.[6]

ARGUMENT

Plaintiffs are entitled to a preliminary injunction because all factors necessary for this Court "to preserve the pre-trial status quo" and avoid the destruction of CBCMA are met.[7]

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[3] Spring 2019 Unified Agenda of Regulatory and Deregulatory Actions, Office of Mgmt. & Budget, RIN No. 2502-AJ50 (Ex. Q-5), *available at* https://bit.ly/2WFUOCA; Dkt. 2-3, ¶¶ 37–38.

[4] Ex. B. This letter was sent to approximately 50 HFAs across the United States.

[5] Ex. C (e-mail from R. Ferguson to C. Baumert dated Aug. 23, 2018).

[6] Ex. D (ltrs. from CBCMA to WSHFC dated Aug. 1, 2018; Dec. 11, 2018; and Feb. 15, 2019).

[7] *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009).

I. Plaintiffs Have Shown A Substantial Likelihood Of Success On The Merits.

A. The Mortgagee Letter Violates APA Notice-And-Comment Requirements.

A legislative rule imposes new "rights and obligations" on parties while removing the ability to "exercise discretion" from the agency.[8] The Mortgagee Letter does both. It imposes new obligations on Plaintiffs by creating new jurisdictional limitations, confining Plaintiffs' DPA program to on-reservation properties and enrolled tribal members, and restricting Plaintiff's ability to direct the sale of the FHA first mortgage. It also amends HUD's substantive requirements for determining whether a loan can be insured. As a legislative rule, HUD's Mortgagee Letter required notice-and-comment rulemaking.

HUD cites (at 13–14) a case that enumerates four ways to tell whether an agency action is a legislative rule.[9] The four inquiries in *American Mining* are merely "factor[s]" to "consider," not a strict test.[10] Regardless, the Mortgagee Letter satisfies the first factor because "in the absence of the rule there would not be an adequate legislative basis for enforcement action."[11] HUD has repeatedly stated that it intended to address DPA for FHA-insured loans through a notice-and-comment rulemaking. Affected entities have waited patiently for that process to begin; indeed, two state HFA *amici* told CBCMA that they "expect[ed] to communicate our agency's views on federal policy issues related to [DPA] as part of" anticipated comments on HUD's planned

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[8] *Am. Bus Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980) (quotations omitted); *see Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994) (finding HUD's determination by letter to the Washington State governor that the state's eviction procedures did not violate due process was a substantive rule that should have gone through notice and comment).

[9] *Am. Mining Cong. v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

[10] *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005); *Air Transp. Ass'n of Am., Inc. v. FAA*, 291 F.3d 49, 55 (D.C. Cir. 2002); *see also Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010) (deeming agency manual legislative without relying on four factors).

[11] *Am. Mining*, 995 F.2d at 1112.

proposed rulemaking.[12] "HUD is not free to ignore the requirements of the APA in its haste to address perceived problems in the realm of national housing policy."[13]

1. The Mortgagee Letter establishes new jurisdictional limitations that have never before existed in any statute or regulation.

The Mortgagee Letter's imposition of new jurisdictional limits absent in statute or regulation "create[d]" a "substantive rule[] which vastly change[d] the standard operating procedures" of DPA programs, triggering the APA's notice-and-comment requirement.[14]

The NHA requires a mortgagor to place a downpayment of at least "3.5 percent of the appraised value of the property," which may be sourced from family members, but may not come from "(i) entit[ies] that financially benefit[] from the transaction" or "(ii) [a]ny third party or entity that is reimbursed, directly or indirectly, by any of the parties described in clause (i)."[15] The statute does *not* place limits on governmental entities' provision of DPA or leave room for HUD to create such limits. Congress knows how to create jurisdictional limitations on state, local, and tribal governmental entities when it wants to. For example, it has permitted insurance on mortgages covering certain property that is "located on trust or otherwise restricted [tribal] land," permitted guaranteed loans to construct housing "located on trust land or land located in an Indian . . . area," and provided that jurisdictions participating in home investment partnerships "shall" distribute assistance "geographically within [their] boundaries."[16] The fact that Congress "did not do

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[12] Ex. E (ltrs. from Utah Hous. Corp. and Wyo. Cmty. Dev. Auth. to R. Ferguson dated Aug. 14, 2018, and Aug. 27, 2018, respectively).

[13] *Patriot, Inc. v. HUD*, 963 F. Supp. 1, 5 (D.D.C. 1997); *see also Walker v. Pierce*, 665 F. Supp. 831, 842 (N.D. Cal. 1987).

[14] *Hous. Study Grp. v. Kemp*, 732 F. Supp. 180, 185 (D.D.C. 1990).

[15] 12 U.S.C. § 1709(b)(9).

[16] 12 U.S.C. §§ 1715z-13(a), 1715z-13a(b)(2); 42 U.S.C. § 12752.

likewise" in this statute "is a textual point of comparison we are not entitled to ignore lightly."[17] Congress's "passage of other related statutes that expressly" impose jurisdictional limits "shows that" Congress "knew how to do so," and Congress's "omission of similar language in" the NHA "indicates that it did not intend" to impose any jurisdictional limits.[18] Any doubt about the statute's application to tribal instrumentalities should be resolved by "the canon requiring resolution of ambiguities in favor of Indians."[19]

This understanding of the NHA is confirmed by Congress's prohibition of the denial of insurance "solely because" the property securing the mortgage "will be subject to a secondary mortgage or loan made or insured, or . . . held, by any" government.[20] While HUD may provide mortgage insurance "upon such terms as the Secretary may prescribe," that is not a blank canvas.[21] HUD cannot discriminate against government-provided loans as such, and its terms and conditions must be "associated with normal underwriting standards."[22] Yet, the Mortgagee Letter singles out tribal providers of DPA. The Letter's restrictions bear no rational relationship to normal underwriting standards, nor does HUD justify the restrictions on that basis.

The statute also does not prohibit activities in the secondary mortgage market. As HUD explained in 2016, the statute is "directed towards parties that financially benefit from the property sales transaction and the *primary* mortgage transaction, not transactions that occur in the *secondary*

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17 *United States v. Adame-Orozco*, 607 F.3d 647, 654 (10th Cir. 2010) (Gorsuch, J.).

18 *Custis v. United States*, 511 U.S. 485, 491–92 (1994).

19 *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1194 (10th Cir. 2002) (en banc).

20 12 U.S.C. § 1735f-6.

21 12 U.S.C. §§ 1709(a), 1735f-6.

22 12 U.S.C. § 1735f-6; H.R. Rep. 95-1161, at 43–44 (1978).

mortgage market."[23] CBCMA operates only in the secondary mortgage market.[24]

The statute's history and HUD's regulatory guidance confirms this interpretation. Before 2008, the NHA did not prohibit DPA from parties with an interest in the primary mortgage transaction, such as the sellers of the properties. In 2007, HUD prohibited those interested-party transactions through a final rule resulting from a notice-and-comment proceeding. HUD was careful to explain that DPA "*is* permitted . . . from . . . governments" and "that a tribal government . . . *is* a permissible source of [DPA]," without any mention of limits on the jurisdictions in which tribal governments could provide DPA.[25] In 2008, after two courts vacated the 2007 Rule on unrelated grounds, Congress passed the Housing and Economic Recovery Act ("HERA"), which adopted word-for-word the 2007 Rule's prohibition on interested-party transactions.[26]

Congress's silence on limiting tribal DPA is telling, as the "correct presumption is that silence does not work a divestiture of tribal power."[27] "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[28] Congress has not spoken clearly, yet the Mortgagee Letter directly limits governments' sovereignty. *See infra* at 9–16. To overcome Congress's silence, HUD points to two places for the purported long-established jurisdictional limitations on government entities providing DPA. Neither suffices.

In 2012, HUD issued an interpretive rule reaffirming that governmental instrumentalities

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23 Dkt. 2-10, at 3 ("2016 Memorandum") (emphases added).

24 Dkt. 2, ¶ 78.

25 72 Fed. Reg. 56,002, 56,002–03 (Oct. 1, 2007) (emphases added).

26 *See* Dkt. 6, at 6; 12 U.S.C. § 1709(b)(9)(C).

27 *Pueblo of San Juan*, 276 F.3d at 1196.

28 *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quotations omitted); *see King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

could provide DPA "as part of their respective homeownership programs."[29] HUD plucks a single, passing sentence from the Federal Register notice as proof of a longstanding HUD policy imposing "jurisdictional" limits on governmental instrumentalities. In a subpart of the background section in the preamble discussing "State and local governments" using HFAs to provide DPA, the 2012 Rule noted that "HFAs provide various services to assist citizens within their jurisdictions in attaining affordable housing options."[30] That general statement is no doubt true, but it cannot plausibly form the basis of a jurisdictional *limitation* on governmental instrumentalities' provision of DPA. "[A] preamble does not create law; that is what a regulation's text is for."[31] Indeed, HUD's analysis of the "Interpretive Issue" begins two pages later and never hints at any federally imposed jurisdictional limits on the provision of DPA. Rather, HUD concluded that HERA allowed governmental DPA because (1) HERA itself authorized governmental homeownership programs with cash investment components, so precluding governments from providing funding "would undercut a central purpose" of the statute, and (2) HERA's legislative history demonstrated that governmental entities were not the Act's intended "targets" for proscription.[32] HUD's conclusion and reasoning made no mention of any jurisdictional limits, because there were none.[33]

HUD also (at 14–17) points to a sentence added to the HUD Handbook in 2015 that said the NHA does not prohibit governmental entities from providing DPA "when acting in their

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29 77 Fed. Reg. 72,219, 72,222 (Dec. 5, 2012) (attached herein as Ex. F).

30 *Id.* at 72,220.

31 *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 237 (D.D.C. 2014).

32 77 Fed. Reg. at 72,222.

33 *N.H. Hosp. Ass'n v. Azar*, 887 F.3d 63, 73–74 (1st Cir. 2018) (noting that single sentence in guidance document supporting agency's assertion of prior policy "falls far short of demonstrating any longstanding—or even short-standing—actual implementation" of such a policy).

governmental capacity."[34] But the Handbook does not define "governmental capacity." To fill the void, HUD now cherry-picks dictionary definitions to restrict tribes to providing DPA within their own political boundaries. But the same dictionary just as easily supports defining governmental capacity to mean the "legal qualification, competency, power, or fitness" to exercise "authoritative direction or control," which plainly supports the concept that a governmental actor may remain in a governmental capacity when outside its political borders.[35] Moreover, under Black's Law Dictionary definitions of "governmental" and "capacity," CBCMA surely had the "ability to do a thing" "relating to[] or involving a government."[36] Semantics aside, an agency may not retrofit a favorable definition in a litigation brief that the agency did not advance when it took the challenged action.[37]

2. HUD's claimed definition contradicts common usage, common sense, and fundamental principles of sovereignty.

The definition of "governmental capacity" now advanced by HUD is not only absent from HUD's own materials, but is plainly illogical. Governments and their instrumentalities do not lose their governmental status by engaging in commercial activities outside of their borders. When the Governor of Utah makes "countless visits to [California] in an effort to lure companies to the

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[34] The State HFAs refer to a 2016 version of the Handbook, but the cited statement was added in spring 2015 and took effect in fall 2015. HUD Handbook 4000.1, II.A.4.d.ii.(B) (Apr. 30, 2015).

[35] *See Capacity* and *Government*, WEBSTER'S THIRD NEW INT'L DICTIONARY (2002). Regardless, Webster's Third has been roundly criticized for its "frequent inclusion of doubtful, slipshod meanings without adequate usage notes." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 422 (2012); *see MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225–26 (1994) (declining to defer to government interpretation based primarily on definitions drawn from Webster's Third).

[36] *See Capacity* and *Governmental*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[37] *USPS v. Postal Regulatory Comm'n*, 842 F.3d 1271, 1274 (D.C. Cir. 2016) (rejecting agency's purported "reasonable interpretation of [a] statute" first advanced in counsel's "brief").

mountains of Utah," he is still acting as the Governor of Utah.[38]

If governments and their instrumentalities did lose their governmental status when they engaged in commercial activities outside their jurisdictions, it would upend tribal sovereign immunity. Immunity from suit is "inherent in the status of the government as a sovereign,"[39] so a determination that an entity is not acting in its governmental capacity is tantamount to a finding that it does not enjoy sovereign immunity. The Supreme Court has expressly declined "to make any exception [from tribal sovereign immunity] for suits arising from a tribe's commercial activities, even when they take place off Indian lands."[40] The Court expressly *rejected* a state's argument that a tribe that "participate[s] in off-reservation gaming and other commercial activity" such as "fishing, selling cigarettes, and leasing coal mines" to non-members "operate[s] . . . less as governments than as private businesses."[41] HUD's argument that tribes operate less as governments than as private businesses when operating off reservations or with non-members should likewise be rejected. Indeed, it is "incontrovertible" that, under the Indian Commerce Clause, Congress can regulate "commerce, or traffic, or intercourse . . . with an Indian tribe, or with a member of such tribe, . . . without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on."[42] That specifically enumerated power makes little sense if tribes act beyond their governmental capacity when they engage in activities outside of their reservation's borders.

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[38] Brock Blake, *Beyond Tech Unicorns: What Other States Can Learn From Utah's Small Business Economy*, FORBES (May 11, 2019), https://tinyurl.com/yypxuc7u (Ex. Q-1).

[39] *Christensen v. Ward*, 916 F.2d 1462, 1472 (10th Cir. 1990).

[40] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014); *see also Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998).

[41] *Bay Mills*, 572 U.S. at 790, 797.

[42] *United States v. Holliday*, 70 U.S. 407, 417–18 (1865).

Neither the HUD Handbook's reference to "governmental capacity" nor the off-hand sentence from the preamble to the 2012 legislative rule could have established a policy contrary to blackletter law. HUD attempts (at 11) to use *Skidmore* deference as a crutch, but it cannot do so, for two reasons. *First*, there is literally nothing to defer to. Because the Mortgagee Letter does not even purport to construe any provision of federal law, it cannot be "fairly described as interpretive" of anything.[43] "[T]here is nothing in the [statute] that the" challenged directive "specifically interprets."[44] Because HUD "offered no meaningful hint" that it "derived the policy announced in the [Mortgagee Letter] from an interpretation of the statute or the regulation," it "looks . . . more . . . as if the Secretary is using delegated power to announce a new policy out of whole cloth."[45] *Second*, a "court only defers under *Skidmore* when the agency decision has the 'power to persuade,'"[46] which requires "examining the thoroughness evident in the [agency's] consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements."[47] Any rationale hinted at in the Mortgagee Letter is far from thorough, any reasoning that can be distilled is not valid, and the Letter is inconsistent with earlier pronouncements. If anything, HUD's claim to *Skidmore* deference shows ambiguity existed before the Mortgagee Letter, which favors CBCMA because the government must be "unequivocal[]" if it intends to limit tribal rights.[48] At the very least, HUD could not implement a

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43 *Mission Grp. Kan., Inc. v. Riley*, 146 F.3d 775, 782–83 (10th Cir. 1998).

44 *Nat'l Ski Areas Ass'n v. U.S. Forest Serv.*, 910 F. Supp. 2d 1269, 1281 (D. Colo. 2012).

45 *N.H. Hosp. Ass'n*, 887 F.3d at 72.

46 *Efagene v. Holder*, 642 F.3d 918, 921 n.1 (10th Cir. 2011).

47 *Vaquero-Cordero v. Holder*, 498 F. App'x 760, 763 (10th Cir. 2012) (quotations omitted).

48 *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quotations omitted); *see United States v. Osage Wind, LLC*, 871 F.3d 1078, 1090 (10th Cir. 2017).

policy that purports to restrict the governmental status of tribal instrumentalities—whether in 2012, 2015, or 2019—without first following the APA's notice-and-comment procedures.

3. HUD has allowed CBCMA's program for years, undermining its claim that the Mortgagee Letter merely clarifies existing policy.

It would be strange indeed if HUD had previously established strict jurisdictional limits on the provision of DPA by governmental entities, as it claims, because HUD has been aware of and tacitly approved nationwide DPA programs for years. At a minimum, HUD's "conspicuous inaction" demonstrates that HUD did not think the "practice was unlawful."[49] Since CBCMA's inception, HUD has insured thousands of loans for which CBCMA provided DPA with full knowledge that CBCMA's assistance was given to non-tribal members for properties located off the reservation.[50] Indeed, HUD and *amici* point to "no evidence that the agency consistently implemented the statute" before now "in accord with [the agency's] present policy," which "reinforce[s] . . . classify[ing] the rule at issue in this case as legislative."[51]

Instead, HUD's insurance of loans that include CBCMA's DPA is "conclusive evidence of the eligibility of the loan or mortgage for insurance."[52] HUD misses the point when it argues (at 23–24) that HUD cannot be estopped. CBCMA has not argued estoppel; rather, the mountain of previously approved, conclusively eligible loans, the approval of which depended on the compliance of CBCMA's DPA with HUD guidelines, shows that HUD never had a contrary policy. While HUD is correct that its Lender Approval and Recertification Division does not look at DPA plans when reviewing *lender* applications, HUD omits that an entirely different division—

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49 *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156–58 (2012).

50 Ex. H (ltr. from Lora E. Tom, Cedar Band Chairwoman, to HUD dated Mar. 27, 2017).

51 *N.H. Hosp. Ass'n*, 887 F.3d at 73–74.

52 12 U.S.C. § 1709(e).

the Quality Assurance Division ("QAD")—is tasked with reviewing *loans*, and the source of the borrower's minimum required investment, including DPA.[53] At the very least, HUD's actions gave CBCMA "settled legal expectations" that cannot be "upset" without notice and comment.[54] HUD argues (at 24) that "[l]ack of enforcement" does not create a policy. That flips the question, which is whether the policy HUD claims the Mortgagee Letter merely implements existed in the first place. The cases cited by HUD (and the State HFAs) are thus inapposite because they involve statutes or regulations that clearly spoke to the specific conduct at issue.[55] In contrast, the Mortgagee Letter is the first pronouncement of HUD's restrictive approach to tribes' authority to provide DPA, and it certainly does not reflect a HUD policy that has been enforced in practice. Indeed, if the Letter did not have a substantive effect, HUD would not have needed to include an effective date—and the brief extension of that effective date would not have given CBCMA any interim relief, yet it did.

Any uncertainty about the status of the Mortgagee Letter as a new policy is erased by the real-world reaction of DPA market participants. The Letter caused an uproar in the mortgage industry, generated extensive national press and industry coverage,[56] and was raised in

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[53] U.S. Br. at 24 & n.92 (citing Ex. A, Decl. of Volky Garcia, Director of the Lender Approval and Recertification Division); 68 Fed. Reg. 50,167, 50,168 (Aug. 20, 2003) (noting QAD "is responsible for ensuring that FHA-approved lenders comply with requirements that govern lender practices"); Ex. I (Mar. 27, 2017 presentation by QAD Director Jack Higgins describing results of QAD loan reviews and noting at slide 9 that QAD examines the sources of minimum required investment).

[54] *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1159 (10th Cir. 2006).

[55] *MetWest Inc. v. Sec'y of Labor*, 560 F.3d 506, 509–11 (D.C. Cir. 2009); *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1349 (10th Cir. 1987); *Warshauer v. Solis*, 577 F.3d 1330 (11th Cir. 2009); *Moran Mar. Assocs. v. U.S. Coast Guard*, 526 F. Supp. 335 (D.D.C. 1981).

[56] *See, e.g.*, Greg Norton, HUD down-payment policy harms first-time buyers, American Banker (June 11, 2019) (Ex. Q-2).

Congressional hearings. "[A]n agency pronouncement will be considered binding as a practical matter if . . . affected private parties are reasonably led to believe that failure to conform will bring adverse consequences."[57] And within a *day* of the Letter issuing, correspondent lenders terminated their relationship with CBCMA effective *immediately*; by the day after, 96% of CBCMA's active lenders had put their business with CBCMA on hold.[58] These facts refute HUD's characterization of the Letter as nothing but a ministerial instruction regarding loan documentation.

The State HFAs, meanwhile, point (at 10–11) to their own programs, which are "limited to their respective territories," to show how HUD's purported policy was "understood." But state and local governments do not function as federally recognized entities, and limits that state and local governments voluntarily imposed on *themselves* long before the 2007 Rule say nothing about whether *HUD* had a restrictive policy with respect to the provision of DPA by governmental entities.[59] So too with the self-imposed practices of other tribes, which the State HFAs also point to. Similarly, HUD argues (at 16) that the Cedar Band's governing documents limit it to acting within the reservation and imply that this supports the existence of HUD's purported prior policy. What the Band's Constitution says is irrelevant to whether HUD needed to comply with the APA's notice-and-comment procedures. Even on HUD's own terms, however, they are incorrect.

The Constitution of the Paiute Indian Tribe of Utah (the conglomerate of the Cedar Band

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57 *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (quotations omitted).

58 Dkt. 2, ¶ 51; Dkt. 2-3, ¶¶ 30–33; *see* Dkt. 70, at 5; Dkt. 70-2, ¶ 17.

59 *See, e.g.*, 35 Penn. Stat. § 1680.404c(a)(1) (since at least 1998, permitting the Pennsylvania Housing Finance Agency to provide assistance to borrowers with a principal residence in Pennsylvania); Idaho Stat. § 67-6205(h) (since at least 1996, defining the Idaho Housing and Finance Agency's "area of operation" as the state of Idaho); Wash. Rev. Code § 43.180.220(1), (3) (since at least 1994, authorizing the WSHFC to develop a program that provides for subsidized mortgage financing for single-family homeownership in the state of Washington).

and the other four bands of Southern Paiute Indians) states that the "governmental powers" of the tribe shall "extend to all persons, subjects, and property . . . within the exterior boundaries of reservation lands."[60] The Tribe's Constitution does *not* state that those powers extend "only" to those boundaries, as HUD and the State HFAs assume. The Tribe's "[p]owers of self-government" are defined as "all governmental powers possessed by the tribe, executive, legislative, and judicial."[61] But the "governmental powers" provision merely delineates the *coercive* authority each band enjoys, i.e. the constrained rights tribes have to "govern[]" individuals and ensure compliance with their own laws.[62] It does not mean that a band or its agents or instrumentalities cease to be governmental the moment they cross the reservation's physical boundaries to interact with the world. Indeed, the constitution of the tribe involved in *Bay Mills* similarly provided that the "jurisdiction of the [tribe] shall extend to all territory within the original confines of the [tribe's] reservation," yet that language did not stop the Supreme Court from holding that tribes act as governments when engaged in commercial activity outside their borders.[63]

Adopting HUD's interpretation also would lead to absurd results. If a band could act as a government only within its reservation, the specifically enumerated governmental powers held by the band councils "[t]o make contracts," "[t]o conduct business affairs," "[t]o manage band enterprises and own and operate businesses," and "[t]o spend band funds" would be severely limited.[64] Each band and its instrumentalities would become private actors any time they contract or even meet with individuals and entities located off the reservation, even for work to be done on

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60 Dkt. 65, Ex. 35, art. I, § 2.

61 *Id.*, art. XIII, § 1(b) (quotations omitted).

62 *See* *Montana v. United States*, 450 U.S. 544, 565 (1981) (quotations omitted).

63 Ex. J, art. II, § 1.

64 *See Amici* Ex. 35, art. VIII, §§ 2(d), (h).

the reservation—or "to negotiate with the Federal, State and local governments," as the Tribe's Constitution also allows.[65] This interpretation also would conflict with Plaintiffs' corporate charter, which expressly permits the "incorporated tribe" to engage in commercial activity both on and off tribal lands.[66] And it would undermine the settled principle that tribes retain their sovereignty when they act through arms of the tribe outside the tribe's reservation.[67]

If there were any doubt, the Court should defer to the Band's and the Paiute Tribe's understanding of "the constitutional language, . . . even though non-Indians are involved"—not HUD's *post hoc* interpretation.[68] In line with judicial principles of deference to tribes, at least one arm of the Executive Branch, the Bureau of Indian Affairs, has a policy of deferring to a tribe's interpretation of its own constitution.[69] The Band understands the tribal constitution to allow it to conduct business off-reservation, as demonstrated by the terms of Cedar Band Corporation and CBCMA's charters, a resolution issued by the Band Council, and clear statements from Band leaders; the Paiute Tribe itself clearly interprets the constitution the same way.[70] HUD's attempt to supplant the Band's and the Paiute Tribe's interpretation of the Paiute Constitution with their own gloss undermines the Band's sovereignty and should carry no weight.

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65 *Id.*, art. V, § 1.

66 25 U.S.C. § 5124; Dkt. 2-4, arts. VII.F., VIII.A., VIII.D, VIII.P, VIII.S.

67 *E.g.*, *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010).

68 *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir. 1993).

69 *See Brady v. Acting Phoenix Area Dir.*, 30 IBIA 294, 299 (1997); *Shakopee Mdewakanton Sioux Cmty. v. Acting Minneapolis Area Dir.*, 27 IBIA 163, 171 (1995).

70 Ex. P (Paiute Tribal Council Resolution, June 26, 2019); *see also* Dkt. 2-4, arts. VII.F., VIII.A., VIII.D, VIII.P, VIII.S; Dkt. 2-5, art. VII, § 7.01, art. VIII, §§ 8.19–8.20; Ex. K (Cedar Band of Paiutes Band Council Resolution 2019-02, dated May 13, 2019) ("The Cedar Band is acting in its essential governmental capacity when, acting through CBCMA, it provides gifts and secondary financing to non-tribal members off reservation land."); Ex. H (ltr. from Lora E. Tom, Cedar Band Chairwoman, to HUD dated Mar. 27, 2017).

4. The Mortgagee Letter contains other, material policy changes.

Imposing new jurisdictional restrictions is not the only way the Mortgagee Letter changes HUD policy *sub silentio*. HUD also amended the substantive requirements that determine whether a loan can be insured, and dramatically restricted the secondary market activities of DPA providers—the very activities HUD acknowledged in 2016 were outside the scope of the HERA interested-party prohibition.[71] *First*, the Mortgagee Letter requires all DPA providers, HFAs and tribal lenders alike, to "establish[]" that "the provision of [DPA]" is not "contingent upon any future transfer of the insured Mortgage to a specific entity."[72] HUD previously examined this practice and found it lawful.[73] This new requirement puts in peril the many DPA programs that rely on the secondary market purchase and sale of insured mortgages to generate sufficient revenues to fund homeownership and other programs that help low-income populations. As the National Council of State Housing Agencies ("NCSHA") and the Mortgage Bankers Association have noted, this new requirement "will make it exceedingly difficult for HFAs to generate sufficient funds to administer sustainable downpayment assistance programs," and several HFAs actually suspended programs following publication of the Mortgagee Letter.[74] NCSHA represents HFAs across the country, including the State HFAs.[75] It is surprising that the State HFAs have

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[71] *See* Dkt. 2-10, at 3.

[72] HUD Handbook 4000.1, II.A.4.d.ii(B); 77 Fed. Reg. at 72,223 (emphasis added).

[73] *See* Dkt. 2-10, at 3. The State HFAs point (at 15 n.48) to a Handbook provision stating that any entity that "financially benefits from the transaction (directly ***or indirectly***)" is prohibited from providing DPA. HUD Handbook 4000.1, II.A.4.d.ii.(B) (emphasis added). The Handbook's inclusion of "indirectly" in the financially-benefits clause is inconsistent with the statutory language, is contradicted by the 2016 Memorandum, and has never been enforced.

[74] Ex. O at 2 (ltr. from MBA and NCSHA to Brian D. Montgomery dated June 24, 2019); *see also* Ex. L (ltr. from NCSHA to Brian D. Montgomery dated Apr. 23, 2019).

[75] NCSHA, *HFA and Associate Members*, https://tinyurl.com/yxcp9hoa (Ex. Q-3).

urged HUD to correct the material change implemented by the Letter while representing to this Court and others that there is no such change.

Second, consistent with HUD's previous policy that HERA's prohibition on interested-party contributions applied only to primary market participants, HUD historically only expressly exempted from the prohibition those governmental authorities that "originat[ed] the insured Mortgage through one of its homeownership programs."[76] In other words, HUD did not need to address whether HERA's prohibition applied to governmental entities' secondary market activities because HERA's prohibition did not apply to the secondary market at all. By amending the Handbook to expressly state that HERA's prohibition applies "where the Mortgage is being originated as part of a Governmental Entity homeownership program,"[77] rather than where the mortgage is originated directly by the Governmental Entity, Mortgagee Letter 2019-06 dramatically expands the scope of HERA's interested party prohibition and changes HUD's prior position. Such drastic changes independently require notice and comment.

5. HUD violated its own public participation policy.

"[W]hether or not the APA's notice and comment requirement is applicable, HUD has nevertheless violated its own policy," codified in 24 C.F.R. § 10.1.[78] That regulation commits HUD to "provide for public participation in rulemaking with respect to all HUD programs and functions." HUD meekly protests (at 21) that Section 10.1 is "non-binding," even though HUD's own test of what constitutes a legislative rule plainly says otherwise because HUD published

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[76] HUD Handbook 4000.1, II.A.4.d.ii(B); 77 Fed. Reg. at 72,223 (emphasis added).

[77] Dkt. 2-2, at 4.

[78] *Patriot*, 963 F. Supp. at 5; *Hous. Study Grp.*, 732 F. Supp. at 186.

Section 10.1 in the Code of Federal Regulations.[79] In any event, HUD ignores multiple cases holding that "Section 10.1 *requires* HUD to proceed by notice and comment rulemaking whenever it promulgates a substantive rule."[80] "Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure."[81] HUD "voluntarily elected to proceed by rulemaking" by adopting Section 10.1, and HUD's failure to meet its obligation is an independent ground for vacatur.[82]

B. The Mortgagee Letter Violates HUD's Own Tribal Consultation Policy.

HUD committed to consulting "with individual tribes" before adopting any policy that has "tribal implications."[83] But HUD never consulted with any tribe before confining tribes' activities to their reservations. HUD does not contest this, instead arguing that the consultation policy is unenforceable. Courts have held that where an agency "has established a policy requiring prior consultation with a tribe, and has thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before [that agency's] policy is made, that opportunity must be afforded" pursuant to both "general principles which govern administrative decisionmaking" *and* the government's "distinctive obligation of trust" in its relationship with tribes.[84] HUD's violation of its policy is thus arbitrary and capricious

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79 *See* U.S. Br. at 13.

80 *Yesler*, 37 F.3d at 448 (emphasis added); *Patriot*, 963 F. Supp. at 5 ("HUD has nevertheless violated its own policy of undertaking notice and comment before it issues substantive rules.").

81 *Utahns for Better Transp. v. DOT*, 305 F.3d 1152, 1165 (10th Cir. 2002).

82 *Hous. Study Grp. v. Kemp*, 736 F. Supp. 321, 325 n.3 (D.D.C. 1990).

83 81 Fed. Reg. 40,893, 40,896 (June 23, 2016).

84 *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979) (quotations omitted); *see Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 399 (D.S.D. 1995) (rejecting agency's contention that consultation policies "do not have the force of law and thus create no duty upon the BIA which would support the tribe's complaint").

regardless of the policy's purported disclaimer that it does not create an enforceable right.[85] HUD's alternative argument that the Mortgagee Letter carried no "tribal implications" is risible. The Mortgagee Letter "ha[d] substantial direct effects on one or more Indian tribe[s]" by imposing tribe-specific DPA requirements and defining for all tribes where they can act in a governmental capacity.[86] The Cedar Band brought this lawsuit, and the Affiliated Tribes of Northwest Indians have condemned the Letter.[87] The tribal implications are obvious.

C. The Mortgagee Letter Violates The APA Because It Offers No Reasoned Explanation.

HUD failed to provide any explanation in the Mortgagee Letter, much less a reasoned one. HUD's passing assertion (at 7) that the Letter was intended to prevent "abuse" of the 2012 interpretive rule is textbook "*post hoc* rationalization[] of counsel" that must be "disregard[ed]."[88]

HUD also says (at 17 n.68) that it was not required to explain itself because the Mortgagee Letter is not a substantive, legislative rule. That is wrong. *First*, as described above, the Letter is a substantive, legislative rule because it alters legal rights. Before the Letter, CBCMA could offer DPA to homebuyers across the country. In a blink, HUD: (1) imposed wholly new jurisdictional limitations that severely restrict the ability of some DPA providers to participate in an emerging national market; (2) curtailed CBCMA's generation of revenue that funds core tribal governmental activities; (3) introduced a new and broader ban on DPA provided by governmental instrumentalities that participate in the secondary (not primary) mortgage market, in contradiction of its own recent holding that the prohibition on interested-party DPA does not apply to

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85 81 Fed. Reg. at 40,897.

86 *Id.* at 40,895 (defining "tribal implications").

87 Ex. M (Affiliated Tribes of Nw. Indians Resolution 19-28, dated May 20-23, 2019).

88 *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1221 (10th Cir. 2009).

transactions in that market; and (4) disrupted a funding mechanism essential to the vast majority of governmental DPA programs. HUD "create[d]" and "impose[d] new . . . duties" for tribal DPA providers,[89] which triggers APA obligations—including the need for reasoned explanation.

Second, the APA's "arbitrary and capricious standard" applies even to "an interpretive rule."[90] Moreover, HUD's prior non-enforcement engendered "significant reliance interests," thus requiring "reasoned explanation for its decision to depart from its existing enforcement policy."[91] That never happened. Secretary Carson has since "agree[d]" that HUD should "collect the appropriate data to judge the success" of DPA programs before "moving forward" with its policy.[92] But the Mortgagee Letter provides *no* data or evidence to support its decision—much less data on the relative and relevant differences among different types of DPA providers. And an agency's interpretation, even in an informal letter, must "be set aside . . . if it lacks factual support."[93]

D. The Mortgagee Letter Violates Fair Notice And Effects A Taking.

HUD violated CBCMA's due process rights by destroying its business without fair notice. HUD's longstanding practice of *insuring* CBCMA's loans gave rise to "settled expectations" that were unlawfully "disrupted."[94] An agency may not flip from effective "acquiescence" through "conspicuous inaction" to a new policy without "fair warning."[95] The Mortgagee Letter also is arbitrary and capricious in violation of the APA because its destruction of CBCMA's "substantial

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89 *Id.* at 1222.
90 *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015).
91 *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).
92 Ex. A, at 53.
93 *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575–76 (10th Cir. 1994).
94 *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *see supra* 12-14.
95 *Christopher*, 567 U.S. at 156–58 (quotations omitted).

past investment incurred in reliance upon" the prior policy means the Letter "has unreasonable secondary retroactivity."[96] HUD's argument (at 27) that "Plaintiffs should have known for years that they" could not operate nationwide ignores that HUD insured CBCMA's loans despite *full knowledge of CBCMA's tribal status and off-reservation operations*. Similarly, HUD destroyed CBCMA's business without compensating it, in violation of the Takings Clause and the APA.[97] Contrary to HUD's assertions (at 25–26), the Constitution's protection is not limited to takings of land.[98] Nor is the Letter directed at "public crimes of general applicability";[99] it is directed at tribal lenders of DPA. At a minimum, the Court should not defer to HUD's interpretations of the NHA or its own guidance documents in light of these serious constitutional issues.[100]

E. The Mortgagee Letter Exceeds HUD's Statutory Authority.

As explained above, the NHA does not establish limits on the provision of DPA by governmental entities, and does not leave room for HUD to create such limits out of whole cloth, especially with respect to tribes and tribal instrumentalities. *See supra* 4–12. The Mortgagee Letter should be vacated for other reasons as well.

First, governmental entities that do not originate the insured mortgage are not financially

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[96] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring). Contrary to HUD's suggestion that this standard is not "actually the law," U.S. Br. at 27 n.103, multiple circuits recognize the doctrine. *See In re FCC 11-161*, 753 F.3d 1015, 1072 (10th Cir. 2014) (acknowledging "secondary retroactivity" rule); *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) ("Secondary retroactivity . . . occurs if an agency's rule affects a regulated entity's investment made in reliance on the regulatory status quo before the rule's promulgation . . . .").

[97] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987).

[98] *E.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984).

[99] *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1210 (10th Cir. 2009) (quotations omitted).

[100] *See Hernandez–Carrera v. Carlson*, 547 F.3d 1237, 1249 (10th Cir. 2008) ("It is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due.").

interested under the NHA's interested-party prohibition, contrary to HUD's assertion (at 22). Many governmental entities, including CBCMA, are not a party to the property sales transaction, nor the primary mortgage transaction, but rather provide the funds to a third-party lender that originates both the first and subordinate lien mortgages, both of which the governmental entity purchases in a secondary market transaction.[101] As HUD itself has previously explained, Section 1709(b)(9)(C)'s interested-party prohibition is "directed towards parties that financially benefit from the property sales transaction and the primary mortgage transaction, not transactions that occur in the secondary mortgage market."[102] Indeed, HUD's contrary assertion in its brief is at odds with its recent announcement that it needs further rulemaking on what it means to "financially benefit."[103] At a minimum, the Mortgagee Letter violates 12 U.S.C. § 1735f-6 by prohibiting DPA from tribal governments when tribal governments cross an arbitrary line set forth in the Mortgagee Letter that purports to strip them of their inherent sovereign status.

Second, restricting the tribes to providing DPA to properties on the reservation or solely to tribal members raises serious Fair Housing Act concerns. The Mortgagee Letter's categorical rule is fundamentally different than the adoption of hiring preferences for Indians to promote self-government.[104] Indeed, HUD aggressively polices lenders who unlawfully refuse to lend to borrowers on Indian reservations.[105] Requiring tribes to limit DPA *only* to borrowers on reservations or enrolled tribal members would be no less discriminatory.

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101 Dkt. 2-3, ¶¶ 10, 11.
102 Dkt. 2-10, at 3.
103 Dkt. 2, ¶¶ 37–38; Spring 2019 Unified Agenda, RIN No. 2502-AJ50 (Ex. Q-5).
104 U.S. Br. at 25 n.95 (citing *Morton v. Mancari*, 417 U.S. 535, 554 (1974)).
105 *See* HUD, Title VIII Conciliation Agreement, FHEO Title VIII Case No. 08-13-0299-8; HUD, Title VIII Conciliation Agreement, FHEO Title VIII Case Nos. 08-17-5267-8 & 08-6949-8.

II. Plaintiffs Are Suffering Immediate Irreparable Harm.

The Mortgagee Letter threatens the very existence of CBCMA's business, CBCMA is suffering the loss of customers, CBCMA's hard-earned goodwill is eroded by the Mortgagee Letter, and the Mortgagee Letter imposes constitutional injury. Each of these injuries is immediate and irreparable. HUD argues (at 27–29) that Plaintiffs will suffer no irreparable harm from "losing profits to which they are not entitled." That circular logic assumes HUD's view of the merits and thus improperly conflates the first two preliminary injunction factors. Moreover, HUD does not contest that CBCMA has suffered harm to its goodwill. HUD argues (at 29) that CBCMA lacks standing to "raise the rights of others," but harm to borrowers supports the *public interest* factor. CBCMA's standing flows from the destruction of its business.

III. The Public Interest Favors An Injunction.

As HUD notes, the final two factors "merge" because "the Government is the opposing party."[106] "There is generally no public interest in the perpetuation of unlawful agency action."[107] Moreover, "the public interest is best served by having federal agencies comply with . . . the notice and comment requirements of the APA, and the agency's own stated polic[i]es."[108] The APA itself "reflect[s] a judgment by Congress that the public interest is served by a careful and open review of proposed administrative rules and regulations," and the public interest "is served from proper process itself," regardless of the "substantive result."[109]

The State HFAs advance several arguments for why HUD's policy is desirable, alleging

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106 *Nken v. Holder*, 556 U.S. 418, 435 (2009).

107 *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

108 *Patriot*, 963 F. Supp. at 6.

109 *California v. Azar*, 911 F.3d 558, 581–82 (9th Cir. 2018) (quotations omitted).

that DPA programs are "ripe for abuse" and that DPA providers should be politically accountable. But the Mortgagee Letter cannot be sustained on grounds that HUD itself did not rely upon.[110] In any event, CBCMA's program is not so different from those offered by the State HFAs, and CBCMA's program in fact promotes their stated policy goals: CBCMA engages a HUD-approved counseling agency—not lenders, brokers, or realtors like certain State HFAs—to educate lower FICO-score borrowers before the purchase and supports borrowers following closing to ensure they maintain a budget and pay their mortgage on time; is politically accountable through CBC, which is itself owned entirely by the Band; and directs 100% of its net revenue to programs that support low-income individuals, including students and the elderly.[111] Indeed, the public interest is served by an injunction because destroying CBCMA harms CBCMA's prospective customers, including many minorities and lower-income borrowers who need help with down payments, since 93% of respondents in a recent survey of CBCMA customers conducted by one of its lenders said they would not "have been able to purchase [their] home[s] without Chenoa Fund [DPA]" and 92% consider their mortgage "affordable."[112] Regardless of the State HFAs' arguments, that they felt the need to submit 300 pages of exhibits illustrates why the APA requires notice and comment. The State HFAs cannot backfill the record that HUD failed to create.

CONCLUSION

The Court should grant the Motion for a Preliminary Injunction.

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[110] *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

[111] Dkt. 2-3, ¶¶ 15–17; Dkt. 2-4, art. XVI.B; Dkt. 2-5, §§ 5.01, 14.02; Dkt. 52-6, ¶¶ 3–6; WSHFC, *Training for Loan Officers, Real Estate Professionals, and Nonprofit Service Providers*, https://tinyurl.com/yxzlxwp9 (Ex. Q-4) (offering training to loan officers and real estate professionals to "[t]each [c]ommission-[s]ponsored [h]omebuyer [e]ducation [s]eminars").

[112] Ex. N (Chenoa Fund Down Payment Assistance Survey Results) (June 6, 2019).

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Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing is no more than 25 pages in length in accordance with the Court's order of May 23, 2019, *see* Dkt. 63, excluding portions of the memorandum exempted by DUCivR 7-1(a)(3)(A).

I further certify that the foregoing complies with DUCivR 10-1(b) and is written in Times New Roman, 12 point font, using Microsoft Word 2016.

Date: June 26, 2019

s/ Jeremy M. Christiansen
Jeremy M. Christiansen

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Utah by using the Court's CM/ECF system on June 26, 2019. All parties to this case are registered CM/ECF users.

Date: June 26, 2019

s/ Jeremy M. Christiansen
Jeremy M. Christiansen