ORAL ARGUMENT NOT SCHEDULED

No. 15-1177

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PHH CORPORATION; PHH MORTGAGE CORPORATION; PHH HOME LOANS, LLC; ATRIUM INSURANCE CORPORATION; and ATRIUM REINSURANCE CORPORATION,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION
(CFPB FILE NO. 2014-CFPB-0002)

BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF RESPONDENT CONSUMER FINANCIAL PROTECTION BUREAU

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Amicus curiae AARP submits the following information in accordance with D.C. Cir. R. 28(a)(1):

A. Parties and Amicus. All parties and intervenors appearing before the Consumer Financial Protection Bureau and in this court are listed in the Brief for Respondent, except that the Amicus Curiae joining this brief is AARP and the attorneys representing AARP on the brief are employed at AARP Foundation Litigation.

B. Rulings Under Review. PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation, have appealed the July 4, 2015 Order issued by the Director of the Consumer Financial Protection Bureau in *In the Matter of PHH Corp.*, CFPB No. 2014-CFPB-0002 (July 4, 2015).

C. Related Cases. An accurate statement regarding related cases appears in the Brief for Respondent.

Dated: November 12, 2015

/s/*Julie Nepveu*
Julie Nepveu
Counsel for Amicus Curiae AARP

CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and AARP Insurance Plan, also known as the AARP Health Trust.

AARP has no parent corporation, nor has it issued shares or securities.

STATEMENT REGARDING CONSENT TO FILE, SEPARATE BRIEFING, AUTHORSHIP AND MONETARY CONTRIBUTIONS

All parties have consented to the filing of this brief. Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, no person or entity other than amicus curiae AARP, their members, or their counsel made a monetary contribution to this brief's preparation or submission. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to D.C. Circuit Rule 29(d), as of November 12, 2015, Amicus Curiae AARP is not aware of any other amici filing a brief in support of Respondent.

TABLE OF CONTENTS

PAGE

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

CORPORATE DISCLOSURE STATEMENT ii

STATEMENT REGARDING CONSENT TO FILE, SEPARATE BRIEFING, AUTHORSHIP AND MONETARY CONTRIBUTIONS ii

TABLE OF AUTHORITIES v

GLOSSARY x

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. RESPA WAS ENACTED TO ENCOURAGE HIGHER HOMEOWNERSHIP RATES BY PROTECTING HOMEBUYERS FROM UNJUSTLY INFLATED SETTLEMENT COSTS 6

II. KICKBACKS CAUSE CONCRETE HARM TO HOMEBUYERS 11

A. Kickbacks Create An Inherent Conflict Of Interest Between Real Estate Service Providers And Homebuyers That Unjustly Increases The Cost Of Homeownership 11

B. Lax Enforcement Of RESPA And Other Mortgage-Related Consumer Protection Statutes Enabled Unscrupulous Lenders To Target Older Homeowners For High Cost Loans With Devastating Consequences 13

III. IN ORDER TO INCREASE PROTECTION FOR HOMEOWNERS, CONGRESS TRANSFERRED PRIMARY ENFORCEMENT AUTHORITY FOR FINANCIAL CONSUMER PROTECTION STATUTES TO THE NEWLY CREATED CFPB, WHICH IT EXPLICITLY VESTED WITH ENHANCED ADMINISTRATIVE ENFORCEMENT AUTHORITY. 16

A. Congress Created The CFPB To Eliminate Enforcement Gaps That Prevent Effective Enforcement Of Existing Financial Consumer Protection Laws 16

B. CFPB's Enforcement Authority Is Designed To Be More Comprehensive Than HUD's Authority To Enforce RESPA, And Is Not Constrained By HUD's Statutory Restrictions Or Enforcement Discretion 19

C. CFPB's Enforcement Order is Constitutional And Entitled to Deference 21

CONCLUSION 25

CERTIFICATE OF COMPLIANCE 26

CERTIFICATE OF SERVICE 27

TABLE OF AUTHORITIES*

Cases

Alston v. Countrywide Fin. Corp.,
585 F.3d 753 (3d Cir. 2009).. 12

Arthur v. Ticor Title Ins. Co.,
569 F.3d 154 (4th Cir. 2009).. 12

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553 F.3d 979 (6th Cir. 2009).. 12

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1:14-cv-00292-SEB-TAB, 2015 U.S. Dist. LEXIS 28254
(S.D. Ind. Mar. 6, 2015)..22, 23

Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc,
60 F. Supp. 3d 1082 (C.D. Cal. 2014)... 21

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798 F.3d 1172 (9th Cir. 2015).. 12

Fink v. SEC,
417 F.2d 1058 (2d Cir. 1969).. 22

**In the Matter of PHH Corp.*,
CFPB No. 2014-CFPB-002 (July 4, 2015)...................... 2, 3, 4, 5, 9, 11, 20

In the Matter of Timbervest, LLC,
Investment Advisers Act of 1940 Release No. 4197, Investment
Company Act of 1940 Release No. 31830, SEC Admin. Proc.
File No. 3-15519 (Sept. 17, 2015)...22, 23

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Patton v. Triad Guaranty Ins. Corp.,
277 F.3d 1294 (11th Cir. 2002). 12

Robinson v. Fountainhead Title Grp. Corp.,
252 F.R.D. 275 (D. Md. 2008).. 12

Voss v. SEC,
222 F.3d 994 (D.C. Cir. 2000) 22

Zacharias v. SEC,
569 F.3d 458 (D.C. Cir. 2009) 22

Statutes

5 U.S.C. § 557 22
12 U.S.C. §§ 1-16 24
12 U.S.C. § 2602... 10
12 U.S.C. § 2607... 10
12 U.S.C. § 2607(d)(4) 20
12 U.S.C. § 5481(12)(A)-(R). 5
12 U.S.C. § 5565(a)(1)-(2)... 20
12 U.S.C. § 1786(e)(3)(A) 21

Dodd-Frank Wall Street Reform and Consumer Protection Act,
Pub. L. No. 111-203, 124 Stat. 1376 (2010)... 18

Emergency Home Finance Act of 1970,
Pub. L. No. 91-351 § 701, 48 Stat. 1246 (1970).. 8

Emergency Housing Act of 1975,
Pub. L. No. 94-50, 89 Stat. 249 (1975) 3

Federal Trade Commission Act of 1914
Pub. L. No. 63-203, 38 Stat. 717... 23

Housing and Economic Recovery Act,
Pub. L. No. 110-289 § 1311, 122 Stat. 2661 (2008)....................................24

Real Estate Settlement Procedures Act,
Pub. L. No. 93-533, 88 Stat. 1724 (1974)...4, 9

Supplemental Appropriations Act,
Pub. L. 98-181 § 461, 97 Stat. 1231 (1983).. 10

Regulations

24 C.F.R. § 3500.19.. 20

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57 Fed. Reg. 49600 (Nov. 2, 1992) (codified at 24 C.F.R.
§ 3500)... 10

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1999–1 Regarding Lender Payments to Mortgage Brokers for
the Dept. of Hous. and Urban Dev., 64 Fed. Reg. 10,080 (Mar. 1,
1999) 18

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Arrangements for the Dept. of Hous. and Urban Dev.,
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boarddocs/rptcongress/tila.pdf. 17

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Reforming The Real Estate Settlement Procedure: Review of HUD's Proposed RESPA Rule Hearing Before H. Comm. on Fin. Services,107th Cong. (2002) (statement of Chairman Oxley)....................... 6

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GLOSSARY

CFPB	Consumer Financial Protection Bureau
Fannie Mae	Federal National Mortgage Association
Freddie Mac	Federal Home Loan Mortgage Corporation
HUD	Department of Housing and Urban Development
NCUA	National Credit Union Administration
OCC	Office of the Comptroller of the Currency
PMI	Private Mortgage Insurance
RESPA	Real Estate Settlement Procedures Act
SEC	Securities and Exchange Commission

STATEMENT OF INTEREST

Older people are often vulnerable to abusive and illegal mortgage lending and real estate settlement practices such as those at issue in this appeal. Kickbacks and junk fees—any fee charged for a service to a borrower that has little or no value in relation to the charge, and/or may be duplicative, to increase a loan originator's profits—can increase the costs of purchasing a home by thousands of dollars. Magnified by the high prevalence of unscrupulous lenders and brokers that target older homeowners, such costs have contributed to stripping away homeowners' equity, which is often the only asset held by older people to sustain them through their lifespan. Widespread mortgage lending abuses also correspond to unprecedented numbers of people entering their retirement years having to make mortgage payments and carrying increasingly unaffordable levels of consumer and health care debt that threaten their ability to afford basic necessities such as food, medicine and shelter.

Practices that threaten the financial security of older people, such as those at issue in this case, are of significant importance to AARP members. AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities, and protection from financial abuse.

As the leading organization representing the interests of people aged fifty and older, AARP works to prevent and remedy illegal and abusive practices that threaten the financial security of older people. The Consumer Financial Protection Bureau ("CFPB") was created in the wake of the subprime mortgage meltdown with one mission: to protect consumers from abusive and unfair practices in the financial services marketplace. Congress recognized that to accomplish its critical mission, the CFPB must have effective tools to enforce and remedy violations of financial consumer protection laws and hold law-breakers accountable for their actions.

This case strikes at the heart of the CFPB's legitimacy and authority to protect consumers, specifically with respect to mortgage lending practices. AARP's brief will address the importance of CFPB's broad authority to enforce consumer protection laws in protecting older people. AARP's participation in this case will assist this Court to resolve the issues presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

During the time period at issue in this case, PHH Corp. was one of the nation's largest home mortgage lenders. *See In the Matter of PHH Corp.*, CFPB

No. 2014-CFPB-0002 (July 4, 2015) at 2 [hereinafter Decision].[1] As is typical of loan originators, PHH referred borrowers whose mortgage loans exceeded 80 percent of the value of the property to private mortgage insurance ("PMI") providers.[2] PMI is paid by the borrower to protect the lender if the borrower defaults on the mortgage loan. PHH's wholly-owned affiliate provided "reinsurance" to the PMI providers to which PHH referred its borrowers.[3] The reinsurance protected the PMI insurer against default losses that exceeded the insured value of the loan in any book year. Decision at 3. Substantial evidence in the record shows that PHH referred its borrowers only to certain PMI providers that would collect premiums for both the PMI and the affiliate's reinsurance. *Id.*

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[1] PHH Mortgage Corp. and PHH Home Loans LLC, are owned in part by PHH Corp., a publicly owned corporation (collectively, "PHH"). Decision at 2. PHH originates home mortgage loans and, during the relevant period, sold virtually all its loans to the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). *Id.* PHH also purchased loans from other lenders and sold them in the secondary market. *Id.*

[2] PMI is generally required for conventional loans that exceed a loan-to-value ratio of 80 percent. *See* Emergency Housing Act of 1975, Pub. L. No. 94-50, 89 Stat. 249 (raising the limit on the outstanding balance of a conventional mortgage eligible for purchase by Fannie Mae and Freddie Mac from 70 percent to 80 percent of the value of the property securing the mortgage).

[3] PHH established Atrium Insurance Corp. as a wholly-owned subsidiary in 1994. Atrium did not have employees of its own; all of its functions were performed by employees of PHH. PHH established Atrium Reinsurance Corp. in 2010 to take over all functions of Atrium Insurance Corp. Decision at 2.

The PMI providers would remit the reinsurance premiums it had collected back to PHH's wholly owned subsidiary. *See* Decision at 2-3; Br. for Resp't at 1.

The CFPB found, pursuant to its administrative enforcement process, that PHH's referral practices violated the anti-kickback provisions of the Real Estate Settlement Procedures Act ("RESPA"), 93 Pub. L. No. 533, 88 Stat. 1724 (1974). *See* Decision at 7-9. In this appeal, PHH challenges the CFPB's enforcement order, claiming, *inter alia*, that the CFPB lacked authority to order injunctive relief and disgorge profits.

PHH's challenge should be rejected. Congress created the CFPB and vested it with broad remedial authority in order to protect consumers from widespread abuses in the financial services marketplace. Congress found that the patchwork of regulatory and enforcement agencies, each with its own jurisdiction and remedial authority, resulted in enforcement gaps that left consumers vulnerable to illegal practices. Baird Webel, et al., *Financial Regulatory Reform and the 111th Congress*, Cong. Research Serv. 10 (Apr. 16, 2010), http://1.usa.gov/1NMU2ws. To eliminate these gaps, Congress transferred primary enforcement authority for over seventeen federal financial consumer protection statutes to the CFPB.[4] *See* 12

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[4] The CFPA granted the CFPB enforcement authority over the Alternative Mortgage Transaction Parity Act, Consumer Leasing Act, Electronic Fund Transfer Act (except § 920), the Equal Opportunity Act, Fair Credit Reporting Act (except §§ 615(e), 628), Home Owners' Protection Act, Fair Debt Collection

U.S.C. § 5481(12)(A)-(R). Congress explicitly authorized the CFPB to enforce RESPA to protect consumers from harmful kickbacks that increase the cost of homeownership.

Effective enforcement of RESPA—and other mortgage-related financial consumer protection statutes within the CFPB's jurisdiction—is essential to protect older homeowners and other consumers from widespread mortgage lending abuses and devastating losses, such as those that precipitated the Great Recession. The CFPB's authority is not limited by the scope of HUD's previous authority, enforcement priorities, resources, or enforcement discretion. Respectfully, AARP urges this Court to find that the CFPB acted within its constitutional and statutory authority and to affirm the Order in *In the Matter of PHH Corp.*, CFPB No. 2014-CFPB-0002 (July 4, 2015).

Practices Act, Federal Deposit Insurance Act, Gramm-Leach-Bliley Act (§ 502-509, except § 505 as it applies to 501(b)), Home Mortgage Disclosure Act, Home Ownership and Equity Protection Act, Real Estate Procedures Act, S.A.F.E. Mortgage Licensing Act, Truth in Lending Act, Truth in Savings Act, Omnibus Appropriations Act (§ 626), Interstate Land Sales Full Disclosure Act.

ARGUMENT

I. RESPA WAS ENACTED TO ENCOURAGE HIGHER HOMEOWNERSHIP RATES BY PROTECTING HOMEBUYERS FROM UNJUSTLY INFLATED SETTLEMENT COSTS.

America historically has sought to encourage homeownership because it provides stability, builds wealth for families and communities, and spurs economic growth. *See* U.S. Dep't of Hous. and Urban Devel., *Homeownership and Its Benefits*, Urban Pol'y Brief, Number 2 (1995) [hereinafter HUD Homeownership Policy Brief], http://bit.ly/1AzFo2X. "For most American families, buying a home is the single biggest investment they will ever make. . . . As a public policy for the good of communities and families across the country, we want to encourage home ownership." *Reforming The Real Estate Settlement Procedure: Review of HUD's Proposed RESPA Rule Hearing Before H. Comm. on Fin. Services*, 107th Cong. (2002) (statement of Chairman Oxley).

America has prospered economically for sustained periods as a result of high levels of homeownership. President Clinton, like many Presidents before him, expressed the national consensus that "more Americans should own their own homes, for reasons that are economic and tangible, and reasons that are emotional and intangible, but go to the heart of what it means to harbor, to nourish, to expand the American Dream." HUD Homeownership Policy Brief, *supra*. Similarly, Ronald Reagan recognized that homeownership "supplies stability and rootedness" and Lyndon Johnson promoted homeownership as part of a strategy for addressing the urban ills of the 1960s, declaring that "owning a home can increase responsibility and stake out a [person's] place in [the] community. . . .The [person] who owns a home has something to be proud of and reason to protect and preserve it." *Id*.

Thus, decades of government housing policy have fostered homeownership. Congress created the government sponsored enterprises, including Fannie Mae and Freddie Mac, as the means to develop a secondary loan market, to be supervised by the Department of Housing and Urban Development ("HUD"). *See* U.S. Dep't of Hous. and Urban Dev., *HUD at 50, Creating: Pathways to Opportunity*, 15-16 , Office of Pol'y Dev. & Research (Oct. 2015), http://bit.ly/1WMZpSg. As the designated regulator for the government sponsored enterprises, HUD played an important role in making thirty-year mortgage loan credit readily available. HUD was responsible for standardizing the underwriting, documents, disclosures, and procedures for mortgage products that could be sold on the secondary market in order to increase market efficiencies and bring down the cost of purchasing a home. *See id*. at 238.

Among other efforts to increase the homeownership rate, HUD was tasked with reducing mortgage loan settlement costs that distort the market and increase the cost of homeownership. Borrowers rarely comparison-shop for settlement services, so there is no marketplace competition to keep prices in check. *See Kahrer v. Ameriquest Mortg. Co*., 418 F. Supp. 2d 748, 754 (W.D. Pa. 2005) ("[S]ince the real estate industry is structured so that settlement service providers do not compete for a consumer's business directly, but almost exclusively rely on referrals from real estate brokers, lenders or their associates for their business, the growth of controlled business arrangements effectively reduce the kind of healthy competition generated by independent settlement service providers.") (quoting H.R. Rep. No. 97-532, at 51-52 (1982)). Payments made in exchange for settlement services and imposing additional charges when no or nominal services have been performed "can unjustly increase the costs of loans and the settlement process." U.S. Gov't Accountability Off., GAO-04-280, *Federal and State Agencies Face Challenges in Combating Predatory Lending*: *GAO Report to Chairman and Ranking Minority Member, Special Committee on Aging, U.S. Senate* 33 (2004) [hereinafter GAO-04-280].

Cognizant that inflated settlement costs were a significant barrier to homeownership, Congress directed HUD and the Veteran's Administration to conduct a joint study as to legislative and administrative actions to reduce and standardize settlement costs and to report its recommendations to Congress. *See* Emergency Home Finance Act of 1970, Pub. L. 91-351 § 701, 48 Stat. 1246 (1970). The report identified "an elaborate system of referral fees, kickbacks, rebates, commissions and the like as inducements to those firms and individuals who direct the placement of business. These practices are widely employed, rarely inure to the benefit of the home buyer, and generally increase total settlement costs." S. Comm. on Banking, Housing, and Urban Affairs, *Mortgage Settlement Costs: Report of the Department of Housing and Urban Development and Veteran's Administration,* 93d Cong., 2nd Sess. (Comm. Print 1972). Congress enacted RESPA specifically "[t]o further the national housing goal of encouraging homeownership by regulating certain lending practices and closing and settlement procedures in federally related mortgage transactions to the end that unnecessary costs and difficulties of purchasing housing are minimized, and for other purposes." Real Estate Settlement Procedures Act, Pub. L. No. 93-533, 88 Stat. 1724 (1974). RESPA specifically prohibited kickbacks from referrals to third parties for settlement-related products and services. 12 U.S.C. § 2607.

The housing market has changed drastically since RESPA was enacted. Down payment requirements for mortgages have been relaxed, home prices have increased drastically, and it has become commonplace for homeowners to draw equity out of their homes by refinancing with loans that require PMI because they have high loan to value ratios. Correspondingly, the PMI industry has become increasingly lucrative. Decision at 3. Eager to capture a portion of the profits generated by PMI, some real estate entities established affiliated or wholly-owned subsidiaries to provide some of the settlement services. Congress amended RESPA in 1983 to clarify that real estate entities could refer their clients to such controlled business arrangements—later called affiliated business arrangements—provided that they did not receive an unearned "thing of value" in exchange for the referral. *See* Supplemental Appropriations Act, Pub. L. 98-181 § 461, 97 Stat. 1231 (1983), (defining "controlled business arrangement" in section 3 of RESPA (12 U.S.C. § 2602) and adding a safe harbor under the section 8 anti-kickback provision of RESPA (12 U.S.C. § 2607)). HUD promulgated regulations in 1992 to implement the safe harbor provision. U.S. Dep't of Hous. And Urban Dev., Real Estate Settlement Procedures Act (Regulation X), Final Rule, 57 Fed. Reg. 49600 (Nov. 2, 1992) (codified at 24 C.F.R. § 3500). HUD later issued further clarification of the safe harbor in 1996, noting that "[s]ince issuing the 1992 RESPA rule, HUD has received numerous complaints that some [controlled business arrangements] are being established to circumvent RESPA's prohibitions and are sham arrangements." *See* Office of the Assistant Secretary for Housing-Federal Housing Commissioner; Real Estate Settlement Procedures Act (RESPA); U.S. Dep't of Hous. And Urban Dev, Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29258, 29259 (July 7, 1996).

II. KICKBACKS CAUSE CONCRETE HARM TO HOMEBUYERS.

The suggestion by PHH and its amici that reinsurance kickback practices do not harm homebuyers is belied by the facts in this case. The Director found, and PHH does not dispute, that from 2008 to 2013, *homeowners referred to PHH's kickback partners were charged $109 million more in mortgage insurance premiums and other fees to cover the cost of the reinsurance kickbacks than they otherwise would have paid.* Decision at 35-37.[5]

A. Kickbacks Create An Inherent Conflict Of Interest Between Real Estate Service Providers And Homebuyers That Unjustly Increases The Cost Of Homeownership.

Importantly, the harm caused by such kickbacks is more insidious than an overcharge of several hundred or even thousands of dollars to an individual homebuyer. Congress recognized that referrals in exchange for kickbacks distort the market by establishing a financial incentive for lenders to refer homebuyers to settlement services that offer the best financial incentives to lender, rather than those that provide the best value for the borrower. "[T]he advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided if the referror or his

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[5] Director Cordray found in addition that "[i]f a lender selected a mortgage insurer that was not on the preferred list, then PHH imposed a surcharge on the loan." Decision at 5.

associates have a financial interest in the company being recommended." H.R. Rep. No. 97-532, at 52. "The purpose of [RESPA] is to prevent certain practices that are harmful to all consumers by establishing that consumers have a right not to be subject to those practices and providing both public and private remedies of that right." *Patton v. Triad Guaranty Ins. Corp.*, 277 F.3d 1294 (11th Cir. 2002); *Kahrer*, 418 F. Supp. 2d at 756 (quoting *Patton*); *Arthur v. Ticor Title Ins. Co.*, 569 F.3d 154, 158 (4th Cir. 2009) ("Congress directed § 8 against a particular kind of abuse that it believed interfered with the operation of free markets.").

Moreover, courts have found that lenders violate RESPA's anti-kickback provisions even if the consumer is not directly charged higher fees or premiums to cover the cost of the kickback. *See, e.g., Edwards v. First Am. Corp.*, 798 F.3d 1172, 1179 (9th Cir. 2015); *Alston v. Countrywide Fin. Corp*., 585 F.3d 753, 760-61 (3d Cir. 2009); *Carter v. Welles-Bowen Realty, Inc*., 553 F.3d 979, 988 (6th Cir. 2009); *Robinson v. Fountainhead Title Grp. Corp*., 252 F.R.D. 275, 286-87 (D. Md. 2008); *Kahrer,* 418 F. Supp. 2d at 749.

Unjustly high fees at loan origination, such as from kickbacks, may force borrowers into more expensive and riskier loans than they otherwise could afford or make it impossible for a homeowner to qualify for a refinanced loan or bankruptcy restructuring; the fees may increase the cost of the loan to more than the value of the property, exceed the permissible debt to income ratios, or make the new loan payments unaffordable. *See* Diane Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755, 765-68 (2011) (discussing unsustainable refinancing practices); Congressional Oversight Panel, November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation 10 (2010), http://1.usa.gov/1B66qg9.

B. Lax enforcement of RESPA and other mortgage-related consumer protection statutes enabled unscrupulous lenders to target older homeowners for high cost loans with devastating consequences.

In the years leading up to the recent financial crisis, many older Americans put their homes on the line to secure mortgages that later proved to be unsustainable and, in some cases, were designed to fail. *See* U.S. Dep't of Treas. and U.S. Dep't of Hous. and Urban Dev., *J. Rep on Recommendations to Curb Predatory Mortgage Lending* (2000), http://bit.ly/1tBfcSo; GAO-04-280, *supra*, at 14-15. The practice of charging inflated or prohibited fees not only led to them facing foreclosure because their loans were unsustainable, but also made it harder for them to save their homes. *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications, supra,* at 765-68. Abusive residential mortgage servicing practices that emerged as the foreclosure crisis heated up compounded the unscrupulous and predatory mortgage origination practices, forcing even more homeowners into foreclosure. *Id.* Such practices also placed older homeowners at additional increased risk of being targeted by foreclosure rescue scammers. Lori Trawinski, *Nightmare on Main Street: Older Americans and the Mortgage Market Crisis* 22, AARP Pub. Pol'y Inst. (July 2012), http://bit.ly/XLk7FC [hereinafter *Nightmare on Main Street*]. (older homeowners lost more than $16 million to foreclosure rescue scams between 2009 and 2011).

Even modestly inflated fees make older people particularly vulnerable to losing their homes because high housing costs consume a disproportionate share of their usually low and fixed income. William C. Apgar and Zhu Xiao Di, *Housing Wealth and Retirement Savings: Enhancing Financial Security for Older Americans*, J. Ctr. for Hous. Studies at Harv. Univ. 16 (Sept. 2005), http://bit.ly/1AzzZABO (finding that among the 20 percent lowest income 65+ seniors without mortgage debt, one in four pays 50 percent or more of their income for housing costs, such as taxes and utilities. For homeowners still paying off their mortgage debt but living at the lower economic margins, the vast majority are paying most of their income for housing costs). *Id*. at 16; Kermit Baker, et al., *Housing America's Older Adults: Meeting the Needs of an Aging Population*, J. Ctr. for Hous. Studies of Harv. Univ. 1 (2014), http://bit.ly/1umYrKY (describing housing as the lynchpin of well-being and finding "[a]s the single largest item in most household budgets, housing costs directly affect day-to-day financial security as well as the ability to accrue wealth to draw upon later in life.").

The evidence of the harm to older people inflicted by inflated fees and abusive mortgage-related practices is indisputable: approximately 1.5 million families headed by a person over age 50 lost their home to foreclosure between 2007 and 2011 alone. *Nightmare on Main Street* at 2. Families lost not only their shelter, but also the wealth, financial stability, and well-being that homeownership affords them:[6]

> Older Americans often used their home equity in retirement to finance health care, home maintenance, and other large expenses and as a safety net that could be used to meet unexpected needs. Others planned to sell their home to downsize, move closer to family, or to finance a move into an assisted living facility or continuing care retirement community. For most older people, the home is, or in some cases, was, their most valuable asset.

Id. at 3.

Congress passed RESPA because it found that the harm of unjustly inflated settlement costs was concrete and real. Appellant's arguments to the contrary should be rejected.

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[6] Foreclosure and the threat of foreclosure are also associated with significant negative health consequences. See *id.* at 4.

III. IN ORDER TO INCREASE PROTECTION FOR HOMEOWNERS, CONGRESS TRANSFERRED PRIMARY ENFORCEMENT AUTHORITY FOR FINANCIAL CONSUMER PROTECTION STATUTES TO THE NEWLY CREATED CFPB, WHICH IT EXPLICITLY VESTED WITH ENHANCED ADMINISTRATIVE ENFORCEMENT AUTHORITY.

Congress identified patchwork regulation and failure to enforce existing consumer protection statutes as significant causes of the foreclosure crisis and the Great Recession. Contrary to PHH's arguments, the CFPB is explicitly authorized to take administrative action both to disgorge profits and to enjoin illegal practices specifically to protect homeowners from the increased costs of illegal kickbacks and other widespread abuses. The CFPB authority to enforce RESPA is not constrained by HUD's historical enforcement authority and activity.

A. Congress Created The CFPB To Eliminate Enforcement Gaps That Prevent Effective Enforcement Of Existing Financial Consumer Protection Laws.

RESPA is one of numerous consumer protection statutes that should have—but failed—to protect homebuyers from the desolation caused by widespread illegal and abusive lending and real estate settlement practices. The mortgage industry often exploited regulatory gaps to circumvent a variety of important existing consumer protections. For example, to avoid RESPA's anti-kickback provisions, some banks began affiliating with or forming wholly-owned non-bank entities that were not subject to supervision by federal regulators. *See* GAO-04-280, *supra*, at 9 (describing enforcement patchwork).

Despite statutory and policy protection for homeowners, no regulator had adequate authority to regulate, supervise, and enforce violations for both bank and non-bank entities, making it easier for law breakers to avoid detection. *Id.* Undeterred mortgage lending industry abuses have caused trillions of dollars of damage and irreparably harmed millions of homeowners. Debbie Gruenstein Bocian, et al., *Collateral Damage: The Spillover Costs of Foreclosures,* Ctr. For Responsible Lending, 2 (2012), http://bit.ly/1iSq9Os (estimating nearly $2 trillion in lost property wealth). The harm caused by illegal and abusive practices is not limited to that suffered by the homeowners whose loans were abusive, however:

> Importantly, these losses represent only the wealth that has been lost or will be lost as a direct result of being in close proximity to homes that have begun the foreclosure process. We do not include in our estimate the total loss in home equity that has resulted from the crisis (estimated at $7 trillion), the negative impact on local governments (from lost tax revenue and increased costs of managing vacant properties) or the non-financial spillover costs, such as increased crime, reduced school performance and neighborhood blight.

Id. at 2.

HUD's authority and resources to enforce RESPA's anti-kickback provisions were widely viewed as essentially toothless and ineffective, so Congress ordered HUD and the Federal Reserve Board to study the problem and report back to it. The joint report they produced urged Congress to enhance HUD's enforcement authority over RESPA. *See* Bd. of Governors of the Fed. Reserve Sys. & U.S. Dep't of Hous. and Urban Dev., *Joint Report to the Congress Concerning*

Reform to the Truth in Lending Act and the Real Estate Settlement Procedures Act, 81-82 (1998), http://1.usa.gov/1WR0qU6. Specifically, HUD and the Federal Reserve Board recommended that Congress "[e]xpand injunctive authority of public enforcers, [e]xpand HUD's civil remedies, [s]trengthen criminal sanctions for § 8 [anti-kickback provision] violations, [e]xpand remedies available through private causes of action, [and c]onsider recognizing a competitor's right to sue for injunctive relief or damages for violations of § 8 and 9." *Id.* at 84-85 (noting that RESPA violation complaints exceed HUD's enforcement capacity). HUD further argued, in guidance it published shortly thereafter, that "broad legislative reform along the lines specified in the HUD/Federal Reserve Board Report remains the most effective way to resolve the difficulties and legal uncertainties under RESPA and the Truth in Lending Act (TILA) for industry and consumers alike." U.S. Dep't of Hous. And Urban Dev., Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999–1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080, 10080 (1999).

The statutory changes Congress enacted when it created the CFPB to be the consumer financial service watchdog are in line with the suggestions that were urged by HUD and the Federal Reserve Board as necessary to enforce RESPA effectively and to protect homebuyers from inflated costs. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376

(2010). Congress explicitly recognized that enforcement gaps left by a patchwork of enforcement agencies hindered achievement of numerous mortgage-related consumer protection statutes and left consumers vulnerable to abuse. *See* Baird Webel, et al., *Financial Regulatory Reform and the 111th Congress*, Cong. Research Serv. 10 (Apr. 16, 2010), http://1.usa.gov/1NMU2ws (explaining that the fragmented regulatory system was one motivating factor in the proposal for a federal consumer financial regulator for non-depository entities). Congress chose to close the enforcement gaps by transferring to the CFPB primary responsibility over the federal financial consumer protection laws for both bank and non-bank entities. *See id.* at 8-9

B. CFPB's Enforcement Authority Is Designed To Be More Comprehensive Than HUD's Authority To Enforce RESPA, And Is Not Constrained By HUD's Statutory Restrictions Or Enforcement Discretion.

Following the foreclosure crisis, it was clear that broad authority was necessary to achieve the consumer protection goals embodied in the mortgage-related statutes. When Congress created the CFPB, it deliberately enhanced regulatory and supervisory authority in order to eliminate the barriers to effective enforcement that had plagued the CFPB's predecessors. Congress also intentionally and significantly enhanced the enforcement authority, resources, and tools compared to HUD's. Congress conferred on the CFPB "jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law." 12 U.S.C. § 5565(a)(1)-(2). Specifically,

> Relief under this section may include, without limitation -- (A) rescission or reformation of contracts; (B) refund of moneys or return of real property; (C) restitution; (D) disgorgement or compensation for unjust enrichment; (E) payment of damages or other monetary relief; (F) public notification regarding the violation, including the costs of notification; (G) limits on the activities or functions of the person; and (H) civil money penalties. . . .

Id. Congress also explicitly authorized the CFPB to take enforcement action and grant such relief through its administrative process. *Id*. The CFPB's authority to enforce REPSA it is not constrained by HUD's comparatively more narrow enforcement authority. Unlike the CFPB, HUD was never granted the broad remedial and enforcement tools necessary to enforce RESPA effectively. *See* 12 U.S.C. § 2607(d)(4) (describing HUD's authority). *See also* Decision at 12.

Additionally, HUD's own regulations contradict PHH's assertion; they explicitly recognize that other agencies have overlapping authority and jurisdiction to enforce RESPA. HUD regulations state its policy is:

> to cooperate with Federal, State, or local agencies having supervisory powers over lenders or other persons with responsibilities under RESPA. Federal agencies with supervisory powers over lenders may use their powers to require compliance with RESPA. . . . *Nothing in this paragraph is a limitation on any other form of enforcement that may be legally available.*

24 C.F.R. § 3500.19 (emphasis added). *See also* GAO-04-280, *supra*, at 53 (describing overlapping jurisdiction).

The CFPB's exercise of its enforcement authority and the remedies it imposed are not constrained by HUD's authority because it has independent statutory authority to act.

C. The CFPB'S Enforcement Order Is Constitutional And Entitled To Deference.

PHH's argument that CFPB's enforcement order is unconstitutional is clearly wrong. *See Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082 (C.D. Cal. 2014). The CFPB's administrative authority to impose civil monetary penalties in administrative proceedings—similar to that of other agencies— is not unconstitutional. For example, the National Credit Union Association (NCUA) has similar remedial power to seek injunctive relief.[7] *See Bd. of Dirs. & Officers, Forbes Fed. Credit Union v. Nat'l Credit Union Admin.*, 477 F.2d 777, 784 (10th Cir. 1973) (affirming the Administrator's reinterpretation of the credit union's charter stating that "in our view the Administrator has given the 1967 charter amendment a reasonable interpretation consonant with the Congressional mandate and the regulations promulgated pursuant thereto."). The

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[7] The NCUA is authorized to order the supervised credit union or third-party affiliate to do the following in an administrative action, "make restitution or provide reimbursement, indemnification, or guarantee against loss if— (i) such credit union or such party was unjustly enriched in connection with such violation or practice; or (ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the Board." 12 U.S.C. § 1786(e)(3)(A).

CFPB's administrative enforcement authority, like that of the SEC, is entitled to deference. *See Zacharias v. SEC*, 569 F.3d 458, 469-70 (D.C. Cir. 2009) (affirming the SEC's disgorgement order of ill-gotten commissions from broker-dealers). Such agency decision-making findings are entitled to deference "unless they are arbitrary, capricious, an abuse of discretion, or not in accordance with law." *Id.* at 464 (quoting *Voss v. SEC*, 222 F.3d 994, 999-1000 (D.C. Cir. 2000) (internal quotation marks omitted)); *Fink v. SEC*, 417 F.2d 1058, 1059 (2d Cir. 1969) (affirming the authority of agency to increase penalty from that suggested by the hearing examiner because the Administrative Procedures Act, 5 U.S.C. § 557, authorizes the agency to make any findings or conclusions that in its judgment are proper on record, notwithstanding different determination by examiner).

Moreover, the restriction on the President's ability to remove the CFPB's Director does not violate the President's constitutional removal powers. *See Consumer Fin. Prot. Bureau v. ITT Educ. Servs.*, 1:14-cv-00292-SEB-TAB, 2015 U.S. Dist. LEXIS 28254, at *26 (S.D. Ind. Mar. 6, 2015) ("[W]e find no basis for concluding that the Director's powers are so great that the inability to remove him or her at whim fatally undermines the President's constitutional prerogatives."). *See also In the Matter of Timbervest, LLC*, Investment Advisers Act of 1940 Release No. 4197, Investment Company Act of 1940 Release No. 31830, SEC Admin. Proc. File No. 3-15519 (Sept. 17, 2015) (SEC rejected arguments that its enforcement proceedings are unconstitutional as a violation of the Appointments clause). Statutory requirements that courts review CFPB's administrative decisions pursuant to a *Chevron* deference standard also do not impermissibly limit judicial oversight. *See Consumer Fin. Prot. Bureau*, 2015 U.S. Dist. LEXIS 28254, at *32-33. *See also In the Matter of Timbervest, LLC, et al.*, SEC Admin. Proc. File No. 3-15519 (SEC rejected arguments that its enforcement proceedings were unconstitutional as a violation of the Appointments clause).

In addition, the various elements of the CFPB's remedial powers and supervisory and enforcement jurisdiction over federal financial consumer protection statutes are not novel or unusual; many administrative agencies are vested with similar administrative enforcement authority and processes and are empowered with broad remedial powers. *See* GAO-04-280, *supra*, at 43, n. 27 ("Banking regulators have broad enforcement powers and can take formal actions (cease and desist orders, civil money penalties, removal orders, and suspension orders, among others) or informal enforcement actions (such as memoranda of understanding and board resolutions). Not all informal actions are publicly disclosed."). For example, the ability of federal regulators to police unfair and deceptive practices dates back to the Federal Trade Commission Act of 1914.[8] The

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[8] Pub. L. No. 63-203, 38 Stat. 717 (1914).

Securities and Exchange Commission ("SEC") has issued many hundreds of rules under broad mandates to protect investors and facilitate capital formation.

The CFPB's structure and authority is very similar to that of the Office of the Comptroller of the Currency (OCC). *See* 12 U.S.C. §§ 1-16. The two large differences are that: the OCC's powers extend to shutting banks down, the CFPB's do not; and the CFPB's independent funding is capped, after which it must come to Congress for additional funds, OCC can simply raise the regulatory fees it imposes on banks to increase its budget. *Id.* Like the CFPB, the Federal Housing Finance Agency also has a single director and dedicated funding. Housing and Economic Recovery Act, Pub. L. No. 110-289 § 1311, 122 Stat. 2661 (2008).

Although the CFPB has broader jurisdiction than some regulatory agencies, and a mission to protect consumers broadly rather than focus on only a portion of the financial services marketplace, the remedial and administrative authority with which Congress vested the CFPB is similar to the powers and authority of regulatory agencies for at least a century.

CONCLUSION

For these reason, this Court should uphold the CFPB's Administrative Enforcement Order.

Dated: November 12, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App.P. 32(a)(7) and Circuit Rule 32(a)(2) because: this brief contains 5,369 words, (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)) as determined by the word counting feature of Microsoft Office Word 2010).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 14 point Times New Roman font.

Dated: November 12, 2015

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on November 12, 2015 the foregoing Brief of Amicus Curiae AARP Supporting Respondent, Consumer Financial Protection Bureau, was electronically filed with the Clerk of the Court for the United States Court of Appeals of the D.C. Circuit using the appellate CM/ECF system which will send notice of such filing to the following registered CM/ECF users:

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