ORAL ARGUMENT SCHEDULED MAY 24, 2017

No. 15-1177

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

PHH CORPORATION, ET AL.,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition For Review Of An Order
Of the Consumer Financial Protection Bureau,
Docket No. 2014-CFPB-002

BRIEF FOR *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, AMERICAN ESCROW ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION, HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE, INDEPENDENT COMMUNITY BANKERS OF AMERICA®, LEADING BUILDERS OF AMERICA, MORTGAGE BANKERS ASSOCIATION, NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, AND REAL ESTATE SERVICES PROVIDERS COUNCIL IN SUPPORT OF PETITIONERS AND VACATUR

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March 10, 2017

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(a) of the Federal Rules of Appellate Procedure, Amici Curiae state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or their counsel made a monetary contribution to its preparation or submission.

Pursuant to D.C. Circuit Rule 29(d), Amici Curiae certify that no other brief of which they are aware provides their cross-industry perspective on the interdependent nature of the homeownership market, the ways in which that market depends on fair notice as well as stable, consistent enforcement of the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601, *et seq.*, or their perspective on the impact of the agency action under review. Amici comprise thirteen different trade associations that have joined this single brief in order to avoid duplication of arguments.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 26.1 and 29(b), Amici Curiae hereby state that:

1. American Bankers Association (ABA) is an unincorporated entity that is neither publicly held nor the subsidiary of a parent company. No publicly held corporation has any form of ownership over the ABA.

2. American Escrow Association (AEA) is a non-profit trade association with no parent corporations. No publicly held corporation has an ownership stake of 10 percent or more in AEA.

3. American Financial Services Association (AFSA) has no parent corporation, nor does any publicly held corporation hold 10 percent or more of its stock.

4. Consumer Bankers Association (CBA) is a non-profit trade group and is not a subsidiary of any other corporation. CBA has no shares or securities that are publicly traded.

5. The Credit Union National Association (CUNA) is a nonprofit trade association organized and existing under the laws of the state of Wisconsin. CUNA has no parent corporation and no publicly traded corporation owns 10 percent or more of its stock.

6. The Financial Services Roundtable (FSR) and the Housing Policy Council of FSR (HPC) are non-profit industry trade associations. Neither FSR nor HPC has any parent corporation, and neither has issued shares of stock to the public.

7. Independent Community Bankers of America (ICBA) has no parent corporation and has no shares or securities that are publicly traded.

8. Leading Builders of America (LBA) is a non-profit trade group and is not a subsidiary of any other corporation. It has no shares or securities that are publicly traded.

9. Mortgage Bankers Association (MBA) is a non-profit trade association that is not a subsidiary of any other corporation and it does not have shares or securities that are publicly traded.

10. National Association of Federally-Insured Credit Unions (NAFCU) is a non-profit corporation organized and existing under the laws of California. NAFCU has no parent corporation and no publicly traded corporation owns 10 percent or more of its stock.

11. National Association of Home Builders (NAHB) is a non-profit corporation organized under the laws of Nevada. NAHB has no parent companies or subsidiaries and has issued no shares of stock to the public. It is composed of more than 700 state and local home builders associations with whom it is affiliated,

but all of those associations are, to the best of NAHB's knowledge, non-profit corporations that have not issued stock to the public.

12. National Association of Realtors® (NAR) is not a publicly held corporation and does not have any parent corporations, and no publicly held corporation owns 10 percent or more of its stock.

13. Real Estate Services Providers Council (RESPRO®) is a non-profit trade association with no parent corporations. No publicly held corporation has an ownership stake of 10 percent or more in RESPRO.

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GLOSSARY

Bureau	Consumer Financial Protection Bureau
HUD	United States Department of Housing and Urban Development
HUD Reinsurance Letter	Letter from N. Retsinas, Ass't Sec'y for Hous.-Fed. Hous. Comm'r, HUD, to S. Samuels, Countrywide Funding Corp. (Aug. 6. 1997)
Order	Decision and Order of the Director, *In re PHH Corp.*, No. 2014-CFPB-00002, Dkts. 226 & 227 (June 4, 2015)
PHH	Petitioners PHH Corporation, PHH Mortgage Corporation, and PHH Home Loans, LLC
RESPA	Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601, *et seq.*

INTEREST OF AMICI CURIAE

Amici Curiae respectfully submit this brief in support of petitioners (collectively, "PHH") and vacatur of the $109 million disgorgement imposed by the Consumer Financial Protection Bureau ("Bureau"). Amici represent a wide spectrum of real estate, home lending, settlement services, and building industry participants subject to the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601 *et seq.* Amici and their members have a strong interest in the proper construction and application of the laws and regulations governing their conduct. They also have a strong interest in ensuring that any changes to regulators' interpretations of these laws and regulations are made with adequate notice, rather than as part of enforcement actions penalizing conduct that conforms to long-settled interpretations. A description of each amicus is included in the appendix to this brief.

INTRODUCTION AND BACKGROUND

Given the significant separation-of-powers issue in this case, Amici do not understand the Court to have granted en banc review to reconsider the panel's straightforward resolution of the RESPA and fair notice questions. Indeed, one of the en banc Court's questions to the parties takes as a given that the panel's decision on RESPA was correct. *See* Order Granting Pet. for Reh'g En Banc 2 (Feb. 16, 2017) ("May the court appropriately avoid deciding that constitutional

question given the panel's ruling on the statutory issues in this case?"). As the panel unanimously recognized, "[t]he basic statutory question in this case is not a close call." *PHH Corp. v. CFPB*, 839 F.3d 1, 41 (D.C. Cir. 2016). Nor did the panel have trouble concluding that the Bureau's Order failed "Rule of Law 101" in retroactively enforcing against PHH the Bureau's new, erroneous reading of RESPA. *Id.* at 48. Indeed, even the Bureau acknowledges that "the panel's refusal to permit the Bureau to apply its interpretation retrospectively is perhaps not worthy of en banc review on its own." Reh'g Pet. 14-15 (Nov. 18, 2016). These statutory and fair-notice questions do not merit the attention of the en banc Court.

Nonetheless, Amici are filing this brief out of an abundance of caution because the RESPA and fair notice questions addressed by the panel are of critical importance to them and their members. The underlying Bureau Order misread RESPA, overturned decades of settled interpretations without any notice, and disrupted a large sector of the economy. The panel's decision correctly restored the status quo, and Amici urge the en banc court to let that decision stand.

The home-lending market comprises a vast network of transactions involving a diverse array of services and service providers. That market facilitates homeownership for approximately 48 million American families and accounts for more than ten percent of gross domestic product, with outstanding home loans

totaling more than ten trillion dollars nationwide.[1] In 2015, there were nearly 7,000 home lenders across the country, according to data reported under the Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801, *et seq.*[2] Real estate brokers were involved in sales of more than 4.7 million homes in 2015 alone, and over the years they have facilitated homeownership for millions of American families.[3] Consumers seeking to purchase homes or refinance existing loans enjoy a wide array of products, including varied terms; fixed, adjustable, and hybrid interest rates; and secured lines of credit. At the other side of the table, homebuilders rely on the market's ability to efficiently provide mortgage credit to their customers. Without it, the majority of home purchases could not take place.

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[1] *See, e.g.*, Economic Research & Data: Mortgage Debt Outstanding, Bd. Of Governors of the Fed. Reserve Sys. (Dec. 2016), http://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm (last visited Mar. 3, 2017) (estimating more than $10.2 trillion of mortgage debt for one- to four-family residences nationwide, not including mortgages on farms and non-residential properties).

[2] Press Release, CFPB, Federal Financial Institutions Examination Council Announces Availability of 2015 Data on Mortgage Lending (Sept. 29, 2016), https://www.consumerfinance.gov/about-us/newsroom/federal-financial-institutions-examination-council-announces-availability-2015-data-mortgage-lending/.

[3] National Association of Realtors®, Field Guide to Quick Real Estate Statistics (Dec. 2016), https://www.nar.realtor/field-guides/field-guide-to-quick-real-estate-statistics (last visited Mar. 6, 2017) (noting that "88% of buyers purchased their home through a real estate agent or broker," and that "89% of sellers were assisted by a real estate agent when selling their home").

The origination of a home loan involves an extensive process that begins with a consumer's decision to purchase a home, or to refinance an existing home loan, and moves forward through application, underwriting, and ultimately closing. The closing process itself requires careful due diligence, satisfaction of terms of purchase (for purchase transactions), the execution of legal documents, and numerous other tasks. For those functions, home lenders and consumers depend on specialized settlement service providers, including attorneys; escrow agents; property appraisers, surveyors, and inspectors; and providers of credit reports, homeowners' insurance, flood insurance, title reviews, and title insurance. To ensure the efficient closing of such loans, lenders, builders, and service providers form interdependent relationships to serve consumers' credit needs.

The sustainability and continued innovation and growth of this market depend on clear, predictable legal rules. Indeed, legal certainty in home-lending arrangements has been critical to providing housing opportunities to millions of American families. Since 1974, RESPA has regulated this market, and thousands of lenders and service providers have ordered their affairs in reliance on that law and endeavored to comply with its requirements.

Section 8 of RESPA regulates relationships among settlement service providers. For decades, Section 8 was understood by market actors and government regulators alike to prohibit kickbacks and referral fees while *allowing*

reasonable, fair-market-value payments for goods and services actually provided. *See* 12 U.S.C. § 2607. The Department of Housing and Urban Development ("HUD") repeatedly affirmed that construction of RESPA in its regulations and policy statements—all of which were the product of notice-and-comment rulemaking or other processes involving stakeholder input.

The government made clear in those statements that RESPA Section 8(c)(2)'s allowance for "bona fide" payments "for services actually performed" applied where "the price paid for the . . . services is truly a market price"—*i.e.*, when "a purchaser would buy the services at or near the amount charged" "in an arm's length transaction." *See, e.g.*, RESPA Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080, 10084-85, 10087 (Mar. 1, 1999) ("1999 Policy Statement"); *see also* RESPA Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 66 Fed. Reg. 53052, 53054, 53059 (Oct. 18, 2001) ("2001 Policy Statement").

Additionally, HUD's "official . . . guidance" on affiliated reinsurance arrangements stated the government's view that RESPA allowed such reinsurance under conditions similar to those articulated in the 1999 and 2001 Policy Statements. *See* Letter from Nicolas P. Retsinas, Ass't Sec'y for Hous.-Fed. Hous. Comm'r, HUD, to Sandor Samuels, Gen. Counsel, Countrywide Funding Corp. at

3, 6-7 (Aug. 6, 1997) ("HUD Reinsurance Letter"). That official guidance was critical to facilitating mortgage-reinsurance agreements, which are economically beneficial for both consumers and industry participants in the housing finance market because they allow risk sharing and, ultimately, additional financing.

In 2010, HUD's RESPA authority was transferred to the Bureau by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010). The Bureau then adopted HUD's regulations along with its "official commentary, guidance, and policy statements." Identification of Enforceable Rules and Orders, 76 Fed. Reg. 43569, 43570 (July 21, 2011).

Notwithstanding the Bureau's obligation to follow existing guidance, however, the Order at issue jettisoned all relevant guidance. The Bureau's enforcement action against PHH thus upended long-settled understandings of RESPA—without prior notice and without input from stakeholders. *See* Decision and Order of the Director, *In re PHH Corp.*, No. 2014-CFPB-0002, Dkts. 226 & 227 (June 4, 2015) ("Order"). In taking this course, the Bureau has severely undermined deeply settled reliance interests, to the detriment of Amici, their members, and the customers they serve. The panel correctly held that the Order misinterpreted RESPA and violated time-honored principles of due process. *PHH*,

839 F.3d at 41-48. If the en banc Court reaches these questions, it should do the same.

SUMMARY OF ARGUMENT

I. The Order cannot be reconciled with RESPA, the Bureau's governing regulations, or longstanding policy guidance.

A. Section 8(c)(2) of RESPA provides that "[n]othing in [Section 8] shall be construed as prohibiting" (1) "bona fide" payments (2) "for services actually performed." 12 U.S.C. § 2607(c)(2). The Order erroneously relegated this provision to a virtually meaningless rule of construction, rather than treating it as the express authorization for reasonable, market-value payments that it is. The Order also conflicts with the statute's structure by mistakenly equating "bona fide" with subjective "purpose," when the language of RESPA as a whole shows that Congress intended the term "bona fide" to mean "reasonable" in an objective, market-value sense.

B. The Order is likewise inconsistent with the Bureau's regulations, which permit transactions in which real services are provided at market-based prices. Those regulations are binding, unambiguous, and irreconcilable with the Order.

C. The Order also rejected the government's longstanding position that Section 8(c)(2) does not prohibit affiliated reinsurance arrangements and other

reasonably-priced transactions. In policy statements and amicus briefs, the government routinely defined Section 8(c)(2) in terms of objective, economic reasonableness—not the subjective purposes of industry participants. Similarly, in the HUD Reinsurance Letter, the government explained the ways in which affiliated reinsurance arrangements could comply with RESPA—a position wholly inconsistent with the Bureau's stance here that RESPA categorically prohibits such arrangements.

II. In abruptly departing from the plain language of the statute, the Bureau's own regulations, and longstanding guidance for industry, the Order exceeded the Bureau's authority and violated fundamental tenets of administrative law and fair notice. The Order also raises the troubling specter of further changes without notice, deeply unsettling a market built on predicable legal rules.

ARGUMENT

I. THE ORDER CONFLICTS WITH RESPA, GOVERNING REGULATIONS, AND LONGSTANDING POLICY GUIDANCE UPON WHICH AMICI'S MEMBERS HAVE RELIED

A. The Order Misreads RESPA

1. The Order's construction of Section 8 contravenes the text and structure of the statute

The Order's interpretation of Section 8 of RESPA cannot be reconciled with the statute's plain terms—on which Amici's members and other market participants have relied for decades. Indeed, as the panel observed, the "basic

statutory question in this case is not a close call." *PHH*, 839 F.3d at 41. In full, Section 8(a) of RESPA provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(a). Put simply, Section 8(a) prohibits "payment by a mortgage insurer to a lender for the lender's referral of a customer to the mortgage insurer." *PHH*, 839 F.3d at 41. "It does not proscribe other transactions between the lender and mortgage insurer." *Id.*

To narrow Section 8(a) still further, Congress enumerated certain practices that are expressly lawful under Section 8(c). 12 U.S.C. § 2607(c); *see* S. Rep. No. 93-866, at 7 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6546, 6552 (explaining that Section 8(c) "sets forth the types of legitimate payments that would not be proscribed"). As relevant here, Section 8(c)(2) provides:

> Nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

12 U.S.C. § 2607(c)(2). "Section 8(c) carves out a safe harbor against overly broad interpretations of Section 8(a)" in order "to provide certainty to businesses in the mortgage lending process." *PHH*, 839 F.3d at 40-42.

As the panel noted, governing regulations, policy statements, and judicial decisions have long interpreted Section 8(c) according to its plain terms to permit payments (1) for goods or services actually provided, in amounts (2) reasonably related to the market value of those goods or services. *Id.* at 41-43; *see also Glover v. Standard Fed. Bank*, 283 F.3d 953, 964 (8th Cir. 2002) (same). In the particular context of this case, "Section 8(a) and 8(c) do not prohibit bona fide payments by the mortgage insurer to the lender for other services that the lender (or the lender's subsidiary or affiliate) actually provides to the mortgage insurer." *PHH*, 839 F.3d at 41. The Order's contrary ruling rests on a misreading of RESPA.

First, according to the Order, the word "construed" in Section 8(c)(2) means that the provision does not identify conduct that is lawful under RESPA. Order 15-16. Rather, relying on repudiated case law, *see* PHH Panel Br. 36 n.5, the Order read the term "construed" as limiting Section 8(c)(2) to a mere clarifying (and virtually meaningless) "gloss" on Section 8(a). Order 15-16.

That interpretation is wrong and unworkable: Section 8(c)(2) can *only* be read as a declaration that the listed transactions are lawful under Section 8(a). *See PHH*, 839 F.3d at 41-43. Any other reading would render superfluous Section 8(c)'s unambiguous directive that "*Nothing* in this section shall be construed as prohibiting . . . ." 12 U.S.C. § 2607(c) (emphasis added). By its plain

terms, that opening proviso means Section 8(a) cannot be "construed" to prohibit payments permitted by Section 8(c)—because subsection (a) is "in this section," and because "[n]othing means nothing." *PHH*, 839 F.3d at 41. A contrary reading would nullify that unambiguous language, in violation of the "cardinal principle" that statutes must be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).

Yet that is precisely what the Order's reading of RESPA would do here—and the Bureau fails to grapple with this problem in its rehearing petition. Instead, the Bureau simply asserts that the panel erred by "interpret[ing] section 8(c)(2) to allow the very kickbacks that section 8(a) prohibits." Reh'g Pet. 12. But a transaction that falls within Section 8(c)(2) is, by definition, *not* a kickback or other prohibited payment under Section 8(a). As Congress explained, that is the very purpose of Section 8(c): to specify "the types of legitimate payments that would not be proscribed" under RESPA. S. Rep. No. 93-866, at 7. The Order in this case cannot be reconciled with that proper understanding of the statute.

Second, the Order also improperly read new, atextual requirements into Section 8(c)(2). Under the Order, no payment is "bona fide" unless it is made "solely for the service actually being provided *on its own merits*." Order 17 (emphasis added). The Order thus construed the phrase "bona fide payment" as a

pretext-revealing condition designed to scrutinize "the *purpose* of the payment"—*i.e.*, a payment is "bona fide" only if "made for the services themselves, not as a *pretext* to provide compensation for a referral." *Id.* (emphases added). According to the Order, "even a reasonable payment may not be 'bona fide' if it is not made solely for the services but also for a referral." *Id.*

The Order clearly erred in conflating "bona fide payment" with a payment having a subjective, "good faith" "purpose." *Id.* As the panel decision explained, "a bona fide payment means a payment of reasonable market value"—*i.e.*, one "that bears a reasonable relationship to the market value of the services performed or products provided." *PHH*, 839 at 41 & n.22. That "commonsensical" reading is supported by RESPA's text, *id.*, and also by the many instances in which Congress has used "bona fide" to denote something *other* than good faith or subjective intent. *See, e.g.*, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 591-93 & n.13 (2010) (defining "bona fide error" in terms of the *type* of error rather than the intent of the actor—and relying on HUD's construction of "bona fide error" in RESPA (citing 12 U.S.C. § 2607(d)(3))); *EEOC v. Aramark Corp.*, 208 F.3d 266, 269-73 (D.C. Cir. 2000) (noting that a "benefit plan" is "bona fide" under the ADA if "it exists and pays benefits," regardless of intent (citing 42 U.S.C. § 12201(c)(3))).

Indeed, RESPA itself includes a provision treating "intent[]" and "bona fide" as separate elements, 12 U.S.C. § 2607(d)(3), showing that when Congress wanted to create a purpose-based exemption in RESPA, it expressly used the term "good faith." *See id.* § 2617(b). Congress did not do so in Section 8 and that deliberate choice should be given effect. *See Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("Congress acts intentionally" when, as here, it "includes particular language in one section of a statute but omits it in another section").

2. The Order's construction of Section 8 conflicts with Congress's clearly expressed purposes

The Order's reading of Section 8 is also inconsistent with the statute's purposes. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("A fair reading of legislation demands a fair understanding of the legislative plan.").

Congress designed RESPA to strengthen the homeownership market by targeting certain conduct that impaired the market's stability and growth and caused unnecessary costs. *See, e.g.*, 12 U.S.C. § 2601; *see also* S. Rep. No. 93-866, at 2, 13 (addressing "unreasonable practices" that had "depressed the housing market"). But here, by inventing a new "purpose" standard for Section 8 and prohibiting economically reasonable agreements, the Order harms the very markets Congress sought to bolster.

First, the Order undermines the purposes of RESPA by clouding the standard for liability and thus chilling reasonable, efficient transactions. A "free

market for settlement services" cannot "function at maximum efficiency" as Congress intended, *see* S. Rep. No. 93-866, at 2, unless regulated entities "have some degree of certainty beforehand as to when" they may engage in economically reasonable transactions "without fear of later evaluations labeling [their] conduct" unlawful, *cf. First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981).

Here, the Order failed to articulate a discernable rule for distinguishing a proper "purpose" from an improper one—and there is none. In particular, the Order noted that an "unreasonably high" payment "may suggest" an improper purpose, but said little about how regulated entities can structure their transactions to avoid RESPA liability when their payments *are* "reasonable." Order 17. Nor did the Bureau clarify matters in its petition for rehearing, simply asserting instead that a bona fide transaction may exist if "the payor had [a] desire to purchase the goods or services" and did not do "so only as a condition of receiving referrals." Reh'g Pet. 13. The Bureau's muddled criteria for liability substantially undermine Section 8(c)'s core purpose of providing "certainty to businesses in the mortgage lending process." *See PHH*, 839 F.3d at 42.

Second, even if the standard were clear, the Order's focus on subjective "purpose" is not consistent with RESPA's underlying aims. Because markets function or fail based on the *behavior* of market actors—not their *purposes*—the mental state of service providers was undoubtedly irrelevant to Congress. As

noted, the home-loan industry involves interdependent, multi-party agreements with firms comprising numerous, independent decisionmakers. Such transactions do not lend themselves to discrete, all-encompassing purposes. In holding that RESPA liability should turn on the subjective "purpose" of a payment, therefore, the Order did not plausibly construe or implement Congress's legislative plan for RESPA.

A simple hypothetical highlights the problem with the Bureau's "sole purpose" approach: A home builder and its lending affiliate hire a property inspector to review a tract of homes before sale and pay her reasonable, market-value compensation. Apart from being delighted to do that work, the property inspector hopes to impress all parties with her subject-matter expertise, customer service, and professionalism. Even more specifically, she hopes that her good work will prompt the builder and lender to refer her to other home buyers in the future. Now assume that the property inspector's hopes are realized: the builder and lender are impressed by her work and provide her referrals, none of which she pays for.

That type of arrangement is precisely what Congress intended to insulate from RESPA liability. *See* 12 U.S.C. § 2607(c)(2); S. Rep. No. 93-866 (stressing that "[r]easonable payments in return for services actually performed . . . are not intended to be prohibited"). But under the Order, even if the property inspector's

compensation for the separate pre-sale review was "reasonable," Order 17, her hope that it would lead to referrals could result in RESPA liability—including *criminal* sanctions of up to one year in prison, *see* 12 U.S.C. § 2607(d). Congress could not have intended such a result. As the panel explained, Congress designed RESPA "to allow market participants to refer customers to other service providers, albeit without demanding or receiving payment for the referral." *PHH*, 839 F.3d at 42-43. The Order's focus on mindreading and divining subjective intent "flouts that statutory goal and upends the entire system of unpaid referrals that has been part of the market for real estate settlement services." *Id.*

B. The Order Contravened The Bureau's Own Regulations

Not only does the Order conflict with RESPA itself, but it also contravenes the Bureau's own rules implementing the statute. *See id.* at 42 (explaining that the Order conflicts with "decades of carefully and repeatedly considered official government interpretations").

The Bureau's binding regulations provide that bona fide compensation payments for goods or services, such as reasonable reinsurance premiums, are exempt from liability under Section 8(c)(2). Specifically, under 12 C.F.R. § 1024.14(b) ("Regulation X"), "referral[s] of a settlement service" that are "set forth in § 1024.14(g)(1)" constitute legitimate "compensable service[s]" and will not therefore be considered "a violation of section 8." *Id.* § 1024.14(a)-

(b). Section 1024.14(g)(1), in turn, provides that "Section 8 of RESPA *permits*" "bona fide . . . payment[s] for . . . services actually performed." *Id.* § 1024.14(g)(1)(iv) (emphasis added). And, under these governing regulations, a payment is "bona fide" when it "bears [a] reasonable relationship to the market value of the goods or services provided." *See id.* § 1024.14(g)(2).

Thus, payments bearing a "reasonable relationship to the market value of the goods or services provided" are not "a violation of section 8"—even if characterized as "referral[s] of a settlement service." *Id.* § 1024.14(a), (b), (g). Because such payments are "set forth in § 1024.14(g)(1)," the Bureau's regulations place them within a class of "compensable" "referral[s] of a settlement service" that "Section 8 of RESPA *permits*." *See id.* (emphasis added). The upshot of the Bureau's own regulations is that affiliated reinsurance premiums and other payments are lawful under Section 8(a) when "reasonabl[y] relat[ed] to the market value" of the goods or services provided. *See id.*; *accord PHH*, 839 F.3d at 45 ("As Regulation X made clear, if an insurer makes a payment at reasonable market value for services actually provided, that payment is not a *payment for a referral*.").

The Order, however, virtually ignored these regulations and instead adopted a construction of the statute in conflict with them. While the regulations "permit[]" "bona fide" referral payments that would otherwise be prohibited, *see*

12 C.F.R. § 1024.14, the Order held that a payment can never be "bona fide" if it "is tied in *any way* to a referral of business," *see* Order 16-17 (emphasis added). Thus, in direct conflict with the regulations, the Order provides that "Section 8 of RESPA [does not] permit" *any* referral payment—*regardless* of whether it satisfies the criteria "set forth in § 1024.14(g)(1)." *But see* 12 C.F.R. § 1024.14.

C. The Order Ignored The Bureau's Longstanding Policy Statements And Public Guidance Materials

When the Bureau assumed HUD's enforcement mandate in 2011, it pledged to "appl[y]" its predecessor's "official commentary, guidance, and policy statements" until further notice. *See* 76 Fed. Reg. at 43570. The Bureau also assured Amici and the public that it would "give due consideration to the application of other written guidance, interpretations, and policy statements issued" by HUD. *Id.* The Order here is not faithful to those assurances.

HUD's "official commentary, guidance, and policy statements" included a number of detailed policy statements addressing Section 8. HUD consistently instructed that payments need only be "reasonably related to the value of the . . . services that were actually performed" in order to avoid Section 8 liability. *See, e.g.*, 2001 Policy Statement, 66 Fed. Reg. at 53054; *see also* Home Warranty Companies' Payments to Real Estate Brokers and Agents, 75 Fed. Reg. 36271, 36272 n.1 (June 25, 2010) (same). Indeed, beginning with its first RESPA rulemaking, and continuing throughout the 1990s, HUD explained that "a fee

would not be in violation of RESPA Section 8" if it "b[ore] a reasonable relationship to the value of [the] services." Real Estate Settlement Procedures, 41 Fed. Reg. 13032, 13036-38 (Mar. 29, 1976); *see* HUD Statement of Policy 1996-3, 61 Fed. Reg. 29264, 29265 (June 7, 1996) (interpreting "Section 8 of RESPA and its implementing regulations to allow payments" that "are reasonably related to the general market value of" the "services actually furnished").

That "consistent and repeated interpretation of Section 8 was widely known and relied on in the mortgage lending industry." *PHH*, 839 F.3d at 45. And the government reinforced HUD's position in the courts, suggesting to the judiciary that the phrase "bona fide" payment "for services actually performed" turns on the "correlation between the cost of a settlement service and the work that is actually performed." Brief for United States as Amicus Curiae, *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261 (4th Cir. 2002) (No. 01-2318), 2002 WL 32351432, at *8 (emphases omitted); *see* Brief for United States as Amicus Curiae, *Santiago v. GMAC Mortg. Grp., Inc.*, 417 F.3d. 384 (3d Cir. Feb. 4, 2004) (No. 03-4273), 2004 WL 3759909, at *28 ("[F]or payments to be legal under Section 8, they must bear a reasonable relationship to the value received by the person or company making the payment."). It should therefore come as no surprise that industry participants understood RESPA to allow financial transactions in which "all fees paid or received are being paid and received for services actually rendered, and are

reasonable compensation for those services." James J. Pannabecker & David Mcf. Stemler, *Lawyers Beware! RESPA Is Not Just a Consumer Disclosure Statute!*, 123 Banking L.J. 454, 463 (2006).

Consistent with the settled understanding of Section 8, the HUD Reinsurance Letter provided that such arrangements were "permissible under RESPA" when "the payments to the reinsurer"—

> (1) were "for reinsurance services 'actually furnished or for services performed'" (which the Letter explained turned on the existence of "a real transfer of risk"); and
>
> (2) were "bona fide compensation . . . not exceed[ing] the value of such services."

HUD Reinsurance Letter at 3, 6-7. Reliance on HUD's Letter was immediate. *See, e.g.*, Robert M. Jaworski, *The RESPA Soap Opera Continues for Another Year*, 53 Bus. Law. 995, 1008-09 (May 1998); *see PHH*, 839 F.3d at 45 ("The 1997 HUD letter was widely disseminated and relied on in the industry.").

Indeed, the Letter's construction of Section 8(c)(2) was later implemented in a series of nationwide injunctions. Those injunctions provided that affiliated reinsurance arrangements would be deemed RESPA-compliant if the parties obtained in advance an actuarial opinion certifying that (1) the arrangements transferred real risk to the reinsurer, and (2) the premiums paid were commensurate with that risk. *See, e.g.*, Injunction, ¶¶ 2, 7, *Baynham v. PMI Mortg. Ins. Co.*, No. 99-00241 (S.D. Ga. June 25, 2001), Dkt. 176. Industry

participants that did not already meet the injunctions' requirements modified their behavior accordingly.

In sum, when "PHH engaged in its captive reinsurance arrangements, everyone knew the deal: Captive reinsurance arrangements were lawful under Section 8 so long as the mortgage insurer paid no more than reasonable market value to the reinsurer for reinsurance actually furnished." *PHH*, 839 F.3d at 46.

The Order, however, dismissed the HUD Reinsurance Letter as "not binding" and the reliance interests of the industry as "not particularly germane." *See* Order 17-19. Instead, the Order focused on the letter's "form" and the fact that it was not "published in the Federal Register." *Id.* The Bureau reiterates this argument in its petition for rehearing, claiming that "PHH did not justifiably rely on the letter," purportedly because "that letter was 'unofficial'" and "did not express the views of the HUD Secretary." Reh'g Pet. 15 n.3.

As the panel observed, this view of HUD's official guidance is "deeply unsettling in a Nation built on the Rule of Law." *PHH*, 839 F.3d at 48. The Letter reflected "HUD's longstanding interpretation that Section 8(c) allowed payments of reasonable market value for services actually performed," which was embodied in "Regulation X," and which the Bureau "itself codified" in its own rules after inheriting HUD's RESPA authority. *Id.* at 45, 48. The Letter also expressed the considered judgment of "the Presidentially appointed and Senate-confirmed

Assistant Secretary of HUD," who was exercising the Secretary's delegated authority when he stated that, "'I trust that this guidance will assist you to conduct your business in accordance with RESPA.'" *Id.* (quoting J.A. 258).[4]

II. THE ORDER EXCEEDED THE BUREAU'S STATUTORY AUTHORITY AND VIOLATED FUNDAMENTAL TENETS OF ADMINISTRATIVE LAW AND FAIR NOTICE

As shown above, the Order is fundamentally inconsistent with RESPA, the Bureau's own regulations, the government's longstanding policy statements, and the guidance of an official with authority to administer the statute. Each of these sources of authority presents an independent reason for adhering to the panel decision vacating the Order.

RESPA. No agency possesses authority to deviate from the plain language of its governing statutes. *See, e.g.*, *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2039-44 (2012) (denying deference to the Bureau's interpretation of RESPA Section 8(b)). Indeed, as the panel noted, regardless of whether the Bureau

[4] *See, e.g.*, Consolidated Delegations of Authority for Housing, 54 Fed. Reg. 22033, 22033-35 (May 22, 1989) (delegating to the Assistant Secretary for Housing-Federal Housing Commissioner the HUD Secretary's "power and authority" over "all Housing programs and functions," including "authority with respect to Mortgage Activities" under "The Real Estate Settlement Procedures Act of 1974"); *see also* Delegation of Authority; Revision and Update, 46 Fed Reg. 57348, 57348-49 (Nov. 23, 1981) (authorizing the Assistant Secretary for Housing-Federal Housing Commissioner "to exercise the power and authority of the Secretary of Housing and Urban Development under . . . The Real Estate Settlement Procedures Act of 1974").

"believes that captive reinsurance arrangements are harmful," the "decision whether to adopt a new prohibition on captive reinsurance arrangements is for Congress and the President when exercising the legislative authority." *PHH*, 839 F.3d at 44. "It is not a decision for the [Bureau] to make unilaterally." *Id.* Thus, because Section 8(c)(2) can only fairly be read as an exemption to Section 8(a), *see supra* pp.8-16, this Court should vacate the Order's contrary holding. *See, e.g.*, *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 580 (1994) ("Whether the [agency] proceeds through adjudication or rulemaking, the statute must control the [agency's] decision, not the other way around.").

Regulations. The Order should also be vacated because it cannot be reconciled with the binding language of the Bureau's regulations. *See, e.g.*, *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) (Scalia, J.) ("It is axiomatic that an agency must adhere to its own regulations."); *Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 711 F.2d 370, 381 (D.C. Cir. 1983) ("[T]he agency is bound by its own rules."). Regulations promulgated through notice-and-comment procedures can be repealed or amended only through the same procedures. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015). Agencies may not alter them through ad-hoc adjudication. *See, e.g.*, *Mendoza v. Perez*, 754 F.3d 1002, 1020-25 (D.C. Cir. 2014).

These restraints on agency caprice exist for good reason. The notice-and-comment process produces better rules than ad-hoc enforcement, since rulemaking necessarily requires the Bureau to consider the informed views of industry and consumers. Moreover, because changes adopted through that process would be prospective only, *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988), affected parties can order their affairs with full notice of governing law.

Here, however, the practical import of the Order is to abandon the relevant RESPA regulation, 12 C.F.R. § 1024.14—which "permits" the very practices that subjected PHH to a $109 million penalty. *See PHH*, 839 F.3d at 42 ("[T]he CFPB now says the opposite of what HUD's prior interpretations and Regulation X all say."). But the Bureau cannot abandon such regulations without issuing a notice of proposed rulemaking and soliciting comments on its proposed amendments. The Bureau's failure to follow such procedures here contravened "axiomatic" principles of administrative law. *See Brock*, 796 F.2d at 536; *see also Perez*, 135 S. Ct. at 1206.

Fair notice. The Bureau violated fair notice principles by penalizing conduct the government had previously permitted. This provides another basis for vacating the Order. "[R]egulated parties" are entitled to "fair warning of the conduct [a regulation] prohibits or requires." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012). Thus, an agency may not "change[] course"

and sanction private parties under a "new principle" without first giving notice "that its interpretation ha[s] changed." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2318 (2012). To do otherwise would run afoul of the "deeply rooted" principle forbidding the government from retroactively altering "the legal consequences of an entity's or person's past conduct." *PHH*, 839 F.3d at 46 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)).

Those principles constitute "Rule of Law 101." *Id.* at 48. And they are particularly important here, given the strength of Amici's and its members' reliance interests and the imperative need for clear, predictable rules in the multi-trillion dollar homeownership market. As the panel noted, PHH was not alone in participating in affiliated reinsurance arrangements: "[m]any other mortgage lenders did the same thing." *Id.* at 40. And like PHH, they too acted "in justifiable reliance on the interpretation stated by HUD in 1997 and restated in 2004" that "captive reinsurance agreements were permissible under Section 8 so long as the mortgage insurer paid no more than reasonable market value for the reinsurance." *Id.* at 40, 48.

Yet the Order admittedly "reject[ed]" that settled interpretation of RESPA—and did so in an enforcement proceeding imposing a $109 million penalty on a party that had relied on the now-rejected interpretation. *See supra* pp. 8-22; Order 16-18. That is inconsistent with "the protections provided by the

Due Process Clause of the Fifth Amendment." *See Fox Television*, 132 S. Ct. at 2317.

The Bureau's choice to dramatically alter its rules without notice in an enforcement proceeding inflicts another type of harm on industry and consumers. In particular, it will result in an uneven playing field, with different market actors effectively following different rules based on their respective tolerance for risk. After all, like any rational business, a participant in the home loan industry invariably hopes that everything it does will improve its business and fully comply with the law. Yet the risk that economically reasonable transactions with garden-variety commercial motivations will now incur RESPA penalties will drastically chill arrangements that ultimately reduce the cost of home loans for consumers. That is particularly true for smaller entities, who may simply exit the marketplace given the compliance costs necessary to glean the Bureau's new liability rules through piecemeal analysis of each enforcement action. Indeed, the Order has already caused some of Amici's members to abandon economically reasonable, historically permissible practices, while other industry participants read the Order differently and have not changed their practices. That uneven playing field reduces choices—and increases costs—for the very consumers the Bureau is charged with protecting.

In sum, the Order's imposition of a $109 million penalty without fair notice is not only grossly unfair to PHH, but is also deeply unsettling for participants in the home lending market. The Bureau has demonstrated that it will impose massive liability on a party that acted in reliance on governing regulations and the government's longstanding policy guidance. If the Order is permitted to stand, participants in the home lending market will understandably ask what other currently permissible conduct will be next to incur potentially ruinous punishment—and who will be the next target of such unforeseen, retroactive lawmaking. The fair notice rule of the Due Process Clause prohibits just such outcomes, as the panel unanimously and correctly held. *PHH*, 839 F.3d at 44-49.

CONCLUSION

For these reasons, Amici Curiae support petitioners' request that the Order be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and Circuit Rule 32(e), I hereby certify that this Brief has been prepared in proportionally-spaced Times New Roman 14-point typeface, and contains 6,073 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

/s/ Joseph R. Palmore
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on March 10, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Joseph R. Palmore
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APPENDIX

The American Bankers Association (ABA) is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members—located in all fifty states, the District of Columbia, and Puerto Rico—include financial institutions of all sizes and hold a majority of the domestic assets of the U.S. banking industry. The ABA frequently appears in litigation involving issues of widespread importance to the industry.

The American Escrow Association (AEA), formed in 1980, is a national association of real estate settlement agents. Representing a large number of "mom and pop" operations in the mortgage closing business, AEA has approximately 3,000 members. AEA seeks to further the knowledge and professionalism of its members and to educate and advise policy-makers at the national level on issues of consequence to the settlement industry as a whole.

The American Financial Services Association (AFSA), founded in 1916, is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Consumer Bankers Association (CBA) is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation on those issues. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

The Credit Union National Association (CUNA) is the largest organization representing America's credit unions. CUNA advocates for credit unions before Congress, federal agencies, and the courts. It also provides credit unions with training, compliance, and operational resources. CUNA likewise provides support on state issues and sponsors educational and networking opportunities for credit union volunteers and staff.

The Financial Services Roundtable (FSR) represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. The Roundtable's Housing Policy Council (HPC) comprises 33 of the Nation's leading mortgage finance companies. HPC Member companies originate and service mortgages and provide mortgage insurance and other services for American home owners across the country.

The Independent Community Bankers of America®, the nation's voice for more than 5,800 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. With 52,000 locations nationwide, community banks employ 760,000 Americans, hold $4.7 trillion in assets, $3.7 trillion in deposits, and $3.2 trillion in loans to consumers, small businesses, and the agricultural community.

Leading Builders of America (LBA) is a national trade association representing twenty one of the nation's largest public and private homebuilders. LBA members build approximately one-third of all new homes sold in the United States each year. LBA seeks to preserve home affordability for American families by engaging issues that impact home affordability, availability of credit, or home construction practices.

The Mortgage Bankers Association (MBA) is a national association representing the real estate finance industry. It has more than 2,200 members comprised of real estate finance companies, mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and others in the mortgage lending field. MBA seeks to strengthen the nation's residential and

commercial real estate markets, to support sustainable homeownership, and to extend access to affordable housing to all Americans.

The National Association of Federally-Insured Credit Unions (NAFCU) represents the interests of approximately 800 of the nation's most innovative and dynamic federally-insured credit unions before the federal government, including 87 of the largest 100 federal credit unions (FCU) as well as many smaller credit unions with relatively limited operations. NAFCU represents 70 percent of total FCU assets and 66 percent of all FCU member-owners. It provides members with representation, information, education, and assistance to meet the constant challenges that cooperative financial institutions face in today's economic environment.

The National Association of Home Builders (NAHB) is a trade association whose mission is to enhance the climate for housing and the building industry. NAHB's central goals are providing and expanding opportunities for safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's more than 140,000 members are home builders or remodelers. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance. NAHB members rely on a variety of funding sources to provide financial

services in the form of home loans and consumer financing for new home construction.

The National Association of REALTORS® (NAR) is the country's largest trade association with over one million members. NAR's membership is composed of residential and commercial Realtors®, who are brokers, salespeople, property managers, appraisers, counselors, and others engaged in all aspects of the real estate industry. NAR is the leader in developing standards for efficient, effective, and ethical real estate business practices.

Real Estate Services Providers Council (RESPRO®) is a non-profit trade association comprised of all segments of the residential home buying and financing industry whose common bond is to offer "one-stop-shopping programs" for homebuyers through "affiliated business arrangements" and other strategic alliances under RESPA. RESPRO®'s members consist of real estate brokerage firms, mortgage providers, title agencies, escrow companies, home warranty companies, and other service providers.