EN BANC ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017

No. 15-1177

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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 Consumer Financial Protection Bureau

REPLY EN BANC BRIEF FOR PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

All parties who appeared in the administrative proceeding before the Consumer Financial Protection Bureau and before this Court are listed in the Certificate in Petitioners' Opening Brief. Except for the following, all amici who have appeared before this Court are listed in Petitioners' Opening Brief and the CFPB's Response Brief: Public Citizen, Consumers Union, National Association of Consumer Advocates, Tzedek D.C., Harold H. Bruff, Gillian E. Metzger, Peter M. Shane, Peter L. Strauss, Paul R. Verkuil, Consumer Action, Demos, Housing and Equal Rights Advocates, National Fair Housing Alliance, Michael S. Barr, Mehrsa Baradaran, Susan Block-Lieb, Peter Conti-Brown, Kathleen C. Engel, Robert Hockett, Howell Jackson, Edward J. Janger, Adam J. Levitin, Patricia A. McCoy, Saule T. Omarova, Jeff Sovern, Alan White, Arthur E. Wilmarth, Jr., Daniel Akaka, William Lacy Clay, Emanuel Cleaver, James Clyburn, Joseph Crowley, Christopher J. Dodd, Bill Foster, Luis V. Gutierrez, Tom Harkin, Steny H. Hoyer, Tim Johnson, Paul Kanjorski, Ted Kaufman, Dan Kildee, Gregory W. Meeks, Frank Pallone, Jr., Brian Schatz, Charles E. Schumer, Christopher Van Hollen, Jr., Nydia Velazquez, and Mark Warner.

(B) Ruling Under Review

The Decision and Order under review are listed in the Certificate in Petitioners' Opening brief.

(C) Related Cases

This matter has not been previously before this Court or any other court. There are no related cases before this Court or any other court.

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GLOSSARY

ALJ	Administrative Law Judge
Atrium	Petitioners Atrium Insurance Corporation and Atrium Reinsurance Corporation
CFPA	Consumer Financial Protection Act
CFPB	Consumer Financial Protection Bureau
HUD	United States Department of Housing and Urban Development
HUD 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) (JA251–58)
PCAOB	Public Company Accounting Oversight Board
PHH	Petitioners PHH Corporation, PHH Mortgage Corporation, and PHH Home Loans, LLC
RESPA	Real Estate Settlement Procedures Act of 1974

INTRODUCTION AND SUMMARY OF ARGUMENT

The CFPB unabashedly proclaims *itself*—not the President—the nation's "primary enforcer of consumer financial laws." Opp. 1. That is exactly the problem. The Constitution vests the President alone with all the executive power and the constitutional prerogative to take care that the laws are faithfully executed. Indeed, the CFPB concedes that the power to enforce the laws is the "quintessence of executive power," *id.* at 31, and that the "Constitution tasks the President . . . with taking care that the laws be faithfully executed," *id.* at 29. In direct conflict with these principles, the CFPB Director wields vast authority to enforce 19 consumer financial laws according to his own views, without any accountability to the President or other structural checks. The executive power exercised "independently" by the CFPB is, by definition, power usurped from the President.

The Constitution does not permit this invasion of Presidential authority. Article II vests the executive power in "a President of the United States of America"—period. And if Congress can divest the President of power to execute the consumer financial laws, then it may do so for the environmental laws, the criminal laws, or any other law affecting millions of Americans. There is no logical stopping point to the congressional infringement of core Article II power reflected in the structure of the CFPB.

Even assuming *arguendo* that Congress can limit the President's executive power, the Supreme Court in *Free Enterprise Fund v. PCAOB* reaffirmed the requirement that special mitigating "circumstances" are needed to justify restricting the President "in his ability to remove" an officer. 561 U.S. 477, 483–84 (2010). The CFPB argues that the "same circumstances" that permitted for-cause removal of FTC commissioners in 1935 apply to the CFPB Director, Opp. 14, but glosses over important differences. In contrast to the FTC, the CFPB is headed by a single Director whose term may be extended indefinitely, and the Director is perpetually self-funded. The Director also executes a wider array of laws than the FTC did in 1935, representing a far greater invasion of the President's constitutional authority. No Supreme Court case condones the CFPB's historically anomalous combination of power and lack of democratic accountability, and the Constitution forbids it.

The panel's unanimous statutory rulings are also plainly correct and consistent with decisions in every court of appeals that has interpreted RESPA's scope. The panel's interpretation of Section 8(c)(2) to mean what it says—reasonable payments for services actually provided are *not* illegal "kickbacks"—does not remotely merit review by the full Court. Nor do the panel's straightforward conclusions that the CFPB is bound by RESPA's statute of limitations, and that the Due Process Clause forbids the CFPB from imposing $109 million in retroactive liability for conduct that the government repeatedly said was lawful.

ARGUMENT

I. The Unconstitutionally Structured CFPB Must Be Struck Down.

Free Enterprise Fund demonstrates that the CFPB is unconstitutionally insulated from democratic accountability. The only satisfactory remedy is to sever the Consumer Financial Protection Act ("CFPA") from the rest of the Dodd-Frank Act and strike down the agency.

A. No Special "Circumstances" Permit The Combination Of Massive Governmental Power And Lack Of Constitutional Accountability.

The Constitution grants the President "the power to oversee executive officers through removal," and "'the Legislature has no right to diminish or modify'" this "Presidential oversight." *Free Enterprise Fund*, 561 U.S. at 492, 500 (quoting 1 Annals of Cong. at 463 (1789) (Madison)). Although the CFPB disagrees with this "general" rule, *compare id.* at 513 *with* Opp. 32, the Supreme Court has allowed only "limited restrictions" on the President's removal power, and then only "under certain circumstances," 561 U.S. at 495, 483. Congress does not have unfettered ability to create "independent agencies."[1]

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[1] In fact, the Constitution does not permit Congress to assign any portion of the executive power to an "independent" officer who is not accountable to, and removable by, the President. *See Myers v. United States*, 272 U.S. 52, 113 (1926). PHH has preserved its argument that the Supreme Court should overturn *Humphrey's Executor* and *Morrison* to the extent they could be construed as authorizing the CFPB's novel structure (and they cannot).

The CFPB asserts that because the Supreme Court approved for-cause restrictions for certain multi-member commissions, *see Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and an inferior officer, *see Morrison v. Olson*, 487 U.S. 654 (1988), Congress may insulate the CFPB's Director. The CFPB's argument depends on deeming "irrelevant" (Opp. 26) the ways in which the Director is *more* insulated than any previous official—indeed, the CFPB fails to offer any historical example of one "independent" officer wielding the broad regulatory, enforcement, and adjudicative authority that the CFPB Director possesses, *see id.* at 24 n.6. And under *Free Enterprise Fund*, the relevant inquiry is whether there is a not-previously-approved "diffusion of authority" that prevents "the President" from being "held fully accountable" to the people for the actions of the Executive Branch. 561 U.S. at 514.

Here, the President has no meaningful control over the CFPB Director or political responsibility for his actions. Indeed, the President can serve an entire four-year term unable to appoint anyone to head the CFPB. 12 U.S.C. § 5491(c)(1)–(2). In contrast, because of the FTC commissioners' staggered terms, every President is guaranteed between two and four nominations each presidential term. 15 U.S.C. § 41 (1934). The FTC commissioners in 1935 also could not remain in office after the expiration of their terms, so the Senate could not extend the tenure of holdover commissioners adverse to the President by blocking their successors.[2] And the FTC's multi-member structure serves as an additional check on arbitrary decisionmaking, whereas the CFPB is headed by one Director whose choices can neither be outvoted nor used to remove him from office. In other words: *L'etat, c'est le Directeur*.

The CFPB's independent funding further insulates the agency from democratic accountability. The CFPB may demand 12% of the Federal Reserve System's operating revenue, 12 U.S.C. § 5497(a)(2)(A)(iii), which itself is obtained outside the appropriations process, *id.* §§ 243, 244. In addition to insulating the Director from Congress, the CFPB's self-funding power further diminishes the President's power, contrary to the CFPB's contention (Opp. 28 n.8) that the two limitations do not impact the same constitutional power. The President proposes budgets for agencies, and his signature is needed for appropriations bills to become law. The FTC cannot obtain funding without the President's help; the CFPB, in contrast, requires no help from the President.

Although other agencies are funded without annual appropriations, the CFPB identifies none possessing the CFPB's double layer of insulation from the appropriations process. Opp. 28 n.8. Just as two layers of "for cause" removal un-

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[2] FTC commissioners were not granted "holdover" tenure until after *Humphrey's Executor*. *See* Pub. L. No. 75-447, § 1, 52 Stat. 111 (1938).

constitutionally shielded PCAOB board members from accountability in *Free Enterprise Fund*, the CFPB's two layers of independent funding exacerbate its unprecedented and unconstitutional insulation.

The CFPB's broad executive, legislative, and adjudicative authority further refutes its claim that it is functionally "indistinguishable" from the FTC in 1935. Opp. 19. In 1935, the FTC had no substantive rulemaking powers—the FTC disclaimed that authority until 1962. *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693 & n.27 (D.C. Cir. 1973). The FTC also could not order "retrospective" remedies, like disgorgement or other penalties. *Heater v. FTC*, 503 F.2d 321, 321–26 (9th Cir. 1974). The CFPB, in contrast, has broad rulemaking authority, 12 U.S.C. § 5512, can "establish [its] general policies" for "all executive and administrative functions," *id.* § 5492(a), and may order "disgorgement" and "penalties," *id.* § 5565(a)(2).

Indeed, the CFPB has all the authority—and more—of a cabinet department such as Treasury or Justice. And, unlike most cabinet positions, the Director may unilaterally appoint *every* subordinate official in the agency, as well as hire and compensate all CFPB employees outside the normal competitive-service requirements. 12 U.S.C. §§ 5491(b)(5)(A), 5493(a). The absence of any Senate-confirmation requirement for subordinate CFPB officers, and the lack of mandatory competitive-service requirements for the Director's hiring and compensation decisions, gives the Director even greater unilateral authority than members of the President's cabinet.

In light of the CFPB Director's massive powers, it is striking that the CFPB fails to identify any limiting principle on the range of executive authority that Congress could assign to "independent" agencies. For example, the CFPB has never attempted to show how its separation-of-powers theory would prevent Congress from adopting a new Tenure of Office Act (*Myers*, 272 U.S. at 166–70) making even, say, the Attorney General removable only for cause. In fact, the CFPB's amici all but declare that Congress is free to insulate the Treasury Secretary from presidential control. Members of Cong. Br. 8; Separation-of-Powers Scholars Br. 5–11. The absence of any discernible limiting principle is a telling indication that the CFPB's view of the separation of powers is wrong.

The CFPB suggests that this Court should simply ask whether the removal restriction "unduly" impinges on the President's ability to execute the laws (Opp. 17), and argues that the removal restriction here is no greater intrusion than other removal restrictions that have been upheld (*id.* at 22, 28). But the Court in *Free Enterprise Fund* considered and rejected an identical argument. The dissenters argued that, "as a practical matter," the "for cause" removal provision at issue did not "affect the President's power to get something done," because "*two* layers of 'for cause' protection" would not "impose any more serious limitation upon the

President's powers than *one* layer," and thus severing only one level of tenure protection "accomplishes virtually nothing." 561 U.S. at 524–26 (Breyer, J., dissenting). In rejecting that argument, the majority concluded that the Framers "did not rest our liberties on such bureaucratic minutiae." *Id*. at 500. The President's constitutional power and duty "to execute the laws" is "impaired" *whenever* he desires to remove an officer "and a statute prevents him from doing so." *Id.* at 496–97 & n.4.

The CFPB misreads *Free Enterprise Fund* in arguing that, by leaving in place the SEC's assumed single layer of insulation, the Court implicitly affirmed the proposition that one layer of for-cause removal protection necessarily satisfies the Constitution's requirement of democratic accountability. Opp. 22. The Court did no such thing. Instead, the Court accepted its precedents as given because the parties "d[id] not ask" the Court "to reexamine any of" them. *Free Enter. Fund*, 561 U.S. at 483. The Court therefore distinguished between the "Constitution," which "empower[s] the President to keep [executive] officers accountable" through the removal power, and the Court's "precedents," which have sustained limitations on this power "under certain circumstances." *Ibid*.[3]

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[3] The Supreme Court has repeatedly made clear that even more typically structured independent agencies suffer from a lack of political accountability. The United States therefore errs in claiming that the CFPB necessarily "presents a

[footnote continued on next page]

Petitioners have already noted the tension between *Free Enterprise Fund*'s reasoning and cases such as *Humphrey's Executor*. Br. 22 n.4. *Free Enterprise Fund* manifested this tension by applying neither *Humphrey's Executor* nor *Morrison* to the PCAOB. This Court should follow *Free Enterprise Fund*'s lead by declining to extend *Humphrey's Executor* and *Morrison* to yet another "new situation." *Free Enterprise Fund*, 561 U.S. at 483.

B. Severing The Director's Removal Restriction Is An Inadequate Remedy.

Unlike in *Free Enterprise Fund*, severing only the Director's removal restriction would create a new agency fundamentally unlike the one created by Congress. *See* 561 U.S. at 509; Br. 30–31. It would also fail to address the many other constitutional defects of the agency, such as the Director's ability to appropriate his own funds. Only the Legislative Branch can fix the CFPB's structure.

[footnote continued from previous page]

greater risk than a multi-member independent commission" of disregarding the "President's executive policy." U.S. Br. 14–15. By definition, all independent agencies are designed to ensure that they may enforce their own view of executive policy. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (plurality). Such "headless Fourth Branch" agencies create a "separation-of-powers dilemma" because "of the power that Congress has wrested from the unitary Executive." *Id.* at 525–26 (plurality). They "are not directly responsible to the voters" or subject to "ballot-box control," because they are "insulate[d]" from "'the exercise of political oversight.'" *Id.* at 547 (Breyer, J., dissenting) (quoting *Freytag v. Comm'r*, 501 U.S. 868, 916 (1991) (Scalia, J., concurring in part and concurring in the judgment)).

In the CFPB, Congress intended to create an agency that would operate *without regard* to the President's views of executive policy. Congress continually emphasized the importance of establishing an "independent Bureau," S. Rep. No. 111-176, at 174, of "improving regulatory independence," *id.* at 24, and of heading the agency with "an independent director," 156 Cong. Rec. H5240 (daily ed. June 30, 2010) (Rep. Meeks); *see* 156 Cong. Rec. S5871 (July 15, 2010) (Sen. Cardin) ("This legislation will create a consumer bureau . . . that is independent."). Far from "one" isolated "statement," U.S. Br. 21, Congress's core aim of a wholly "independent" CFPB was repeatedly memorialized in statutory text. *See* 12 U.S.C. § 5491(a); 44 U.S.C. § 3502(5). Indeed, numerous legislators, including the CFPB's architect, have already insisted in this Court that severing the CFPA's removal provision would "fundamentally alter[] the CFPB and hamper[] its ability to function as Congress intended" and would be "at odds with Congress's design." Members of Cong. Supporting Rehearing En Banc Br. 2, 5 (Nov. 29, 2016), Doc. 1648256.

The CFPB's primary constitutional defect, the Director's unaccountability, therefore is not a wart to be surgically removed; Congress placed it right at the agency's heart, and it cannot be removed without changing the nature of what Congress adopted. That is why the general severability clause that applies to Dodd-Frank at large does not save the CFPB in particular. *See* Opp. 32 & n.10;

U.S. Br. 21. A severability clause creates only a "presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). Here the offensive provision is the agency's basic structure. Congress, not this Court, should choose how best to re-form the agency in light of that structure's unconstitutionality.

II. This Court Cannot Avoid Addressing The Constitutionality Of The CFPB's Structure Unless It Vacates Without Remanding.

The Court *must* reach the separation-of-powers issue if this matter is allowed to proceed. *See* Br. 31–37; Panel Op. 10–11 n.1. Any future proceedings would prolong PHH's exposure to enforcement action by an unconstitutional entity: The Court cannot remand to an unconstitutional agency, and any remand without resolution of the separation-of-powers issue would be futile. Br. 32–37. Only by vacating the CFPB's order and making clear that the CFPB may not continue this action could this Court avoid the separation-of-powers question.

Even if the Court could otherwise avoid the separation-of-powers question, all parties and the United States agree that this Court *should* decide that question. *See* Opp. 3, 33–34; U.S. Br. 22. As the CFPB notes, the issue arises frequently and has now been fully briefed before this Court. *See* Opp. 34. The parties in this case and the entire regulated community need an answer to the question of the agency's constitutional legitimacy.

III. A Holding That The ALJ Was Improperly Appointed Would Not Entirely Dispose Of This Case.

This Court requested briefing on the appropriate disposition in the event the Court decides in *Lucia v. SEC* that the ALJ's appointment was unconstitutional. The CFPB's principal response is to request *supplemental* briefing—effectively declining to answer the Court's question. Opp. 52.

In the "alternative," the CFPB reluctantly admits that if the ALJ is improperly appointed, the Court must "vacate the Bureau's Order." Opp. 52. That is correct as far as it goes. But there is no basis for the CFPB's additional request that the Court decline to "address[] PHH's liability under RESPA" and simply "remand" for "new proceedings using a properly appointed ALJ." *Ibid.* As PHH explained in its Opening Brief, there can *be* no remand to an unconstitutional agency. Br. 2, 31–32. Moreover, the panel unanimously agreed that "[t]he basic statutory question in this case is not a close call." Panel Op. 73. Where, as here, the "plaintiffs and the government" have "fully briefed the issue before this court," the issues "involve purely legal questions," a subsequent appeal on the RESPA questions "after remand is likely," and the "merits of th[e] case are clear," a "remand" would "be a waste of judicial resources." *Mendoza v. Perez*, 754 F.3d 1002, 1020 (D.C. Cir. 2014). The real-estate settlement services community needs the certainty that the panel's RESPA ruling reinstated. Regardless of the outcome in *Lucia*, this Court should, as explained below, not disturb the panel's statutory rulings.

IV. The CFPB Identifies No Basis To Revisit The Panel's RESPA Rulings.

The CFPB spills much ink seeking to relitigate its failed statutory arguments, despite the fact that this Court directed the parties to treat the "panel's ruling on the statutory issues" as "given." Order at 2 (Feb. 16, 2017). The panel's ruling was consistent with two decades of government policy and the decisions of every court of appeals that has considered RESPA's proper scope. It also provided mission-critical clarity to the many entities regulated under RESPA by restoring the long-settled interpretation of the statute recklessly upended by the Director. The Court should reinstate the panel's RESPA holdings.

A. Reasonable Payments For Services Actually Performed Do Not Violate RESPA.

1. The CFPB uses the term "kickback" 33 times in its brief, but pejorative labels cannot disguise the CFPB's untenable position. As the panel correctly held, Section 8(c)(2) of RESPA categorically exempts reasonable payments for services actually provided from Section 8(a)'s broad prohibition on "kickbacks." Panel Op. 73–79. The CFPB says that Section 8(c)(2) is simply an "interpretive tool," Opp. 36–37, but Section 8(c) affirmatively and unambiguously provides that certain transactions are not prohibited. If a payment satisfies Section 8(c)(2), then it is lawful, end of story.

Indeed, Section 8(c) makes no sense unless it "unambiguously excuse[s] conduct that would otherwise violate [S]ection 8(a)." Opp. 36. The phrase "nothing . . . shall be construed as prohibiting" appears in Section 8(c)'s introductory clause, which applies to all of the conduct listed afterward, including several provisions describing conduct that would plainly "otherwise violate Section 8(a)." *See* 12 U.S.C. § 2607(c); Br. 42. The CFPB fails to explain how the Director's strained interpretation of Section 8(c)(2) is plausible in light of those provisions.

Instead, the CFPB focuses on the phrase "bona fide." Opp. 37–38. According to the CFPB, whether a payment is "bona fide" depends on the subjective motives underlying a provider's purchase of goods or services—that is, whether a particular transaction is actually a "quid pro quo" and whether the goods or services are "unwanted" unless they come with referrals. *See* Opp. 36–37. Even if the phrase "bona fide" modifies "other payment," 12 U.S.C. § 2607(c)(2), it is the *payment* that must be bona fide, not the buyer's motives. A payment is "bona fide" if it is objectively legitimate in light of what the buyer receives in return—that is, if it bears a reasonable relationship to the value of the goods or services provided. *Cf. Transbay Auto Serv., Inc. v. Chevron USA Inc.*, 807 F.3d 1113, 1116 (9th Cir. 2015) (a "bona fide offer" under the Petroleum Marketing Practices Act is an offer that "approach[es] fair market value") (internal quotation marks omitted). In contrast, a payment that is grossly disproportionate to the value of the goods or services the buyer receives is likely not "bona fide" under Section 8(c)(2).[4]

Nor would it be either sensible or feasible for the legality of a payment to turn on a hindsight examination of subjective motives. People buy and sell goods and services for many reasons. A transaction's legality should not depend on which reason a judge, a jury, or the Director thinks was most important. ABA Br. 11–16.

The CFPB contends that the panel's interpretation of "bona fide" makes Section 8(c)(1) superfluous. Opp. 36–37. Section 8(c)(1) states that "the payment of a fee" to attorneys, title insurers, or loan agents for performing particular services is not prohibited. 12 U.S.C. § 2607(c)(1). Section 8(c)(2), meanwhile, applies to anyone who performs any kind of service (or furnishes goods or facilities). *Id.* § 2607(c)(2). And, unlike Section 8(c)(2), Section 8(c)(1) lacks the phrase "bona fide." *Id.* § 2607(c)(1). Section 8(c)(2) is thus "at once broader" because it applies to all services "and narrower" because it contains an additional substantive requirement, *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2043 (2012), as HUD

[4] *McDonald v. Thompson*, 305 U.S. 263 (1938), is inapposite. There, the Supreme Court said that an "[e]xact definition of 'bona fide'" was unnecessary, and never said that "bona fide" always means "absence of evasion." *Id.* at 266. Indeed, in other statutes, Congress uses "bona fide" to refer to "an objective market standard." *See*, *e.g.*, *Transbay*, 807 F.3d at 1116.

recognized, Br. Add. 60. *See also Howland v. First Am. Title Ins. Co.*, 672 F.3d 525, 533 (7th Cir. 2012). To be sure, some services might qualify for both exemptions; but each exemption has independent meaning.

The CFPB's interpretation is also directly contrary to precedent in every circuit that has addressed whether Section 8(c)(2) protects reasonable payments for services actually provided. Br. 41. The CFPB makes little attempt to address that caselaw, asserting without citation that those courts merely "refused to infer that [reasonable] payments, without more, established a violation of RESPA." Opp. 38 n.13. The caselaw refutes that characterization. In *Howland*, for example, the Seventh Circuit held that "[w]here *any* services have been provided, the only way to prove a Section 8 violation is to . . . compare the services with the compensation." 672 F.3d at 531.

Finally, the CFPB contends that the panel's decision undermines RESPA's purpose by purportedly allowing PHH to accept "kickbacks." *See* Opp. 36–37. But Section 8(c)(2) reflects Congress's determination that reasonable payments for services actually provided are *not* improper kickbacks. *See* S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6551. Boiled down, the CFPB's argument is a naked attempt to substitute its own policy preferences for Congress's decision to declare certain conduct lawful.[5]

2. Even if Section 8 were unclear, and it is not, the Court should not defer to the Director's interpretation for at least three reasons. *First*, since Section 8 has criminal applications, *Chevron* is inapplicable and the rule of lenity resolves any ambiguity in PHH's favor. Br. 44 n.8. The CFPB cites a footnote in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995), to argue that *Chevron* applies here. Opp. 35 n.11. Yet in *Sweet Home* the Supreme Court merely observed that the rule of lenity might not apply to "facial challenges to administrative regulations." 515 U.S. at 704 n.8; *see also Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734–35 (6th Cir. 2013) (Sutton, J., concurring). The Court later made clear that it has "never held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 135 S. Ct. 1144, 1151 (2014); *see also Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014).

[5] Contrary to AARP's demonstrably false assertion, AARP Br. 16, the disgorgement figure reflects the premiums that mortgage insurers paid for reinsurance, not any purported overcharge to homeowners. JA34–37. The Director himself confirmed that there is "little variation" among mortgage insurance rates because they must be filed "with state insurance regulators." JA3. Given these filed rates, homeowners did not pay more for their mortgage insurance because of the reinsurance. Unsurprisingly, the CFPB does not contend that the reinsurance agreements cost homeowners *anything*. *See* Opp. 37 n.12.

Second, the Director's interpretation is inconsistent with the CFPB's own rules. The text of Regulation X speaks for itself: It says that referrals are "compensable" so long as the compensation takes the form of payments that bear a "reasonable relationship to the market value of the goods or services provided" in return. *See* 12 C.F.R. § 1024.14(b), (g)(1), (g)(2); Panel Op. 76, 81–82; ABA Br. 17.

Third, the Director failed to consider the industry's "significant reliance interests" in HUD's longstanding interpretation of Section 8. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). The CFPB fails even to acknowledge *Encino Motorcars*, let alone offer any plausible basis for distinguishing it.

B. RESPA's Three-Year Limitations Period Applies To This Proceeding.

The CFPB's arguments against the panel's statute-of-limitations holding also fail. The CFPB first contends that "[t]here is no reason to believe" Congress wanted RESPA's limitations period to apply to administrative enforcement actions under 12 U.S.C. § 5563. Opp. 40. That ignores Section 5563(a)(2), which provides that the CFPB may *not* bring an administrative enforcement action if another statute "specifically limits the Bureau['s]" ability to do so. Here, Section 16 of RESPA specifically imposes a three-year limitations period. 12 U.S.C. § 2614. The CFPB simply omits this aspect of the panel's reasoning.

The CFPB contends that under *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006), the word "action" in Section 16 refers only to "court actions." Opp. 40. But *BP* turned on language in 28 U.S.C. § 2415(a) that Section 16 lacks—namely, the word "complaint" and the phrase "money damages." 549 U.S. at 91–92; Br. 45–46. The Court did not hold that the word "action" never refers to both judicial and administrative enforcement actions, no matter the statutory context.

As the CFPB concedes, the CFPA itself frequently uses the word "action" to refer to both administrative and judicial proceedings. But the CFPB contends that this makes no difference because whenever the statute does so "it accompanies the word 'action' with the adjective 'administrative.'" Opp. 40. That is wrong. Section 5492(a)(10) authorizes the CFPB to establish general policies governing "enforcement actions," without distinguishing between administrative and judicial proceedings. 12 U.S.C. § 5492(a)(10); *see also*, *e.g.*, *id.* § 5496(c)(5). Moreover, where the CFPA does use the phrase "administrative action," it treats judicial and administrative proceedings as interchangeable. Hence, Section 5497(d)(1) refers to "judicial or administrative actions." 12 U.S.C. § 5497(d)(1); *see also*, *e.g.*, *id.* § 5538(b)(6).

Next, the CFPB argues that the Court must construe limitations periods in the government's favor. The cases it cites, however, involved suits to recover money owed to the government. *See* Opp. 41. For enforcement actions, "there is another Supreme Court maxim, older still," that "point[s] in quite the opposite direction: 'In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture.'" *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (citation omitted). The CFPB has yet to identify any conceivable reason why Congress would allow it to bypass Section 16 simply by bringing an enforcement action in its own administrative courts rather than in an Article III court. The word "action" certainly does not mandate that result.

Perhaps feeling compelled to identify (for the first time) *some* time limit, the CFPB points to the five-year limitations period for certain forms of relief in 28 U.S.C. § 2462. Opp. 41. Section 2462 applies only "[e]xcept as otherwise provided by Act of Congress." 28 U.S.C. § 2462. Here, Section 16 provides that enforcement actions—including by "the Bureau"—are subject to a shorter, three-year limitations period. That more specific rule governs.

C. If Any Violations Occurred, They Occurred At Closing.

The Director's decision to treat each mortgage-reinsurance payment as a separate violation is unambiguously foreclosed by RESPA. The CFPB does not grapple with PHH's explanation in its Opening Brief (at 47–48) that the "thing of value" PHH received with each allegedly improper referral of business was the contractual right to a future stream of payments in exchange for reinsuring the risk on that particular loan. Each individual payment was not an independent "kick-back" but merely a drop in the promised stream. Thus, each alleged violation occurred, if at all, at closing. That interpretation comports with Section 8(a)'s text and structure, since each alleged violation consists of one referral and one "kick-back." But under the Director's theory, a single referral can lead to *hundreds* of violations.[6]

The CFPB disputes that the Director's theory has a profound effect on RESPA's limitations periods, since the nominal one- and three-year periods remain the same. Opp. 43. But "any period of limitation is utterly meaningless without specification of the event that starts it running." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 199 (1997) (Scalia, J., concurring). Here, the Director's interpretation would allow RESPA's three-year limitations period to begin running *decades* after an allegedly improper referral—not just for mortgage reinsurance, but for any "thing of value" where payments are made over time. 12 C.F.R. § 1024.14(d).

[6] The CFPB relies on *White v. PNC Financial Services Group*, *Inc.*, 2017 WL 85378 (E.D. Pa. Jan. 10, 2017), which applied the continuing violation doctrine to RESPA, as a case that "got it right." Opp. 44. But the Director himself concluded just the opposite—"the continuing violation doctrine is not properly applicable to the statutory violations at issue here." JA27.

The Fifth Circuit rejected a similar interpretation in *Snow v. First American Title Insurance Co.*, 332 F.3d 356, 358–61 (5th Cir. 2003). The CFPB says that there, unlike here, "the title insurer paid the kickback in full at closing." Opp. 44. Even a cursory read of the Fifth Circuit's opinion belies that attempt to distinguish *Snow*. There, as here, the plaintiffs argued that the alleged violations occurred "when defendants pa[id] their agents," months after closing, even though the payments had been earned "at closing." 332 F.3d at 358–61. The court rejected that argument as inconsistent with RESPA's structure and because it would "upset Congress's policy choices regarding limitations periods for RESPA actions." *Id.* at 359.[7]

V. The Director's Decision Violates Fundamental Principles Of Fair Notice.

The Director's newfound construction of Section 8 faces a fatal problem that precludes retroactive liability against PHH: fair notice. The CFPB claims that HUD's prior interpretations were just "unofficial" (Opp. 46) enough to fool not only Petitioners but also the entire mortgage settlement services industry, other agen-

[7] The disgorgement award here must be reduced by the value of the reinsurance services provided by PHH. Panel Op. 79 n.24. Unlike *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011), *see* Opp. 45 n.16, PHH provided services with real value, as evidenced by the more than $150 million mortgage insurers received in reinsurance payouts. JA69. Moreover, this Court held in *SEC v. Whittemore*, 659 F.3d 1, 7 (D.C. Cir. 2011), that disgorgement must be based on "profits," not gross receipts.

cies, courts, commentators, and even the ALJ below, all of whom viewed them as binding. This bait-and-switch cannot stand.

A. The Director's New Interpretation Of Section 8(c)(2) Contradicts Nearly Two Decades Of Consistent Agency Guidance.

When Petitioners entered into the arrangements at issue (and even while receiving premiums), *all* of HUD's "regulations and other public statements," *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995), said the same thing: Payments for services do not violate Section 8(a) if the services are actually performed and the payments are reasonable.[8] *See* Br. 50–57. The CFPB can identify no agency pronouncement that would have warned a party, "with 'ascertainable certainty,'" that such arrangements were illegal. *Gen. Elec.*, 53 F.3d at 1329. Nevertheless, the CFPB claims that the Director was free to ignore this letter and penalize conduct that the letter authorized because it did not qualify for RESPA's statutory safe harbor. Opp. 47–50.[9]

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[8] Contrary to the CFPB's suggestion, Opp. 46, the HUD Letter's use of the word "solely" is consistent with and built into the HUD Letter's two-part test, *see* JA251, 253.

[9] The CFPB implies (Opp. 46 n.17) that PHH's fair-notice argument is at odds with its argument in *Munoz v. PHH Corp.*, No. 1:08-CIV-759 (E.D. Cal.), that the HUD Letter was not entitled to *Chevron* deference. D.E. 233, at 17–18 (May 30, 2013). PHH is not arguing that the HUD Letter is entitled to *Chevron* deference, only that the Director's rejection of it deprived PHH of fair notice.

The CFPB's position is fundamentally flawed. For starters, due process is not a matter of legislative grace, and the scope of Petitioners' right to constitutional fair notice does not depend on the scope—or even the existence—of RESPA's safe-harbor provision. Indeed, agency pronouncements far less formal than the HUD Letter have been held to create fair-notice issues for regulated parties. *See, e.g.*, *Gen. Elec.*, 53 F.3d at 1332 (informal letter from "one EPA regional office"); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1356 (D.C. Cir. 1998) (NHTSA's internal test schematic). And even *silent agency acquiescence* can preclude fair notice. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

Moreover, faithfully applying constitutional fair-notice principles does not deprive RESPA's statutory safe harbor of its intended "effect." Opp. 47. The safe harbor simply supplements—rather than supplants—the Due Process Clause's protections. Nor do constitutional fair-notice principles deprive agencies of "flexibility when responding to requests for compliance advice." *Ibid*. Agencies have the flexibility to change their minds, or to withhold advice altogether, but *not* to punish retroactively a party for relying on advice the agency chooses to give. If, as the CFPB posits, "HUD did not want to be bound by informal letters such as the 1997 letter," *ibid.*, it was generally free at any time to advise regulated parties that it would change its interpretations of RESPA on a prospective basis. *See Fox*, 556

U.S. at 514–16. Moreover, the legal position set forth in the HUD Letter was embodied in binding regulations published in the Federal Register. Regulation X makes clear that RESPA "permit[s]" payments for "services actually performed" unless the payment "bears no reasonable relationship to the market value of the goods or services provided." 24 C.F.R. § 3500.14(g) (2011). As the ALJ here put it, the 1997 letter is a "straightforward application of [Regulation X] to captive reinsurance." JA147.[10] This is the exact same standard that HUD applied in the 2007 settlement agreement that the CFPB cites. Opp. 48. The CFPB quotes the settlement agreement's description of Section 8(a), but fails to quote the application of Section 8(c) in the very next sentence, which notes that captive reinsurance arrangements "violate Section 8 of RESPA" when "the payments to the reinsurer are not bona fide and exceed the value of the reinsurance." HUD Settlement with Beazer Homes USA, Inc. 3 (Oct. 23, 2007). This is yet another straightforward application of Regulation X. The CFPB's about-face in this case thus implicated fair-notice principles even on its own narrow view.

HUD also issued numerous Federal Register publications applying the same RESPA interpretation to other settlement services. Br. 9. The CFPB maintains

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[10] The CFPB is thus wrong to suggest that PHH had no reliance interests because its "first captive reinsurance agreement" predated the 1997 letter. *See* Opp. 47 n.19.

that "[t]hose statements address fact situations that bear no similarity to" affiliated mortgage reinsurance. Opp. 49. But they all deal with goods or services subject to Section 8. Regulated parties may reasonably rely on an agency's consistent interpretation of a statute, even if the agency has not yet applied that interpretation. *See Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 629 (D.C. Cir. 2000). Here, Petitioners did not need to "assume[]" that HUD's two-part test "applied equally" to affiliated-reinsurance arrangements, *ibid.*, because HUD explicitly said that it did, JA256–57.

The CFPB nonetheless insists that agencies may apply new interpretations "retrospectively" "in adjudicative proceedings." Opp. 50. An agency may "*not* change an interpretation in an adjudicative proceeding," however, "where doing so would impose 'new liability . . . on individuals for past actions which were taken in good-faith reliance on agency pronouncements.'" *Christopher*, 132 S. Ct. at 2167 (citation and alterations omitted) (emphasis added).

And contrary to the CFPB's claim, Opp. 51 n.24, the "duty to provide notice is triggered" whenever a "sufficiently grave sanction" "deprives [a regulated party] of property." *Chrysler*, 158 F.3d at 1355. Absent fair notice, "an agency may not deprive a party of property by imposing civil or criminal *liability*." *Gen. Elec.*, 53 F.3d at 1328–29 (emphasis added). Here, no one denies that the Director purported to deprive Petitioners of $109 million or that he imposed—in his words—"liability" and "sanctions" on them. JA31 (capitalization omitted).

In a last-ditch effort, the CFPB tries to resurrect an "alternative" holding that ostensibly relied on the traditional understanding of Section 8(c)(2). Opp. 51. The meaning of that "[a]lternative theory of liability" (JA20) is far from clear, and the scant three sentences that the CFPB belatedly devotes to it fail to clarify the issue. Indeed, during the stay briefing before this Court, the CFPB affirmatively abandoned that "theory," asserting that it "did not form the basis of the Director's decision." CFPB Stay Br. 14 n.5. PHH noted that the CFPB had waived any reliance on that holding in its opening panel merits brief, PHH Panel Br. 37, and the CFPB never mentioned it again, either before the panel or in its en banc petition.

The CFPB had good reason not to defend the alternative holding: It depended on improperly shifting the burden of proof from the government to PHH and assuming that evidentiary *silence* equaled liability. *See* JA20–21. The panel correctly held that it is "the CFPB's burden to prove that the payments for reinsurance were more than reasonable market value and were disguised payments for referrals." Panel Op. 89 n.27. PHH noted that the CFPB has not sought rehearing on that question, Br. 44 n.7, and the CFPB has not denied it. Moreover, the alternative holding applies to only four book years and thus provides no support for the vast majority of the disgorgement award.

B. The Director's New Interpretation Of RESPA's Limitations Period Contradicts The Previously Settled Interpretation.

PHH also lacked fair notice of the Director's new interpretation of Section 8(a). *See* Br. 56–57. The CFPB claims that "[c]oncepts of fair notice" apply only to "prior agency pronouncements," not to "court decisions." Opp. 51 n.25. That is wrong. Regulated entities may reasonably rely on settled judicial statutory constructions, even when an agency has not expressly agreed with those decisions. *De Niz Robles v. Lynch*, 803 F.3d 1165, 1177–79 (10th Cir. 2015) (Gorsuch, J.). That is precisely what Petitioners (and numerous other companies) did.

CONCLUSION

The Decision and Order should be vacated without remand, and this Court should prohibit the CFPB from resuming proceedings against Petitioners.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 10, 2017, an electronic copy of the foregoing Reply Brief for Petitioners was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon the following counsel for respondent Consumer Financial Protection Bureau, who is a registered CM/ECF user:

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