No. 21-55459

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Amy Thomas-Lawson; Brenda Boley; Miguel Padilla; William Green; on behalf of themselves and all those similarly situated,

Plaintiffs-Appellants,

v.

Carrington Mortgage Services, LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. 20-cv-7301
Hon. Otis D. Wright, II

Brief of *Amici Curiae* Mortgage Bankers Association, American Bankers Association, National Association of Federally-Insured Credit Unions, Credit Union National Association, and American Financial Services Association, in Support of Appellee and Affirming the District Court Order

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Michael J. Agoglia, *Counsel of Record*
Tania Rice
ALSTON & BIRD LLP
560 Mission Street, Suite 2100
San Francisco, CA 94105
Telephone: (415) 243-1000
michael.agoglia@alston.com
tania.rice@alston.com

Nanci Weissgold
ALSTON & BIRD LLP
The Atlantic Building
950 F Street, NW
Washington, DC 20004
Telephone: (202) 239-3300
nanci.weissgold@alston.com
anoush.garakani@alston.com

Sam Bragg
ALSTON & BIRD LLP
2200 Ross Ave.
Ste. 2300
Dallas, TX 75201
Telephone: (214) 922-3400
sam.bragg@alston.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *amici curiae* Mortgage Bankers Association, American Bankers Association, National Association of Federally-Insured Credit Unions, Credit Union National Association, and American Financial Services Association, each states that it is a non-profit corporation that has no parent corporation. No publicly held corporation owns 10% or more of the stock of any of the *amici*.

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IDENTITY AND INTEREST OF *AMICI* AND COMPLIANCE WITH RULE 29

The Mortgage Bankers Association is a national association representing over 2,200 members of the real estate finance industry. For more information, visit https://www.mba.org/. The American Bankers Association is the principal national trade association of the financial services industry in the United States with members in all fifty states. For more information, visit https://www.aba.com/. The National Association of Federally-Insured Credit Unions advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 127 million consumers with personal and small business financial service products. For more information, visit https://www.nafcu.org/. The Credit Union National Association is the largest trade association in the United States serving America's credit unions. For more information, visit https://www.cuna.org/. American Financial Services Association, founded in 1916, is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. For more information, visit https://afsaonline.org/. *Amici* are interested in this case because its outcome will directly impact their members, the finance industry more broadly, and the consumers whom *Amici* serve.

All parties have consented to *Amici* filing this brief.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that: (i) no party's counsel authored the brief in whole or in part; (ii) no party nor their counsel contributed money that was intended to fund preparing or submitting

INTRODUCTION

Amici write to provide important background about the informed use of convenience fees by consumers, and the constraints on the contents of mortgage loan agreements. They also write to emphasize why the construction advanced by Appellants and *amicus curiae* Consumer Financial Protection Bureau (CFPB) of the phrase "permitted by law" in the Fair Debt Collection Practices Act (FDCPA) is improper, and will deprive consumers' of important, cost-saving choices.

BACKGROUND

I. CONSUMERS MAKE INFORMED CHOICES KNOWING THE FEES INVOLVED WHEN DECIDING HOW TO PAY THEIR MORTGAGE

Consumers, like Plaintiffs-Appellants, knowingly elect to use a payment method for which they will be charged a convenience fee. Mortgage servicers generally offer borrowers many ways to make a monthly loan payment, including:

- Mailing a check;
- Automatic withdrawals from the borrower's checking account (ACH);
- Online through a portal or website;
- In-person at a branch; or
- Over the phone through an automated system or a live agent.

Most of these options are offered without cost. For example, Plaintiffs-Appellants could have paid by mail without incurring a fee.

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the brief; and (iii) no person other than amici, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

Convenience fees also are not assessed without the borrower's knowledge and consent. Rather, the fact and amount of the convenience fee are disclosed to borrowers before they elect to continue with that payment method. Often, borrowers are also reminded of the free alternatives before they make that election.

Mortgage servicers are not obligated to offer expedited payment methods, such as online and phone pay methods. Even though typical mortgage agreements do not require those options, many mortgage servicers (like Carrington) choose to make them available for the borrowers' benefit. But those expedited options come with costs to the mortgage servicer. They often require the use of a third-party payment processing vendor, such as Western Union or (as in Carrington's case) Speedpay. Among other costs, the mortgage servicer typically needs to hire and train customer service agents to receive payments over the phone and/or hire computer programmers to build and maintain the systems needed to accept payments online or through interactive-voice-response technology.

Mortgage servicers developed expedited payment processing services in response to borrowers' demand for convenient alternative payment options. Penalizing mortgage servicers by eliminating their ability to charge clearly disclosed fees for those services—ones they are not required to provide—will at a minimum reduce the incentive to offer such options, limit important consumer choices, and deter future servicing innovations that benefit borrowers.

Such expedited payment processing options also enable borrowers to avoid the more costly consequences of late payments. Regardless of the payment method they choose, borrowers must ensure that they remit their payments early enough so that they are received by their due date. If a borrower misses a payment deadline, the loan is deemed delinquent or in default. This can subject borrowers to late fees, adverse credit reporting, and other costs of delinquency. *See* F.T.C., *Trouble Paying Your Mortgage or Facing Foreclosure?* (2021)[2] ("even one late payment can negatively affect your credit score," which "affects whether you can get a new loan or refinance your existing loan—and what your interest rate will be.").

It is standard in the industry for late fees to be approximately 4-5% of the payment due. Borrowers whose payments otherwise would be late can make a last-minute payment by phone. Electing that option, with the fully disclosed modest convenience fee, leaves them far better off financially than incurring the considerably more expensive late fee (not to mention avoiding adverse credit reporting which can adversely impact the consumer in even broader ways). For example, Appellant Thomas-Lawson's monthly payment was $1,462.31, and the applicable late charge was 4%. (*See* Plaintiffs-Appellants Excerpts of Record, at ER-190-91.) Accordingly, if she paid late, she would incur a $58.49 fee—much higher than the $5 convenience fee she was charged. (*See id.*)

[2] https://www.consumer.ftc.gov/articles/trouble-paying-your-mortgage-or-facing-foreclosure.

Further, these expedited mortgage payment methods tend to be used by a small percentage of borrowers (due to the number of free alternatives), and are used most frequently by the same customers who are paying on the last day of a grace period before a late fee applies. These expedited payment methods, for which servicers incur additional processing costs and charge a modest convenience fee, benefit those customers tremendously, rather than damaging them.

II. LOAN AGREEMENTS COULD NOT REASONABLY ANTICIPATE EVERY SERVICING ACTIVITY OVER THE LIFE OF THE LOAN

The construction of the FDCPA advanced by Plaintiffs-Appellants and the CFPB misapprehends the role of the operative agreements created at the time a mortgage loan is originated, and the institutions that effectively control their content. It relies on the unsupported notion that mortgage servicers could remedy the FDCPA issue here by explicitly providing for convenience fees and their amounts in the underlying loan agreements. That assumption is incorrect.

The loan agreements that govern mortgage originations are mortgages or deeds of trust, and notes. The notes are designed to set forth the basic terms on which the money has been lent—the loan's duration, interest rate, payment period and due date, late fee, prepayment provisions, and the like. The mortgage or deed of trust is the security instrument between a mortgage lender and a mortgage borrower. Like the note, the primary function of a mortgage is to protect the interest of the mortgage lender (and any subsequent investors or downstream purchasers who later buy rights to the payments of interest and principal on the loan) in the event of default. *See* Restatement (Third) of Property: Mortgages § 1.1 (1997). It does so by providing the mortgage lender or its assignee with a security interest in the real property owned by the mortgage borrower. *See id. See, e.g.*, Fannie Mae/Freddie Mac Uniform Deed of Trust, California 3005.[3]

For the last four decades, the types of available home loans have expanded to meet demand (*e.g.*, fixed, adjustable, and hybrid rates; conventional and non-conventional; interest only; 10, 15, 30-year terms). At the same time, the loan agreements used by mortgage lenders within given products have become increasingly uniform, and effectively dictated by third parties, as part of a government-led effort to increase the availability of low cost home loans by fostering more efficient secondary markets for those loans. Until the 1970s, conventional residential mortgage loans were mostly local in nature. *See generally* U.S. Dep't of Hous. & Urb. Dev., *The Secondary Market in Residential Mortgages* at 12 (1982)[4]. In 1970, Congress created the government-sponsored enterprise (GSE) known as Freddie Mac, with the mission of "increas[ing] the availability of funds for mortgage lending by developing and maintaining a nationwide secondary market for conventional residential mortgages." *Id.* at 9. Shortly thereafter, Congress similarly authorized another GSE known as Fannie Mae "to purchase

[3] https://singlefamily.fanniemae.com/legal-documents/security-instruments.

[4] https://www.huduser.gov/portal//Publications/pdf/HUD-11648.pdf.

conventional mortgage loans." *Id.* at 10. Together, Freddie Mac and Fannie Mae became the first—and remain the largest—purchasers of conventional residential mortgages on the secondary market. *See* Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 Am. U.L. Rev. 1489, 1499 (2011).

A major obstacle to robust secondary markets for mortgage loans was that most mortgages were being made using non-standardized loan agreements from local lenders. *See The Secondary Market in Residential Mortgages*, *supra*, at 12-13. So, in 1975, Fannie Mae and Freddie Mac "introduced uniform legal documents for conventional mortgages in each state," and required that loans they purchase be documented on their forms. *Id.* at 14. An estimated 90 percent of all conventional mortgages were originated on these uniform loan agreements. *See* Julia Patterson Forrester, *Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners*, 72 Mo. L. Rev. 1077, 1086-87 (2007).

Significantly, while these uniform mortgage instruments do address some mortgage servicing at a high level, they were never intended to address every servicing activity that might arise over the course of the loan's ensuing administration. *See generally, e.g.*, Fannie Mae/Freddie Mac Uniform Deed of Trust, California 3005.[5] It would be impossible to anticipate what servicing fees

[5] https://singlefamily.fanniemae.com/legal-documents/security-instruments (clarifying that "Lender may not charge fees that are expressly prohibited by this

expenses might arise over the next 10, 20, or even 30 years the loans are active. Differences in what services the borrower might elect to use, regional differences in costs of providing services, and changes occasioned by technology are but a few of the reasons why, even if they could create their own loan agreements, a lender cannot forecast at the time the loan agreements are signed all the fees that might be incurred over the life of the loan. For example, it would have been miraculous for the uniform mortgage instrument used to originate a mortgage in the 1980s to have expressly contemplated that mortgage payments would someday be made online.

Also, Fannie Mae and Freddie Mac strictly limit what changes lenders using the forms may make to their terms. *See, e.g.*, Freddie Mac's Authorized Changes to Notes, Riders, Security Instruments and the Uniform Residential Loan Application (effective July 7, 2021). So, even as it becomes clear that new servicing fees, charges, or expenses have arisen with time, lenders are powerless to add terms regarding them. Given this and the pervasive use of the Fannie Mae/Freddie Mac uniform instruments in originating conventional mortgages, it is unremarkable that the vast majority of mortgages do not expressly contemplate all foreseeable (and unforeseeable) fees, charges, or expenses that may be incurred during the course of an up-to-30 year mortgage servicing relationship.

Security Instrument or Applicable Law. In regard to any other fees, the absence of express authority in this [agreement] to charge a specific fee to Borrower **shall not be construed as a prohibition on the charging of such fee**.") (emphasis added.)

Mortgage servicers are even more removed from the origination of the loan and execution of loan agreements. Unlike mortgage lending, mortgage servicing involves post-origination day-to-day administration on the loan. Commonly, the servicing of the loan is not performed by the originating lender. *See* Restatement (Third) of Property: Mortgages, Introduction at 3. Servicers inherit the loan agreements. They have no authority to alter the terms of the governing notes or security instruments. The array of different activities a mortgage servicer will be called to perform is vast, often varying significantly, from one loan to the next.

It is in this context that expedited mortgage payment options arose, and they serve legitimate and constantly evolving needs of consumers and the industry. Mortgage servicers and consumer lenders are more than willing to operate on the premise that the fees they charge must conform to what state or federal law permits, but strongly oppose the efforts here by the CFPB and Appellants to use the FDCPA to exclude whole categories of such law—such as traditional notions of state contract law—from consideration of what is permissible. Facing ever-changing circumstances and consumer demand, mortgage servicers enter fair and conscionable contracts with their customers regarding fees for services that could not possibly have been envisioned at the time of the originating mortgage.

ARGUMENT

I. THE COURT SHOULD NOT DEFER TO THE CFPB'S READING OF SECTION 1692f(1)

In its *amicus* brief, the CFPB argues for a construction of the phrase "permitted by law" in section 1692f(1) of the FDCPA as prohibiting fees unless a law expressly authorizes such fees. As a preliminary matter, the CFPB claims its interpretation of the FDCPA is entitled to *Skidmore* deference, meaning at best deference is limited "only to the extent [its interpretation] has the 'power to persuade.'" *See Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020) (quoting *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944)). Courts routinely reject agency interpretations under *Skidmore* deference when the interpretations are unpersuasive or unreasonable. *See, e.g.*, *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020) (rejecting agency interpretation as "neither persuasive nor reasonable"). Indeed, the CFPB's prior interpretations of the FDCPA have been rejected by this Court. *Vien-Phuong Thi Ho v. ReconTrust Co., NA*, 858 F.3d 568, 576 n.10 (9th Cir. 2017) (inviting CFPB to submit *amicus* brief and then rejecting CFPB's interpretation of the FDCPA as unpersuasive).

As carefully explicated in Appellee's brief and in the following section, the CFPB's interpretation carries little persuasive weight because it is contrary to the plain language of the FDCPA. Amici here point out further that the materials upon which the CFPB relies also are unpersuasive. The Fall 2014 Supervisory

Highlights do not analyze the FDCPA's language, provide any reasoning, or cite any authoritative support. They simply state the CFPB's interpretation of section 1692f(1) as a legal conclusion. Similarly, that interpretation in the CFPB's Fall 2015 Supervisory Highlights is supported by a lone federal district court decision. The CFPB's Compliance Bulletin 2017–01: Phone Pay Fees, also provides no meaningful analysis. It merely repeats the CFPB's interpretation, citing only the Fall 2015 Supervisory Highlights for support. *See* 82 Fed. Reg. 35936, 35938 & n.12 (Aug. 2, 2017). Repetition in informal guidance[6] of an agency's unsupported statutory interpretation does not transform it into a persuasive one.

More significantly, despite ample opportunity to do so, the CFPB opted ***not*** to enact the FDCPA interpretation it advances here through administrative rulemaking. Beginning in 2013, the CFPB engaged in a nearly seven-year notice and comment rulemaking process to substantially amend Regulation F, which implements the FDCPA. During that process, the CFPB stated it was "considering

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[6] The CFPB has also acknowledged that Supervisory Highlights and Compliance Bulletins are not valid channels to append legal requirements onto statutes like the FDCPA. *See* Role of Supervisory Guidance, 86 Fed. Reg. 9261, 9265 (Feb. 12, 2021) ("[T]he Bureau fully agrees that it is not the role of supervisory guidance to create legal requirements."); *see also id.* at 9261 n.4 ("[S]tatutes and legislative rules, not statements of policy, set legal requirements."). *See also* 12 C.F.R. pt. 1074 app. A ("Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the Bureau does not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the Bureau's supervisory expectations or priorities and articulates the Bureau's general views regarding appropriate practices for a given subject area.").

clarifying that incidental fees, including payment method convenience fees, that are collected either directly or indirectly by the collector are permissible only if . . . state law expressly permits them . . . ."[7] Well aware that its interpretation of section 1692f(1)'s went well beyond the plain language of that provision, the CFPB ultimately declined to adopt that interpretation in the rulemaking. Instead, the language for 12 C.F.R. § 1006.22(b) "generally mirrored the statute" and made only "minor wording and organizational changes for clarity." Debt Collection Practices (Regulation F), Final Rule, 85 Fed. Reg. 76734, 76833 (Nov. 30, 2020).

Accordingly, the Court should not accord the CFPB's interpretation any deference. It is not only unpersuasive, it would impermissibly impose legal requirements beyond the plain language of the statute.

II. THE COURT SHOULD NOT CONSTRUE THE FDCPA'S CLEAR ALLOWANCE OF FEES "PERMITTED BY LAW" TO PREVENT APPLICATION OF TRADITIONAL STATE LAW PRINCIPLES

The Court should base its analysis on the plain language of section 1692f(1). That section prohibits "unfair or unconscionable means to collect or attempt to collect any debt" including collecting amounts "unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1). By this text, Congress provided two distinct means by which a fee

[7] Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking, Outline of Proposals Under Consideration and Alternatives at app. H-2 (2016), https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf.

would be permissible under the FDCPA: (1) those expressly authorized by the agreement and (2) those permitted by law.

According the text of Section 1692f(1) its plain meaning, as the Court must, "permitted by law" contains no inherent limitation on the nature or sources of law that can be considered. The phrase stands in stark contrast to the preceding and alternative test where Congress purposefully chose the "expressly authorized" qualifier. The phrase "permitted by law" is not fairly read to categorically exclude any type of law. More specifically, there is no support in the plain language of Section 1692f(1) for the Court to declare that express statutory authorization qualifies as the only law permissibly considered within the "permitted by law" analysis. Indeed, legally enforceable contracts are permitted by both state common law and state statutes. *See, e.g.,* Cal. Civ. Code § 1619 *et seq.* Under the law generally, two parties—such as a mortgage servicer and borrower—are fully permitted to agree that one party will provide specified services for specified price. There is no basis in the broad "permitted by law" language of Section 1692f(1) to eliminate the freedom of borrowers and servicers to enter otherwise lawful, enforceable contracts under state law unless a state statute specifically authorizes a certain fee for a certain service.

Plaintiffs-Appellants and the CFPB argue that this plain reading would render the first category of allowable fees—amounts "expressly authorized by the agreement"—superfluous. Not so. Contrary to the Fourth Circuit's holding in

Alexander v. Carrington Mortgage Services, LLC, No. 20-2359, 2022 U.S. App. LEXIS 1549 (4th Cir. Jan. 19, 2022), *Amici* are not contending that the "permitted by law" clause includes anything that is not expressly prohibited by law. "Permitted by law" still requires that the mortgage servicer and borrower create a valid agreement that is enforceable under all applicable principles of contract law. For example, an unconscionable contract would not be permitted by law and would not qualify under the second category of allowable fees. This reading aligns with the fact that Section 1692f(1) is intended to prohibit "unfair or unconscionable means to collect or attempt to collect any debt." Conversely, Section 1692f(1) is not intended to restrict consumer options and contracting power. There is nothing inconsistent with Section 1692f(1) to hold that even if the loan agreement does not expressly authorize the fee, courts could find based on state contract principles applied to separate facts relating to the disclosures and choices made by servicers and borrowers after the loan was originated (often years later) that a distinct, subsequent, and lawful agreement was created between the consumer and servicer.

Additionally, Plaintiffs-Appellants and the CFPB argue for a reading of Section 1692f(1) that would require the specific dollar amount of the fee to be authorized by either the mortgage instruments or a statute. That reading is untenable. As discussed, the mortgage instruments are not intended to enumerate every service fee that a borrower may agree to pay a mortgage servicer in the future. Nor is it realistic to expect that a statute or loan agreement would be capable of anticipating the ever-evolving changes in available services, and their disparate costs, over a typical 30-year loan term. It also ignores the fact that servicers inherit the loan agreements from originating lenders, and neither lender nor servicer have the ability to modify the uniform instruments widely used across the country to originate mortgages. Most importantly, such a rule does not derive from the statute, and would stifle innovation and important options for consumers.

Allowing borrowers to elect the benefits of expedited payment methods, with full knowledge of the associated convenience fee, is fully consistent with the purpose and language of the FDCPA. 15 U.S.C. § 1692(e) (FDCPA intended to "eliminate abusive debt collection practices."); *see also Hahn v. Triumph P'ships LLC*, 557 F.3d 755, 757 (7th Cir. 2009) (FDCPA is "designed to provide information that helps consumers to choose intelligently").

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

Dated: February 22, 2022 By: */s/ Michael J. Agoglia*

Michael J. Agoglia

ALSTON & BIRD LLP
560 Mission St., Suite 2100
San Francisco, CA 94105

Attorneys for Amici Curiae Mortgage Bankers Association, American

Bankers Association, National Association of Federally-Insured Credit Unions, Credit Union National Association, and American Financial Services Association

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7). The brief is 15 pages. The type size and typeface comply with Rule 32(a)(5).

Dated: February 22, 2022 By: */s/ Michael J. Agoglia*
Michael J. Agoglia

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing documents on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 22, 2022 By: */s/ Michael J. Agoglia*
Michael J. Agoglia