No. 10-1042

IN THE

Supreme Court of the United States

TAMMY FORET FREEMAN ET AL.,

Petitioners,

v.

QUICKEN LOANS, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Patrick W. Pendley
Stanley P. Baudin
Christopher L. Coffin
Nicholas R. Rockforte
PENDLEY, BAUDIN &
COFFIN, LLP
24110 Eden St.
Plaquemine, LA 70764

Kevin K. Russell
Counsel of Record
Thomas C. Goldstein
Amy Howe
GOLDSTEIN, HOWE &
RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
(301) 941-1913
krussell@ghrfirm.com

Andre P. LaPlace
2762 Continental Dr.,
Suite 103
Baton Rouge, LA 70808

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REPLY BRIEF FOR THE PETITIONERS

The Fifth Circuit recognized that it was "enter[ing] the interpretive fray," Pet. App. 7a, over whether "REPSA § 8(b) requires two culpable parties, a giver and a receiver of the unlawful fee," *id*. 6a. The court acknowledged that three circuits have held that it does not. *Id*. 6a. However, the Fifth Circuit adopted instead the view of three other circuits that "RESPA is an anti-kickback statute," *id*. 10a, and, accordingly, prohibits lenders from charging unearned fees only if they split the fee with a third party, *id*. 7a-8a.

Quicken does not contest either the existence of this circuit conflict or its importance. Nor could it. The circuit split has been widely recognized by courts and commentators alike.[1] And the applicability of Section 8(b) to various settlement charges is a recurring question under a statute that governs millions of mortgage closings every year.[2] Nor does Quicken deny that the continued existence of such dramatically different interpretations of the same statute is untenable, requiring this Court's

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[1] *See* Pet. 18 n.11 (collecting cases); John R. Chiles & Zachary D. Miller, *The Long Arm of RESPA: Judicial Expansion of Section 8(b) in 2009*, 64 CONSUMER FIN. L.Q. REP. 22, 34 (2010) ("Of course, hanging over the head of any RESPA observer is the possibility of a United States Supreme Court decision settling the current circuit split."); Jonathan P. Solomon, *Resolving RESPA's § 8(b) Circuit Split*, 73 U. CHI. L. REV. 1487 (2006).

[2] Indeed, petitioners' research has identified more than thirty federal decisions in Section 8(b) cases since this petition was filed in February.

intervention to restore a uniform meaning to a statute Congress specifically enacted to create a single standard throughout the nation. Pet. 17-18.

Instead, Quicken insists that the Court should deny certiorari because the question upon which the courts are divided arose in this case with respect to an unearned, undivided fee, while other courts have typically confronted markups. BIO 15. But beyond simply pointing out this factual difference, Quicken makes no effort to explain why it matters. The circuits themselves have seen no relevant distinction between these slightly different forms of unearned charges.

Quicken's only other grounds for opposing certiorari are its insistence that it could have prevailed below on alternative grounds that neither court addressed, BIO 19-21, and that the decision below is correct, *id.* 22-28. Neither assertion is a reason to deny certiorari, and both are meritless in any event.

I. The Circuits Are Divided Four To Three Over Whether RESPA Section 8(b) Prohibits Only Kickbacks, Or Instead Reaches All Unearned Fees.

Quicken does not seriously dispute that circuits broadly disagree whether RESPA prohibits only kickbacks or instead also prohibits a defendant from charging and retaining for itself an unearned fee. The court of appeals in this case itself explained that the "Fourth, Seventh, and Eighth Circuits have each held that RESPA § 8 is exclusively an anti-kickback provision" while the "Second, Third, and Eleventh Circuits have rejected the two-party requirement . . . ." Pet. App. 6a. Quicken nonetheless

argues that "the 'four to three' circuit split cited by Petitioners is not a basis for granting review in this case," because some of the cases in the split involved "markups" and others involved "unearned, undivided" fees. BIO 15. But that distinction made no difference to any of the courts in the split. And the fact that the question presented by the petition controls the disposition of claims regarding a variety of different fees, arising in a range of different contexts, is a reason to grant review, not to deny it.

1. In resolving the lawfulness of markups, the Fourth, Seventh, and Eighth Circuits have adopted a rule that applies equally to unearned, undivided fees. For example, the Eighth Circuit has held that markups are not actionable under RESPA unless divided with a third party because it has construed Section 8(b) to be "an anti-kickback provision that unambiguously requires at least two parties to share a settlement fee in order to violate the statute," *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003), not because of anything particular to markups. *See also Krzalic v. Republic Title Co.*, 314 F.3d 875, 877 (7th Cir. 2002) ("[S]ection 8(b) is an anti-kickback provision."); *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 264 (4th Cir. 2002) ("We agree with the Seventh Circuit that § 8(b) is a prohibition on kickbacks . . . .").

Because that rationale applies equally to the kind of unearned, undivided fee imposed in this case, the Fifth Circuit rightly observed that "[p]resumably, the three circuits that require two culpable actors would not find undivided, unearned charges actionable" either. Pet. App. 6a-7a. In fact, district courts in the Fourth and Seventh Circuits have relied

on their circuit's markup precedent to reject challenges to unearned, undivided fees. *See Haehl v. Wash. Mut. Bank, F.A.*, 277 F. Supp. 2d 933, 937 (S.D. Ind. 2003); *Stith v. Thorne*, 488 F. Supp. 2d 534, 557 (E.D. Va. 2007).

At the same time, three other circuits have applied RESPA to markups because they reject the assertion that the statute unambiguously applies only to kickbacks. *See Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384, 388-89 (3d Cir. 2005); *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 58 (2d Cir. 2004); *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 982 (11th Cir. 2003). Again, nothing about those courts' reasoning rests on anything special about markups that distinguishes them from other unearned fees. Quicken has not suggested that any of these courts would reverse course and suddenly conclude that RESPA is only an anti-kickback statute as applied to unearned, undivided fees. And, in fact, when confronted with that question, the Second Circuit has rejected the fee-splitting requirement in both contexts. *See Cohen v. JP Morgan Chase & Co.,* 498 F.3d 111, 120 (2d Cir. 2007) (unearned, undivided "post-closing fee"); *Kruse*, 383 F.3d at 58 (markup).

The fact that courts have treated markup decisions as relevant authority in cases involving undivided, unearned fees confirms the irrelevance of the distinction upon which Quicken relies. In this case, for example, the Fifth Circuit relied on markup decisions from the Fourth and Seventh Circuits to decide whether Quicken's unearned, undivided fee was subject to Section 8(b). *See* Pet. App. 7a-8a. Moreover, it rejected petitioners' reliance on the

Third Circuit's markup decision in *Santiago*, not because it arose in a distinguishable context, but rather because the court disagreed with *Santiago* on the merits. *Id*. 14a. *See also Cohen*, 498 F.3d at 119-20 (Second Circuit undivided, unearned fee case considering, as relevant authority, markup cases on both sides of the circuit conflict).

None of this is at all surprising. Quicken never even attempts to explain why RESPA would apply differently to markups and unearned, undivided fees. Both are "charge[s] made or received for the rendering of a real estate settlement service" for services that are not "actually performed." 12 U.S.C. § 2607(b). The only difference is that the unearned markup is tacked on to some other fee being passed on to the consumer, whereas an unearned, undivided fee is billed as its own line item. But nothing in the text of RESPA turns on that distinction. The only reason for arguing that either is exempt from RESPA is the claim that Section 8(b) is an anti-kickback statute that requires fee splitting. And on that question, the circuits are indisputably divided.[3]

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[3] As the petition explained, this case also implicates a long-standing division in the circuits regarding the application of this Court's *Chevron* jurisprudence to less formal agency interpretations. Pet. 29-32. Quicken argues that there is "no lack of clarity concerning the *methodology* for considering whether HUD's interpretation of Section 8(b) warrants deference . . . ." BIO 30 (emphasis in original). But numerous courts and commentators, as well as Justice Scalia, have recognized that the opposite is true. *See* Pet. 29-31. Contrary to Quicken's assertion, BIO 30-31, this disparity does not arise from the fact that different courts have examined different aspects of HUD's Policy Statement addressing different portions

2. Quicken cannot, and does not, suggest that the courts of appeals will reconcile their construction of RESPA absent this Court's intervention. As the petition demonstrated, the circuits are not drifting towards a consensus but instead are simply picking sides in a well-ventilated disagreement about the best reading of the statute. Pet. 18-19. Further percolation would serve no purpose.

II. This Case Is An Appropriate Vehicle For Resolving The Circuit Conflict.

Quicken next argues that this case presents a poor vehicle for resolving any circuit conflict because even if the Court reverses the Fifth Circuit's construction of RESPA, Quicken could ultimately prevail in this case on other grounds. In particular, Quicken contends that the loan discount fees it charged petitioners were not unearned as a factual matter, BIO 10, 19-20, and insists that loan discount fees are not covered by RESPA in the first place. BIO 10, 17-19.

The courts below did not address these arguments, and neither provides a reason to deny the petition. That a respondent may have other defenses

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of RESPA. Instead, courts have disagreed over the more basic question of the *Chevron* consequences of HUD's decision to forgo notice-and-comment rulemaking or a similarly formal process for issuing its interpretation. *Compare Krzalic*, 314 F.3d at 881, *and* Pet. App. 13a, *with Kruse*, 383 F.3d at 60-61, *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1012-14 (9th Cir. 2002), *and Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1261-62 (11th Cir. 2002).

to raise on remand is no reason to deny review of the ground upon which the case was actually decided. *See*, *e.g.*, *Abbott v. Abbott*, 130 S. Ct. 1983, 1997 (2010) (deciding question presented and remanding for adjudication of alternative defenses); *Jerman v. Carlisle*, *McNellie, Rini, Kramer & Ulrich LPA,* 130 S. Ct. 1605, 1610 n.3 (2010) (same). And in any event, both alternative defenses are meritless.

1. Quicken claims to have established at summary judgment that that the loan discount fees it charged petitioners "were earned in exchange for the loans Petitioners received." BIO 20. That is simply untrue.

In response to Quicken's Statement of Uncontested Material Facts, petitioners expressly asserted that "loan discount fees were paid to lower their interest rates, but such service was not provided."[4] They further presented detailed summary judgment evidence contradicting Quicken's assertion that the discount fees were earned. For example, the Freemans submitted Quicken's underwriting analysis report finding that they qualified for a rate of 6.375% with no points.[5] The Freemans then paid a loan discount fee to lower the interest rate,[6] but the final rate was still 6.375%.[7]

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[4] Freeman and Bennett Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts ¶¶ 3, 11.

[5] Plaintiffs' Combined Memorandum in Opposition to Defendants' Motions for Summary Judgment, Ex. 30.

[6] *Id.* Ex. 7.

[7] *Id.* Ex. 1.

Quicken presented no evidence to explain why the Freemans would be required to pay a loan discount fee to receive the rate for which they initially qualified without one.[8]

Quicken nonetheless insists that because petitioners "admitted that the loan discount fees were a component of the pricing of each loan," they thereby conceded that "the loan discount fees were *earned*." BIO 20 (emphasis in original). Not so. Obviously, the loan discount fee, like the loan origination fee and other closing charges, was a component of the price Quicken charged petitioners in exchange for obtaining their loans. But that hardly makes the fee earned. If it did, any fee (for example, a courier fee) would be considered earned so long as it was demanded as a condition of closing the loan, even if the service was never actually provided.

2. Alternatively, Quicken argues that "the loan discount fees paid by Petitioners are not settlement service charges subject to Section 8(b)." BIO 17. Section 8(b), Quicken notes, regulates only "charge[s] . . . *for the rendering of a real estate settlement service*." BIO 17 (citing 12 U.S.C. § 2607(b)) (emphasis in original). And, it argues, a loan discount fee is not a charge for a "real estate settlement service" because "it is part of the pricing of a loan, is related to the interest rate, and is not charged for a 'service' provided in connection with the execution of a mortgage." BIO 18-19.

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[8] The Bennetts provided comparable evidence with respect to their loans, *id*. at Exs. 3, 8, 21, as did the Smiths, *id*. at Exs. 5, 9, 31.

As an initial matter, Quicken waived this argument by failing to raise it until its reply brief at summary judgment. *See* Pet. App. 33a, 35a-36a; *United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005) ("Arguments raised for the first time in a reply brief . . . are waived.").[9]

But even if the argument had been preserved, it is unavailing. "Settlement services" is a defined statutory term, including not only "administrative services," BIO 18, but also financial services, including "title insurance" and the "funding of loans." 12 U.S.C. § 2602(3).[10] Loan discount fees fall squarely within this definition because they constitute part of the fee paid for the financial service of funding the loan.

Contrary to Quicken's suggestion, loan discount fees are not "*terms* of a loan." BIO 18 (emphasis in original). The mortgage note, which contains the terms of the loan, makes no mention of points or loan discount fees; it simply reflects the final interest rate.[11] A loan discount fee, instead, is a one-time charge paid at settlement to secure a loan with particular terms, including a specific interest rate. It

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[9] The Fifth Circuit also noted that Quicken argued the point only "cursorily" on appeal. Pet. App. 4a n.1.

[10] "Settlement services" is defined to include "the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans." 12 U.S.C. § 2602(3).

[11] *See*, *e.g.*, Plaintiffs' Combined Memorandum in Opposition to Defendants' Motions for Summary Judgment, Ex. 1 (Freemans' mortgage note).

is no more a term of the loan than is a loan origination fee, which is also required in order to obtain the loan the lender has offered.

This understanding of the statutory language is confirmed by the administrative regulations, *see* Pet. 20 n.12,[12] and the history of the statute. Congress added "funding of loans" to the definition of "settlement services" in 1992 to overturn the result in *United States v. Graham Mortg. Corp.,* 740 F.2d 414 (6th Cir. 1984). *See Wooten v. Quicken Loans, Inc.,* 626 F.3d 1187, 1194 (11th Cir. 2010) (noting that the 1992 RESPA amendments were "enacted specifically in response to *Graham*"). In *Graham*, a mortgage lender charged a home builder "fewer points than it charged to other[s]," in exchange for referring its homebuyers to the bank for mortgages. 740 F.2d at 416. The buyers, then, were charged increased points to make up for the discount given to the builder. *Id*. Relying on the rule of lenity, the Sixth Circuit reversed the lender's conviction because RESPA's definition of "settlement services" did not unambiguously encompass the loan discount fee before it. *Id.* at 423. Congress amended the statute to remove that ambiguity, believing that "mortgage lending must be included as a settlement service to preserve the effectiveness of RESPA as a consumer protection statute." H.R. Rep. 102-760, 58 (1992).

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[12] In implementing RESPA's requirement that lenders provide "a good faith estimate" for "specific settlement services the borrower is likely to incur in connection with the settlement," 12 U.S.C. § 2604(c), HUD requires loan discount fees to be disclosed on a good faith estimate form, 24 C.F.R. Pt. 3500 App. C.

Quicken cannot plausibly contend that the amendment designed to overrule *Graham* does not extend RESPA to cover the very loan discount fees at issue in that case and this one.[13]

III. The Decision Below Is Incorrect.

Nothing about Quicken's defense of the Fifth Circuit's construction of RESPA justifies allowing the circuit conflict to persist, and it is unconvincing in any event.

Quicken largely repeats without further elaboration the Fifth Circuit's textual analysis, BIO 22-25, which petitioners have already addressed, Pet. 19-23.

Apart from the text, Quicken claims that the "interpretation suggested by Petitioners . . . would make Section 8(b) a price-control mechanism." BIO 25. But prohibiting providers from charging fees for services never rendered is no more a form of "price control" than are statutes prohibiting fraud. Nor does enforcing that prohibition embroil courts in difficult economic determinations – the only reasonable price for a service not provided is zero. Moreover, even under Quicken's interpretation of the statute, a fee split with a third party is unlawful only if it is unearned. *See* BIO 13. Thus, to the extent Quicken objects to courts deciding whether a particular fee was earned or not, that is an objection to the statute, not to petitioners' interpretation of it.

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[13] The Eleventh Circuit's contrary decision in *Wooten* is based in part on its misreading of *Graham* as not involving loan discount fees. *See* 626 F.3d at 1194; *cf.* BIO 19.

At the same time, Quicken offers no explanation why Congress would have intended to prohibit even small unearned fees when they are split, but turn a blind eye when providers falsely charge exorbitant fees for services they never provided, so long as they retain the entirety of the ill-gotten gains for themselves. Whether the fee is split or not has no impact on the consumer; in either event, the fee contributes to the "unnecessarily high settlement charges" the statute was meant to redress. 12 U.S.C. § 2601(a). Moreover, Quicken cannot explain why Congress would bother requiring providers to "clearly itemize all charges imposed upon the borrower," *id*. § 2603, if they could comply with this requirement by simply making up line items for services never provided and keeping the unearned charges.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Patrick W. Pendley
Stanley P. Baudin
Christopher L. Coffin
Nicholas R. Rockforte
PENDLEY, BAUDIN &
COFFIN, LLP
24110 Eden St.
Plaquemine, LA 70764

Kevin K. Russell
Counsel of Record
Thomas C. Goldstein
Amy Howe
GOLDSTEIN, HOWE &
RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
(301) 941-1913
krussell@ghrfirm.com

Andre P. LaPlace
2762 Continental Dr.,
Suite 103
Baton Rouge, LA 70808

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