No. 10-1042

In The Supreme Court of the United States

TAMMY FORET FREEMAN, et al.,

Petitioners,

v.

QUICKEN LOANS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE STATES OF CALIFORNIA, ALASKA, ARIZONA, CONNECTICUT, GEORGIA, HAWAI'I, IDAHO, ILLINOIS, IOWA, MAINE, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, OHIO, RHODE ISLAND, TENNESSEE, WASHINGTON, WEST VIRGINIA, AND WYOMING AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Section 8(b) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(b), prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF AMICI CURIAE

The Amici States and the District of Columbia have a compelling interest in ensuring the proper interpretation and enforcement of consumer protection laws such as the Real Estate Settlement Procedures Act of 1974 (RESPA), which protects consumers from abusive practices in the mortgage lending industry that lead to unnecessarily high closing costs for mortgage loans. Additionally, RESPA expressly grants state Attorneys General and insurance commissioners a longer limitations period (3 years) than private litigants (1 year) to enforce violations of 12 U.S.C. § 2607, making state enforcement essential in many cases. *See* 12 U.S.C. § 2614.

STATEMENT OF THE CASE

1. Congress enacted RESPA "to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the [mortgage loan] settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a). In furtherance of these objectives, RESPA provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." *Id.*, § 2607(b).

As authorized under 12 U.S.C. § 2617(a), the Secretary of the Department of Housing and Urban Development (HUD) has promulgated regulations interpreting § 2607(b). Those regulations state in relevant part that "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates [§ 2607]." 24 C.F.R. § 3500.14(c). In 2001, HUD issued a Statement of Policy in which it "reiterate[d] its long-standing interpretation" that § 2607(b) "prohibits any person from giving or accepting any fees other than payments for goods and facilities provided or services actually performed," including cases where "one settlement service provider charges the consumer a fee where no, nominal, or duplicative work is done." Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53052, 53052, 53053 (Oct. 18, 2001) (Statement of Policy); *see also id.* at 53057 (HUD "specifically interprets [§ 2607(b)] as not being limited to situations where at least two persons split or share an unearned fee for the provision to be violated.").

2. Petitioners are three couples who brought lawsuits under § 2607(b) alleging that respondent, Quicken Loans, Inc. (Quicken), charged them "loan discount fee[s]" of approximately $980, $1,100, and $5,100, respectively, yet failed to provide any loan discount or other service in exchange for these fees.

The district court granted summary judgment for Quicken, and a divided panel of the Fifth Circuit affirmed, holding that § 2607(b) prohibits only kick-backs and referral fees and thus does not prohibit "unearned fees" unless those fees are divided with another party. Pet. App. 1a-18a.

SUMMARY OF ARGUMENT

This Court should reverse the Fifth Circuit and hold that § 2607(b) prohibits real estate settlement service providers from charging unearned fees – *i.e.*, fees for which no service was provided – under all circumstances, regardless of whether the fees were kept entirely by one party or divided with one or more other parties.

Petitioners' brief explains how the text, structure, and purposes of RESPA demonstrate Congress's unambiguous intent to prohibit all unearned fees, whether divided or not, under § 2607(b). Rather than repeating those arguments, Section I of this brief focuses on the practical applications and real-world consequences of abusive unearned fees, and places them in the context of Congress's purposes in enacting RESPA. Section II analyzes the text of RESPA and demonstrates why only petitioners' argument is consistent with the text of § 2607(b) and congressional intent.

1. A straightforward, textual application of § 2607(b) is essential to protecting consumers from

unearned fees that unnecessarily inflate closing costs. First, unearned fees under § 2607(b) are *by definition* abusive. Section 2607(b) does not regulate rates or otherwise tell brokers or lenders how much they can charge for services actually provided. Instead, it prohibits them from charging fees for which *no services were actually provided*. As reflected in the record below, lenders and brokers currently engage in numerous practices that can result in an unearned fee, such as charging "discount points" without providing any actual discount. The fact that only one entity may be involved in some of these practices does not change their nature: they are unearned fees and, as such, precisely the type of practice that Congress sought to preclude when it enacted RESPA.

Second, these types of fees can be tremendously harmful to borrowers and can have profound negative effects on the overall mortgage and housing markets. As the "loan discount fees" of $980, $1,100, and $5,100 in this case show, the unearned fees that many borrowers pay – for which they get nothing in return – can be quite significant. And even seemingly small fee increases can make a difference in whether many potential borrowers can afford a home, thereby burdening an already-troubled housing market. Moreover, unearned fees – particularly unearned yield spread premiums that increase borrowers' interest rates – can greatly increase borrowers' risk of falling into serious financial difficulty, including foreclosure, which can have profound consequences for the real estate market as a whole.

Finally, RESPA's protections are essential for consumers because the complex nature of closing costs, coupled with brokers' and lenders' ability to wait until the last minute to disclose the fees that they are charging, make it far too easy for unscrupulous brokers and lenders to charge unearned fees that borrowers are either unaware of or unable to realistically contest given the high costs to the borrower of having a loan fall through at closing.

2. The most natural reading of the text of § 2607(b) is to prohibit all unearned fees. The prohibition is written in broad terms that do not indicate any intent to carve out an exception for undivided unearned fees. The structure of RESPA strongly supports this interpretation, as § 2607 is titled "Prohibition against kickbacks and unearned fees." Section 2607(a) expressly prohibits kickbacks, thus indicating that § 2607(b) serves an independent function of addressing unearned fees. RESPA's legislative history further confirms this reading, as the Senate Report expressly states that Congress intended RESPA to eliminate the payment of "unearned fees."

Moreover, interpreting § 2607(b) to prohibit all unearned fees is the only interpretation that is consistent with RESPA's core purpose of preventing abusive lending practices that unnecessarily increase closing costs. The Fifth Circuit's contrary interpretation, that § 2607(b) prohibits unearned fees only when they are divided with a third party, would undermine RESPA's core objectives and open a gaping hole in the statute's consumer-protective umbrella. It would make no sense for Congress to have carved out an exception allowing brokers and lenders to charge unearned fees so long as they keep them entirely for themselves, as the harm to the consumer – and the abusiveness of the broker or lender's practice – is the same regardless of whether an unearned fee is divided.

In any event, to the extent that § 2607(b) is ambiguous, this Court should accord *Chevron*[1] deference to HUD's regulation and policy statement interpreting § 2607(b) to prohibit all unearned fees.

ARGUMENT

Congress enacted RESPA to prevent, among other things, abusive practices that unnecessarily inflate borrowers' closing costs. Unearned fees – literally, fees for which no services are provided – are unquestionably abusive and can cause tremendous harm both to borrowers and the real estate market as a whole. The text of § 2607(b) unambiguously prohibits brokers and lenders from charging unearned fees, without exception, and this straightforward interpretation is consistent with Congress's intent to protect consumers from such abusive fees.

[1] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

I. Limiting § 2607(b) to Prohibit Only Divided Unearned Fees Would Undermine RESPA's Consumer Protection Objectives and Have Serious Consequences for Mortgage Borrowers and the Overall Real Estate Market

The Amici States have a compelling interest in ensuring that § 2607(b)'s prohibition of unearned fees is properly interpreted and enforced. Unearned fees by definition lack any legitimate business justification and have serious consequences for the borrowers who end up paying significant amounts of money for services that they do not receive. Beyond that, unearned fees also impact the overall real estate market by introducing unnecessarily high transaction costs for borrowers, reducing the number of potential buyers and putting additional financial burdens on many borrowers who do purchase homes. RESPA's enforcement mechanisms are essential to curtailing and preventing the harms caused by unearned fees, as the complex and asymmetrical nature of mortgage settlement transactions makes it extremely difficult, if not impossible, for the market to self-regulate these abuses.

A. Unearned Fees Are By Definition Abusive.

The unearned fees addressed by § 2607(b) are by definition abusive and lack any legitimate business justification. Section 2607(b) is not a rate-setting statute, nor does it intrude upon brokers' or lenders' ability to obtain a legitimate profit or set whatever rates the market will bear for the services that they actually perform. Instead, § 2607(b) prohibits *only* genuinely unearned fees, that is, fees for which *no services were actually performed*. Such fees could not exist in any properly functioning market, as "the reasonable fee for nothing is nothing." Pet. App. 18a (Higginbotham, J., dissenting).

As petitioners' cases below demonstrated, unearned fees can be charged by a single party, acting alone, in several contexts. All of these contexts implicate the concerns expressed by Congress when it enacted RESPA, and all of the practices described below are forbidden under a straightforward application of the text of the statute.

1. Discount points without corresponding rate reductions.

The unearned "discount points" or "loan discount fees" that petitioners were charged in this case are a widespread problem in the mortgage lending industry. When used properly, "discount points," "loan discount fees," or similar fees can serve a legitimate business purpose, allowing a borrower to obtain a lower (often below-market) interest rate by paying additional cash to the lender or broker at closing. However, as petitioners' case below demonstrates, such fees are prone to frequent abuses by brokers and lenders who take advantage of borrowers' confusion to charge these fees without providing any reduction in the interest rate or other discount.

These abusive practices are common. For example, a 2008 study of Federal Housing Administration (FHA) loans found that "[o]verall, borrowers see a benefit of only $20 for each $100 of [discount] points paid, for a net loss of $80." Susan E. Woodward, *A Study of Closing Costs for FHA Mortgages*, at x (2008) (report prepared for U.S. Dep't of Hous. & Urban Dev.), *available at* http://www.urban.org/publications/411682.html. Many borrowers "see no benefit at all from paying points, either in lower interest rates or in lower fees with other names." *Id.* A 2007 Federal Trade Commission (FTC) study found that "many borrowers were confused by the current mortgage cost disclosures and did not understand key terms" such as "discount fees." James M. Lacko & Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms*, at ES-6 (2007) (Fed. Trade Comm'n Bureau of Econ. Staff Report), *available at* http://www.ftc.gov/be/workshops/mortgage/articles/lackopappalardo2007.pdf. "In practice, it appears that discount points are mainly just another fee charged to borrowers that do not displace other cash fees" and "appear to be charged to borrowers who do not really understand what points are." Woodward, *supra*, at 65. These observations "do not make for a very satisfactory picture of the functioning of our mortgage markets." *Id.* Further, as Quicken's $980, $1,100, and $5,100 "loan discount" charges to petitioners show, consumers' direct losses from unearned discount points can be quite significant.

2. Yield spread premiums without corresponding reductions in up-front costs.

Like discount points, "yield spread premiums" are complex mortgage settlement devices that can have legitimate uses but are prone to abuse by brokers and lenders. Yield spread premiums are essentially discount points in reverse, allowing borrowers to reduce or even eliminate their up-front closing costs by agreeing to pay a higher (typically, above-market) interest rate. However, HUD has specifically noted that "in some cases less scrupulous brokers and lenders take advantage of the complexity of the settlement transaction and use yield spread premiums as a way to enhance the profitability of mortgage transactions without offering the borrower lower up front fees." Statement of Policy, 66 Fed. Reg. at 53054. Woodward's 2008 study of closing costs in FHA loans found that "[b]orrowers on average save only $20 in up-front cash for each $100 they pay in yield-spread premium, for a net loss (or extra cost) of $80." Woodward, *supra*, at x. And a 2007 HUD study found "no evidence that FHA borrowers receive any relief in fees when they borrow at above-market rates." Mark D. Shroder, *The Value of the Sunshine Cure: The Efficacy of the Real Estate Settlement Procedures Act Disclosure Strategy*, 9 Cityscape No. 1, at 73, 86 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1089448##. Because yield spread premiums take the form of higher interest rates rather than cash paid directly out of pocket, they tend to be particularly confusing to borrowers and hence more prone to abuse by unscrupulous brokers and lenders.

3. "Junk fees" without any corresponding services provided.

In addition to discount points and yield spread premiums, brokers and lenders also routinely charge unearned fees through an array of difficult-to-decipher "junk fees" that are confusing for borrowers and often bear no relationship to any services actually performed. Common examples include charges for "processing," "administration," "application," "commitment," "courier," "document prep," "origination," and "underwriting," among others. *See* Stephen Gandel, *Closing Cost Scams*, CNNMoney.com, Oct. 10, 2006, *available at* http://money.cnn.com/2006/02/13/real_estate/closingcosts_money_0603/index.htm. As long as these fees are charged for services actually performed, they are generally proper and § 2607(b) is not implicated. When, however, these fees are not related to any services actually performed, they are unearned "junk fees" and there is no justification for brokers or lenders to charge them. *See id.*

B. Creating a Loophole in RESPA for Undivided Unearned Fees Would Cause Tremendous Harm to Many Borrowers and Could Negatively Impact the Overall Real Estate Market.

While unearned fees can appear small in comparison with the mortgages to which they are attached, in absolute terms they are quite significant, and unnecessarily high closing costs hurt not only the borrowers who end up paying for services that they do not receive, but also the real estate market as a whole.

High closing costs can make the difference between whether or not many borrowers can afford to buy a home. As HUD has specifically recognized, "[o]ne of the primary barriers to homeownership and homeowners' ability to refinance and lower their housing costs is the up front cash needed to obtain a mortgage." Statement of Policy, 66 Fed. Reg. at 53053. "[C]losing costs and origination fees" are a "significant component of these up front cash requirements." *Id.*; *see also* Woodward, *supra*, at 40 ("[S]ettlement costs are a substantial burden of buying a home.").

Additionally, even if a borrower is able to purchase a home, high closing costs can cause financial difficulties down the road – including an increased risk of foreclosure – by leaving the borrower with less cash on hand for future emergencies, an above-market interest rate for the life of the loan, or both.

"If consumers do not understand the costs and terms of their mortgages, they may pay more for their mortgages than necessary, obtain inappropriate loan terms, fall prey to deceptive lending practices, and experience unpleasant surprises and financial difficulties during the course of their loans." Lacko & Pappalardo, *supra*, at ES-12; *see also id.* ("The results of the study show that current mortgage disclosures fail to convey key mortgage costs and terms to many consumers, leaving them susceptible to these problems.").

When these problems occur repeatedly on a grand scale, they affect the entire real estate market by reducing the number of potential home buyers and increasing the number of distressed properties. "[L]ending and title fees are large in absolute terms, [and] have a structure that may distort the housing market." Shroder, *supra*, at 81. And even small changes in closing costs can make a significant difference. For example, a 1996 study by Freddie Mac estimated that just a $400 decrease in closing costs could increase the number of families who qualify to buy a home nationwide by approximately 70,000. *See* Peter E. Mahoney & Peter M. Zorn, *The Promise of Automated Underwriting: Providing a Simpler, Fairer, More Inclusive Mortgage-Lending System*, 1996 Mortgage Market Trends 18, 22 (1996), *available at* http://www.freddiemac.com/finance/smm/nov96/pdfs/mhnyzorn.pdf.

The problems caused by unnecessarily high closing costs are particularly acute today, as we find ourselves in the midst of an ongoing foreclosure crisis and a protracted slump in the nationwide real estate market. While unnecessarily high closing costs are only one piece of a larger puzzle, they have contributed significantly to these problems and have risen dramatically in recent years. For example, it was reported in 2006 that homebuyers at that time paid *eight times* more in closing costs than they did forty years earlier. *See* Gandel, *supra*; *see also* Elizabeth Renuart & Jen Douglas, *The Limits of RESPA: An Empirical Analysis of the Effects of Mortgage Cost Disclosures*, 22 Housing Policy Debate (forthcoming 2011-2012) (manuscript at 30) (finding that the cost of closing a mortgage as a percentage of the loan amount has risen by more than 418% since 1972), *available at* http://ssrn.com/abstract=1635841. A recent survey from a leading industry analyst showed that closing costs jumped 8.8% nationwide between 2010 and 2011. *See* Polyana da Costa, *New York, Texas Have Highest Closing Costs*, bankrate.com, July 18, 2011, *available at* http://www.bankrate.com/finance/mortgages/2011-closing-costs/. For FHA loans, charges for all settlement services (including a real estate agent) now average approximately 10% of the value of the loan, significantly exceeding the average FHA borrower's down payment. *See* Woodward, *supra*, at 40. And closing costs have continued to rise even while many of their underlying component costs have been decreasing. *See*, *e.g.*, http://www.loanprospector.com/about/ (discussing Freddie Mac's automated underwriting service, Loan Prospector, which provides underwriting for just $20 and is intended to help lenders "provide more borrowers with the lowest cost financing available").

Finally, high settlement costs and their attendant harms fall disproportionately on minorities, less educated borrowers, and less affluent borrowers. For example, a recent survey of FHA loans found that even "after accounting for other borrower differences," on average "African-American borrowers pay an additional $415 for their loans" and "Latino borrowers pay an additional $365." Woodward, *supra*, at ix. Unexplained differences based on education levels are even more stark, as the survey found that "[o]n average, borrowers who completed college are charged $1100 *less* than borrowers who did not go to college at all, other things equal." *Id.* Similarly, high closing costs "tend to work a disproportionate burden on the least affluent participants in the market." Shroder, *supra*, at 81. While the data does not directly explain the cause of these differences, it appears likely that they result largely, if not entirely, from borrowers with certain characteristics being targeted by predatory brokers and lenders seeking to inflate their profits with unearned fees. *See id.* at 85-86 (finding that borrower characteristics unrelated to loan worthiness or the broker's or lender's costs are a significant factor in the amount of fees charged, and noting that much of this likely results from "exploitation of the buyer's ignorance of the market").

C. RESPA's Protections Are Essential for Consumers Because the Complex and Asymmetrical Nature of Mortgage Transactions Makes it Virtually Impossible for the Market to Self-Regulate.

RESPA's protections are essential for consumers because the complex nature of closing costs, coupled with brokers' and lenders' ability to wait until the last minute to disclose the fees that they are charging, make it easy for unscrupulous brokers and lenders to charge unearned fees that borrowers are either unaware of or unable to realistically contest given the high costs to the borrower of having a loan fall through at closing.

First, the complex nature of mortgage closing costs and the accompanying mass of documents make it difficult for many borrowers to understand the fees they are being charged. Thus, even when such fees are fully disclosed, many borrowers remain unaware that they are being charged unearned fees for which no services are actually provided. As HUD has recognized, "[t]he mortgage transaction is complicated, and most people engage in such transactions relatively infrequently, compared to the other purchases they make." Statement of Policy, 66 Fed. Reg. at 53053. Accordingly, "[t]here is a growing awareness that many consumers struggle to understand the costs associated with the purchase of a home, especially when mortgages have numerous and complex terms." Woodward, *supra*, at viii; *see also id.* at 3 (There is a "bewildering array of different numbers that go into determining the size of the check the buyer must write at closing.").

Based on an empirical study of mortgage disclosures that utilized in-depth consumer interviews, the FTC "found that many borrowers were confused by the current mortgage cost disclosures and did not understand key terms in the disclosure forms," including terms such as the "discount fees" at issue in this case. Lacko & Pappalardo, *supra*, at ES-6; *see also id.* at ES-7 (finding that "[n]early a quarter [of consumers sampled] could not identify the amount of settlement charges," and "[n]early nine-tenths could not identify the total amount of up-front charges in the loan"); Statement of Policy, 66 Fed. Reg. at 53056 ("[T]he Department is aware and has stated that the current GFE/HUD-1 disclosure framework is often insufficient to adequately inform consumers about yield spread premiums and other lender paid fees to brokers."). Accordingly, even when fees are fully disclosed, it is all too easy and common for unscrupulous lenders and brokers to take advantage of borrowers' confusion and charge them unearned fees that result in unnecessarily high closing costs.

Second, even when a borrower is aware of an unearned fee, as a practical matter there is often little the borrower can do to contest it. Such fees are not required to be disclosed until the HUD-1 form is presented at closing,[2] 12 U.S.C. § 2603(b), and thus

[2] While the broker or lender is required to provide a "good faith estimate" of closing costs within three business days after receiving an application, 12 U.S.C. § 2604(c) & (d), this estimate "need not be provided until after the consumer has applied for a

(Continued on following page)

"[b]orrowers seldom know the complete total of [the various closing] charges until a date very close to the loan closing – often only at the closing itself." Woodward, *supra*, at 3; *see also id.* at 83 ("Many borrowers do not see a [yield spread premium] until their loan closing."). At that point the borrower has little, if any, bargaining power and typically has no practical choice but to accede to the terms offered, as "most borrowers are reluctant to do anything that would jeopardize their loan closing." *Id.* at 83.

Indeed, by the time of closing the borrower's costs of walking away are substantial, as the borrower already will have paid nonrefundable application and appraisal fees; likely will have invested substantial time and energy into searching for a house and obtaining a loan; and – perhaps most significantly – may stand to lose out on the purchase of a unique

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mortgage and may have paid a significant fee." Statement of Policy, 66 Fed. Reg. at 53056. Moreover, there is no effective enforcement mechanism for requiring brokers or lenders to adhere to (or even remain in the same ballpark as) their "good faith estimate," rendering the estimate meaningless in the hands of an unscrupulous broker or lender. *See* Renuart & Douglas, *supra*, at 30 (noting that RESPA's new disclosure provisions still lack an effective enforcement mechanism); Shroder, *supra*, at 82, 86 (finding that while most good faith estimates are fairly accurate, it is "troubling" that in "the minority of cases . . . very large underestimates occur," and hypothesizing from the data that large fees often result from "exploitation of the buyer's ignorance of the market"); *see also* Gandel, *supra* (reporting that one couple was charged $7,320 after receiving a good faith estimate of $4,524).

property if the loan does not close. *See*, *e.g.*, Statement of Policy, 66 Fed. Reg. at 53056 (noting that the good faith estimate of closing costs "need not be provided until after the consumer has applied for a mortgage and may have paid a significant fee"). The late disclosure of such fees, coupled with the complex and confusing nature of both the fees and the disclosure forms, make the proper enforcement of § 2607(b) essential to protecting borrowers from abusive lending practices. Indeed, it is virtually impossible for such fees to be self-regulated through the market, as borrowers' lack of information and bargaining power all but preclude the possibility of a properly functioning market for lenders and borrowers to freely and knowledgeably negotiate such fees. *See* Woodward, *supra*, at 58, 65 ("The data reveal a market far from the transparent and competitive ideal" and "do not make for a very satisfactory picture of the functioning of our mortgage markets.").

II. Section 2607(b) Prohibits All Charges for Unearned Fees

A. The Text, Structure, History, and Purpose of RESPA Evince Congress's Unambiguous Intent to Prohibit All Unearned Fees Under § 2607(b).

The text, structure, history, and purpose of RESPA demonstrate Congress's clear intent to prohibit all unearned fees, regardless of whether such fees are divided with one or more other parties.

1. The text of § 2607(b) prohibits all unearned fees in mortgage lending transactions, without exception. Specifically, § 2607(b) states:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b). The most natural reading of this text is that it prohibits brokers and lenders from charging unearned fees under any circumstances, as it forbids (1) any "person" (2) to "accept" (3) "*any* portion, split, or percentage" (*i.e.*, including 100%) of (4) "*any* charge made or received for the rendering of a real estate settlement service" (5) "other than for services actually performed." *Id.* (emphases added).

The Fifth Circuit's contrary reading strains the statutory language. When read in context, the phrase "[n]o person shall give and no person shall accept" is most naturally read to *expand*, rather than limit, the prohibition on unearned fees by ensuring that any person who accepts, passes through, or otherwise is involved in the charging of such fees will be held culpable. Indeed, the rest of the statute's text indicates an intent to sweep broadly, referring to "*any* portion, split, *or* percentage" – which plainly includes 100% – "of *any* charge." *Id.* (emphases added). The Fifth Circuit's narrow focus on the conjunctive "and" in the phrase "[n]o person shall give and no person shall accept" is misplaced. Pet. App. 7a. While that phrase in isolation is ambiguous and may be *consistent with* a requirement that there be two culpable parties before § 2607(b) can be violated, it does not by itself *impose* such a requirement. Nor does anything else in the statute indicate that Congress intended to impose such a requirement. Moreover, the Fifth Circuit's reading leads to an absurd result, as there is no sound reason for carving out an exception that would allow brokers and lenders to charge abusive unearned fees – *i.e.*, fees for which no services are actually performed – so long as they keep them entirely for themselves.

2. Congress's intent to prohibit all unearned fees under § 2607(b) is reinforced by the statute's structure and context. Section 2607 is titled "Prohibition against kickbacks and unearned fees," and § 2607(a) expressly prohibits "kickbacks." This indicates that Congress intended § 2607(b) to prohibit unearned fees.[3] Moreover, RESPA's statement of congressional purpose supports a robust, rather than limited, reading of § 2607(b). RESPA is broadly intended, *inter alia*, "to insure that consumers . . . are protected from unnecessarily high settlement charges

[3] The subtitle of § 2607(b) in the United States Code, "Splitting charges," was not part of the bill passed by Congress, but instead was added during the statute's codification. *See* Pub. L. No. 93-533, § 8(b), 88 Stat. 1724 (1974). Accordingly, this subtitle provides no evidence of congressional intent and has no interpretive weight. *See United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 & n.3 (1993).

caused by certain abusive practices." 12 U.S.C. § 2601(a).

The Fifth Circuit's structural arguments for limiting § 2607(b) to fee splitting are unavailing. First, the Fifth Circuit held that because §§ 2607(a) and 2607(b) both use the phrase "[n]o person shall give and no person shall accept," and § 2607(a)'s prohibition on kickbacks and referral fees requires two culpable actors, § 2607(b) must also require two culpable actors. Pet. App. 8a. But the requirement of two culpable actors for a violation of § 2607(a) stems not from the phrase "[n]o person shall give and no person shall accept," but rather from the language requiring an "*agreement or understanding*" that one person will refer business to another. 12 U.S.C. § 2607(a) (emphasis added). The harm to be prevented by § 2607(a) is a kickback or referral agreement that *necessarily* requires two culpable parties. Section 2607(b), in contrast, contains no comparable language *requiring* two parties to commit the violation, and the harm to be remedied – a "charge made . . . other than for services actually performed" – can plainly be committed by a single culpable party. *Id.*, § 2607(b).

Second, the Fifth Circuit misinterpreted RESPA's statement of purpose in § 2601 by narrowly focusing on the fact that § 2601(b) explicitly references the "elimination of kickbacks or referral fees" while making no mention of unearned fees. Pet. App. 10a-11a; 12 U.S.C. § 2601(b). But § 2601(b) is not an *exclusive or exhaustive* list of RESPA's purposes. Indeed, the subsection immediately preceding it expresses a broad overall purpose of protecting consumers from "unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a). And construing § 2601(b) as an exhaustive list would place it in direct conflict with RESPA's express prohibition of fees for preparation of truth-in-lending, uniform settlement, and escrow account statements. *See id.*, § 2610.

3. RESPA's legislative history further reinforces Congress's intent to prohibit unearned fees. The Senate Report describes RESPA as a bill to, *inter alia*, "eliminate the payment of kickbacks *and unearned fees* in connection with settlement services." S. Rep. No. 93-866, at 1 (1974) (emphasis added), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6546. "The HUD-VA Report and subsequent hearings by the Housing Subcommittee" found that one of the "major problem areas that must be dealt with if settlement costs are to be kept within reasonable bounds" is "[a]busive and unreasonable practices within the real estate settlement process that increase settlement costs to home buyers without providing any real benefits to them." *Id.* at 1, *reprinted in* 1974 U.S.C.C.A.N. at 6547. RESPA "would proceed directly against the problem areas pointed out above . . . by prohibiting or regulating abusive practices, such as kickbacks, *unearned fees*, and unreasonable escrow accounts." *Id.* at 3 (emphasis added), *reprinted in* 1974 U.S.C.C.A.N. at 6548. "By dealing directly with such problems as kickbacks, *unearned fees*, and unreasonable escrow account

requirements, the Committee believes that S. 3164 will ensure that the costs to the American home buying public will not be unreasonably or unnecessarily inflated by abusive practices." *Id.* (emphasis added). While portions of the legislative history indicate that Congress was *also* very concerned with kickbacks and referral fees, *see* Pet. App. 11a n.9, nothing in the legislative history indicates that these were Congress's *exclusive* concerns, as confirmed by the Senate Report's numerous references to "unearned fees." Nor is there any indication that Congress intended to limit the prohibition on unearned fees by permitting brokers and lenders to charge unearned fees so long as those fees are undivided, as the Fifth Circuit's interpretation would allow.

4. Section 2607(b) should be interpreted to effectuate RESPA's core purpose of protecting consumers from "unnecessarily high settlement charges" caused by "abusive practices." 12 U.S.C. § 2601(a). Charging unearned fees is unquestionably an abusive practice that inflates borrowers' settlement costs, and is therefore precisely the type of misconduct that RESPA was intended to prevent. As petitioners' case below demonstrates, these fees can run into the thousands of dollars and are a direct, uncompensated loss to the consumer. To carve out a loophole whereby brokers and lenders can charge unearned fees so long as they keep those fees entirely for themselves makes no sense, as the harm to consumers is the same regardless of whether an unearned fee is divided. In the absence of clear and unambiguous language to the

contrary, § 2607(b) should not be interpreted to create such a loophole, which would directly undermine RESPA's core consumer-protection objectives. *See* Statement of Policy, 66 Fed. Reg. at 53058 (to require an unearned fee to be divided to violate § 2607(b) would constitute "an unnecessarily restrictive interpretation of a statute designed to reduce unnecessary costs to consumers").

B. To the Extent § 2607(b) Is Ambiguous, HUD's Interpretation Is Entitled to *Chevron* Deference.

To the extent that § 2607(b) is ambiguous with respect to whether an unearned fee must be divided with a third party to be actionable, the Court should accord *Chevron* deference to HUD's regulation and statement of policy interpreting § 2607(b) to prohibit all unearned fees, whether divided or not. *See Chevron*, 467 U.S. at 842-43.

"[I]f the statute speaks clearly 'to the precise question at issue,'" the Court "'must give effect to the unambiguously expressed intent of Congress.'" *Barnhart v. Walton*, 535 U.S. 212, 217 (2002) (quoting *Chevron*, 467 U.S. at 842-43). "If, however, the statute 'is silent or ambiguous with respect to the specific issue,'" the Court "must sustain the Agency's interpretation if it is 'based on a permissible construction' of the Act." *Id.* at 218 (quoting *Chevron*, 467 U.S. at 843). This Court has held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

Here, Congress authorized the Secretary of HUD "to prescribe such rules and regulations, [and] to make such interpretations . . . as may be necessary to achieve the purposes of [RESPA]." 12 U.S.C. § 2617(a). Pursuant to that authorization, HUD has issued at least two interpretations of § 2607(b) that are entitled to *Chevron* deference.

First, in 1992 HUD enacted through formal notice-and-comment rulemaking a regulation interpreting § 2607(b) to prohibit all unearned fees, regardless of whether they are divided:

> A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this Part be avoided by creating an arrangement wherein the purchaser of the services splits the fee.

24 C.F.R. § 3500.14(c). This formal "legislative regulation[ ]," enacted pursuant to "an express delegation of authority" from Congress, is entitled to "controlling weight unless [it is] arbitrary, capricious, or

manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44.

Second, in 2001 HUD issued a Statement of Policy reiterating its longstanding interpretation of § 2607(b) "to prohibit settlement service providers from charging unearned fees," including where "one settlement service provider charges the consumer a fee where no nominal, or duplicative work is done." Statement of Policy, 66 Fed. Reg. at 53053. HUD emphasized that it "specifically interprets [§ 2607(b)] as not being limited to situations where at least two persons split or share an unearned fee for the provision to be violated." *Id.* at 53057. And HUD also noted that this interpretation is "longstanding" and has been "consistently" held "[s]ince RESPA was enacted," *id.* at 53053, citing a HUD Settlement Costs Booklet with this interpretation that was issued in 1976. *Id.* at 53057 (citing 41 Fed. Reg. 20289 (May 17, 1976)).

While HUD's Statement of Policy was not issued through formal notice-and-comment rulemaking, such formality is not required where other factors demonstrate that *Chevron* deference is appropriate. *See Barnhart*, 535 U.S. at 221-22 (holding that formal notice-and-comment rulemaking is not required and applying *Chevron* deference despite its absence); *Mead*, 533 U.S. at 230-31. Here, *Chevron* deference to HUD's Statement of Policy is appropriate for several reasons. First, such deference is appropriate when "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," *Mead*, 533 U.S. at 229, and here Congress expressly authorized HUD to issue not just regulations, but also "*interpretations* . . . as may be necessary to achieve the purposes of [RESPA]." 12 U.S.C. § 2617(a) (emphasis added); *see also* 24 C.F.R. § 3500.4(a)(1)(ii) (any document "that is published in the Federal Register by the Secretary and states that it is an 'interpretation,' . . . or a 'statement of policy' " constitutes a "rule, regulation or interpretation" for purposes of § 2617(a)). Second, HUD's interpretation is entitled to "particular deference" because of its " 'longstanding' duration" dating back to shortly after RESPA was enacted. *Barnhart*, 535 U.S. at 220. Finally, *Chevron* deference is appropriate here because of the "interstitial nature of the legal question," the "related expertise" of HUD, the "importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Id.* at 222.

Moreover, HUD's Statement of Policy is additionally entitled to *Auer* deference to the extent that it interprets 24 C.F.R. § 3500.14(c), which is HUD's own regulation. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation").

Because HUD's interpretation is consistent with the statutory language and will protect consumers as intended by Congress, it is binding on the courts and directs reversal of the decision below.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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