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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When the evidence is undisputed that a lender rendered services for a loan discount fee that it charged, does Section 8(b) of the Real Estate Settlement Procedures Act (12 U.S.C. § 2607(b)) prohibit the lender from collecting and retaining this fee?

RULE 29.6 DISCLOSURE STATEMENT

Respondent, Quicken Loans Inc., discloses the following corporate affiliations:

Quicken Loans is owned by Rock Holdings Inc. Neither Quicken Loans nor Rock Holdings is a publicly held corporation, and no publicly held corporation owns ten percent or more of either of their stock.

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STATEMENT OF THE CASE

I. INTRODUCTORY STATEMENT

In 1974, Congress enacted the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq*., to reform the real estate settlement process to "insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country."[1] The goal was to create "more effective advance disclosure to home buyers and sellers of settlement costs," to reduce "the amounts home buyers are required to place in escrow accounts" and to eliminate "kickbacks or referral fees" in connection with settlement services.[2] RESPA was not enacted to fix the prices of settlement services. *See Kuknyo v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985) ("Congress considered and explicitly rejected a system of price controls for fees."); *see also Kruse v. Wells Fargo Home Mortg., Inc*., 383 F.3d 49, 56-57 (2d Cir. 2004); S. REP. NO. 930866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6545, 6549-50 (Congress did not intend to use RESPA as a means of "fixing rates for real estate settlement charges[.]"). RESPA also was not

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[1] 12 U.S.C. § 2601(a).

[2] 12 U.S.C. § 2601(b).

enacted to regulate interest rates or the pricing of residential mortgage loans.

Section 8 of RESPA places two restrictions on settlement service charges. Section 8(a) provides that no person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement to refer settlement service business.[3] Section 8(b) provides that no person shall give and no person shall accept any portion, split, or percentage of a settlement service charge other than for services actually rendered.[4]

In the instant case, Petitioners allege that Quicken Loans violated Section 8(b) by collecting loan discount fees without providing a specific reduction in their interest rates.[5] Petitioners claim these loan discount fees were unearned and that Section 8(b) prohibits fees for which no services are provided, even when those fees are not split or shared with another party.[6] On the summary judgment record in this case, it is undisputed, as a matter of fact, that the loan discount fees did not fall within the statute's reach. The fees were not divided; they were paid to and retained solely by Quicken Loans.[7] It is also

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[3] 12 U.S.C. § 2607(a).

[4] 12 U.S.C. § 2607(b).

[5] Petitioners' brief at p.6.

[6] Petitioners' brief at pp.19-20.

[7] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 9; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 9 and 16. Citations to the record in this brief styled "R – USCA5" are

(Continued on following page)

undisputed, as a matter of fact, that the loan discount fees were a component of the pricing of the loans Petitioners received from Quicken Loans.[8] As required under the Truth in Lending Act, 12 U.S.C. § 1601 *et seq.*, and RESPA, these fees and the related interest rates were disclosed to Petitioners well in advance of their loan closings to permit Petitioners to compare the costs of credit between various lenders.[9] After receiving the required disclosures, Petitioners chose to accept the extensions of credit, with all corresponding terms, offered by Quicken Loans.

Petitioners ask this Court to grant certiorari and to reverse the decisions of the district court and the Fifth Circuit upholding Quicken Loans' motions for summary judgment. To justify their petition, the Petitioners attempt to manufacture a "four to three"

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references to the record in *Freeman v. Quicken Loans*, No. 08-1626 (5th Cir.).

[8] *Compare* R – USCA5 312-315, Statement of Uncontested Material Facts, ¶¶ 5 and 13, *with* R – USCA5 427-429, Freeman and Bennett Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts, ¶¶ 5 and 13. The Smith Petitioners disputed this fact only because they claimed that the fee in question was not a loan discount fee. *Compare* R – USCA5 248-250, Statement of Uncontested Material Facts, ¶ 7, *with* R – USCA5 430-432, Smith Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts, ¶ 7. However, all Petitioners proceed here as if the fee at issue was a loan discount fee for which it is alleged no service was provided. Petitioners' brief at pp.2 and 6.

[9] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 7; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 6 and 13.

circuit split by citing to Section 8(b) cases generally without regard to the type of claim at issue. As both Petitioners and the Fifth Circuit acknowledged, the only other circuit to determine whether Section 8(b) applies to unearned, undivided fees (as alleged by Petitioners) is the Second Circuit, *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007).[10] Thus, there is no entrenched circuit split that warrants this Court's review.

Additionally, this case does not present the factual predicate to resolve the question presented by Petitioners – whether Section 8(b) prohibits unearned, undivided settlement service charges – because the loan discount fees were not settlement service charges and there was undisputed summary judgment evidence that the fees were, in fact, earned.[11] Accordingly, Quicken Loans respectfully requests that this Court deny the Petition.

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[10] Appellants' Fifth Circuit brief at p.6; Pet. App. 6a; *Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 802-03 (5th Cir. 2010).

[11] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶¶ 8 and 11; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 7, 8, 14, and 15.

II. STATEMENT OF FACTS

A. The Loan Discount Fees Were a Component of Quicken Loans' Pricing of the Loans.

Petitioners each obtained a residential mortgage loan from Quicken Loans.[12] Petitioners each paid a loan discount fee to Quicken Loans that was fully disclosed prior to their loan closings.[13] The payment of these loan discount fees was a condition of and a prerequisite to each loan as well as a component of the pricing of the loan that Petitioners received.[14] The loan discount fees were paid solely to and retained by Quicken Loans.[15]

B. The Lawsuits and Quicken Loans' Motions for Summary Judgment.

Petitioners brought suit against Quicken Loans alleging several causes of action, including allegations that the loan discount fees violated Section 8(b). Section (8)(b) is entitled "Splitting Charges" and provides:

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[12] Petitioners' brief at p.6.

[13] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 7; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 6 and 13.

[14] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶¶ 8 and 11; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 7, 8, 14, and 15.

[15] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 9; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 9 and 16.

(b) Splitting charges

> 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.[16]

Quicken Loans moved for summary judgment against each Petitioner and presented undisputed and uncontroverted evidence that: (a) it did not split the loan discount fees with anyone; (b) it solely received and retained the loan discount fees; and (c) it performed services for the loan discount fees because those fees were a condition of and a prerequisite to each loan as well as a component of the pricing of the loans that each Petitioner received.[17] Petitioners' opposition relied exclusively on the allegations in their complaints and legal arguments based on the closing documents.[18] They presented no affidavits or

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[16] 12 U.S.C. § 2607(b).

[17] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶¶ 7-9; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 7-9 and 14-16.

[18] *See* R – USCA5 427-429, Freeman and Bennett Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts; R – USCA5 430-432, Smith Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts; R – USCA5 498, 500, 502-503, 539, 554, 577-578, and 582, Exhibits 7, 8, 9, 18, 21, 22, 30, and 32 to Plaintiffs' Combined Memorandum in Opposition to Defendants' Motions for Summary Judgment.

other competent summary judgment evidence to contest Quicken Loans' evidence that the loan discount fees were a component of the pricing of and a condition of and prerequisite to their loans.

The district court granted Quicken Loans' motions for summary judgment and dismissed all claims asserted against it.[19] In a fifty-seven page opinion, the district court thoroughly analyzed all authority concerning the proper interpretation of Section 8(b) and held that the plain language of Section 8(b) "*requires* that the challenged fee have been split in some fashion" and that the loan discount fees could not violate Section 8(b).[20]

C. The Fifth Circuit Affirmed.

Petitioners argued on appeal that Section 8(b) does not require that the loan discount fees be split or otherwise shared with a third party.[21] They acknowledged that this was an issue of first impression in the Fifth Circuit and noted that "the only Circuit Court to address this very specific type of fee (i.e., an undivided, unearned fee) in the context of Section 8(b), is the Second Circuit in the *Cohen* case."[22]

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[19] Pet. App. 19a-70a.

[20] Pet. App. 66a-67a (emphasis supplied).

[21] *See* Appellants' Fifth Circuit brief at p.6.

[22] *See id.*

The Fifth Circuit affirmed the district court, holding "that the language of RESPA § 8(b) is unambiguous and does not cover undivided unearned fees."[23] Additionally, the Fifth Circuit stated that it did not have to reach the issue of whether a loan discount fee was a settlement service charge due to its disposition of the case based on the plain language of Section 8(b).[24] The Fifth Circuit also addressed and rejected, in *dicta*, Petitioners' argument that HUD Statement of Policy 2001-1[25] (which purported to interpret Section 8(b) more broadly) is entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).[26] Judge Higginbotham dissented.[27]

REASONS FOR DENYING THE PETITION

There is no entrenched circuit split on the issue presented to this Court – whether Section 8(b) prohibits allegedly unearned, undivided loan discount

[23] Pet. App. 7a; *see also Freeman*, 626 F.3d at 803.

[24] Pet. App. 4a n.1; *see also Freeman*, 626 F.3d at 802 n.1.

[25] *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 Fees Under Section 8(b)*, 66 Fed. Reg. 53,052 (Oct. 18, 2001).

[26] Pet. App. 11a-14a; *see also Freeman*, 626 F.3d at 805-06.

[27] Pet. App. 15a-18a; *see also Freeman*, 626 F.3d at 806-08. Judge Higginbotham's dissent failed to consider the undisputed evidence that the loan discount fees were conditions of and prerequisites to each loan, as well as a component of the pricing of each loan.

fees. The "four to three" circuit split cited by Petitioners involves a factual circumstance that is not presented by the facts of the case at bar.[28] The cited cases concern markups of a third party's settlement service charges. *See Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384, 386 (3d Cir. 2005); *Kruse*, 383 F.3d at 57-58; *Weizeorick v. Republic Title Co.*, 337 F.3d 827, 829 (7th Cir. 2003); *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 981 (11th Cir. 2003); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 834 (8th Cir. 2003); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 877 (7th Cir. 2002); *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 264 (4th Cir. 2002); *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623, 624-25 (7th Cir. 2001). This case, however, involves allegedly unearned, undivided loan discount fees paid entirely to, and retained by, a single person (Quicken Loans). As both Petitioners and the Fifth Circuit acknowledged, prior to the instant decision, "the only Circuit Court to address this very specific type of fee (i.e., an undivided, unearned fee) in the context of Section 8(b), is the Second Circuit in the *Cohen* case."[29] There is far from an established circuit split on this narrow factual circumstance: two circuit court decisions in over thirty-five years of the existence of Section 8(b) does not warrant intervention by this Court.

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[28] Petitioners' brief at pp.12-16.

[29] Appellants' Fifth Circuit brief at p.6; *see also* Pet. App. 6a; *Freeman*, 626 F.3d at 802-03.

Further, no circuit has ever held that a loan discount fee violates Section 8(b). In fact, the Eleventh Circuit recently rejected this argument and held that loan discount fees are not settlement service charges under RESPA and cannot form the basis of a Section 8(b) violation. *Wooten v. Quicken Loans, Inc.*, 626 F.3d 1187, 1189 (11th Cir. 2010). There was no dispute that the unearned, undivided fee addressed by the Second Circuit in *Cohen*, a so-called "post closing fee," was a settlement service charge subject to Section 8(b). *See* 498 F.3d at 113. Thus, the factual basis of Petitioners' claims is not substantially similar to that presented to the Second Circuit, and the Fifth Circuit's decision could be affirmed on other grounds without reaching the question presented.

Even if loan discount fees could be characterized as settlement service charges subject to Section 8(b), Petitioners failed to prove that the fees they paid were unearned, and so Section 8(b) was not implicated. In support of its motions for summary judgment, Quicken Loans submitted affidavits establishing that the loan discount fees were earned as a component of the pricing of Petitioners' loans.[30] Petitioners did not dispute this fact.[31] Thus, if anything,

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[30] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 11; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 8 and 15.

[31] *Compare* R – USCA5 312-315, Statement of Uncontested Material Facts, ¶¶ 5 and 13, *with* R – USCA5 427-429, Freeman and Bennett Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts, ¶¶ 5 and 13. The Smith Petitioners disputed this fact only because they claimed that the fee in

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Petitioners' complaint is that the loan discount fees they paid were too high, constituting an alleged overcharge. Circuit courts have universally rejected attempts to apply Section 8(b) to overcharges. *See Cohen*, 498 F.3d at 114; *Kruse*, 383 F.3d at 57; *Sosa*, 348 F.3d at 983; *see also*, *e.g.*, *Martinez v. Wells Fargo Home Mortg. Inc.*, 598 F.3d 549, 553-54 (9th Cir. 2010) (noting the Second, Third and Eleventh Circuits have all held overcharges are not actionable and joining their conclusion); *Patino v. Lawyers Title Ins. Corp.*, No. 3:6-CV-1479-B, 2007 WL 4687748, at *3 (N.D. Tex. Jan. 11, 2007) (unpublished) (collecting cases).

Assuming *arguendo* that this case does involve unearned, undivided fees that are settlement service charges subject to Section 8(b), the question presented to this Court is not ripe for review for two reasons.

First, the Second Circuit in *Cohen* performed a cursory review of only one phrase of Section 8(b) before it found the statute ambiguous as to unearned, undivided fees. *See* 498 F.3d at 117-21. The Fifth Circuit is the only circuit to undertake a full analysis of the construction of the statute under the principles

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question was not a loan discount fee. *Compare* R – USCA5 248-250, Statement of Uncontested Material Facts, ¶ 7, *with* R – USCA5 430-432, Smith Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts, ¶ 7. However, all Petitioners proceed here as if the fee at issue was a loan discount fee for which it is alleged no service was provided. Petitioners' brief at pp.2 and 6.

espoused by this Court to determine whether Section 8(b) applies to unearned, undivided fees.[32] Based on this thorough analysis, the Fifth Circuit correctly held that Section 8(b) is unambiguous and does not apply to unearned, undivided fees.[33] If there is any conflict between the circuits, it is not mature and not deserving of this Court's attention.

Second, the Second Circuit decision in *Cohen* was decided on a Fed. R. Civ. P. 12(b)(6) motion to dismiss, not summary judgment. *See* 498 F.3d at 114. Here, Quicken Loans presented evidence in support of its motions for summary judgment that the loan discount fees were earned; Petitioners presented no evidence to the contrary.[34] Thus, regardless of the language in Petitioners' application (or in the Fifth Circuit opinion), this case does not procedurally present a claim of an "unearned" fee.

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[32] Pet. App. 7a-11a; *Freeman*, 626 F.3d at 803-05.

[33] Pet. App. 7a-11a; *Freeman*, 626 F.3d at 803-05.

[34] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶¶ 8 and 11; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 7, 8, 14, and 15. Petitioners' opposition was based solely on allegations and references to documents that did not refute Quicken Loans' evidence. *See* R – USCA5 427-429, Freeman and Bennett Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts; R – USCA5 430-432, Smith Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts; R – USCA5 498, 500, 502-503, 539, 554, 577-578, and 582, Exhibits 7, 8, 9, 18, 21, 22, 30, and 32 to Plaintiffs' Combined Memorandum in Opposition to Defendants' Motions for Summary Judgment.

Finally, review is not warranted to address the level of deference that should be afforded to HUD Statement of Policy 2001-1. This Court has clearly prescribed the appropriate analysis for determining when a court should defer to an agency interpretation of a statute it is charged with administering, and every circuit to perform this analysis has refused to defer to the policy statement to some extent. *See*, *e.g.*, *Martinez*, 598 F.3d at 554; *Friedman v. Mkt. St. Mortg. Corp.*, 520 F.3d 1289, 1297 (11th Cir. 2008); *Santiago*, 417 F.3d at 387; *Kruse*, 383 F.3d at 56-57; *Haug*, 317 F.3d at 838-39; *Krzalic*, 314 F.3d at 881; *Boulware*, 291 F.3d at 267.

I. There Is No Entrenched Circuit Split on Unearned, Undivided Fees.

Circuit courts interpreting Section 8(b) have recognized four potential violations: (1) a split of an unearned fee between two parties; (2) an overcharge of a single fee paid to a single person that exceeds the reasonable value of the services provided; (3) an unearned markup of an earned fee; and (4) an unearned, undivided fee paid completely to a single person.

Circuit courts consistently recognize that Section 8(b) prohibits the first variety – a split of an unearned fee between two parties.[35] It is undisputed

[35] Pet. App. 5a (internal citation omitted); *Freeman*, 626 F.3d at 802 (same).

that there was no split of the loan discount fees at issue – they were paid to and retained solely by Quicken Loans.[36]

Circuit courts also agree that Section 8(b) does *not* prohibit an overcharge of a single fee paid to a single person. *See Cohen*, 498 F.3d at 114; *Kruse*, 383 F.3d at 57; *Sosa*, 348 F.3d at 983; *see also*, *e.g.*, *Martinez,* 598 F.3d at 553-54 (collecting cases). While Petitioners do not label their claim as an overcharge, the loan discount fees at issue can only fall into this category – for the essence of Petitioners' claim is that they allegedly paid more than was reasonably related to the services they received from Quicken Loans.

Petitioners correctly note that some courts are divided over whether an unearned markup of an earned settlement service fee that is retained by a single person violates Section 8(b).[37] It is undisputed, however, that the loan discount fees at issue were not markups.[38] Quicken Loans did not add an unearned fee to a fee earned by another settlement service provider.[39] The loan discount fees were paid to and

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[36] *See* Petitioners' brief at p.i; *see also* Pet. App. 2a ("This appeal concerns . . . 'unearned, *undivided* fees. . . .' ") (emphasis supplied); *Freeman*, 626 F.3d at 801 (same).

[37] Petitioners' brief at pp.12-16.

[38] *See* Petitioners' brief at p.i; *see also* Pet. App. 2a; *Freeman*, 626 F.3d at 801 (same).

[39] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 9; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 9 and 16.

retained solely by Quicken Loans.[40] Thus, the "four to three" circuit split cited by Petitioners is not a basis for granting review in this case.

All seven circuits involved in this alleged split addressed the applicability of Section 8(b) to *markups*, not unearned, undivided fees wholly paid to a single person. *See Santiago*, 417 F.3d at 389 (alleged markups of charges for tax and flood certification services states a Section 8(b) claim); *Kruse*, 383 F.3d at 57-58 (same re: alleged markups of fees for tax services, flood certifications and document preparation); *Sosa*, 348 F.3d at 983 (same re: alleged markup of a fee for courier services); *Haug*, 317 F.3d at 836 (alleged markups of credit report, appraisal, and document delivery services does not state a Section 8(b) claim); *Krzalic*, 314 F.3d at 879 (same re: alleged markup of recording fee); *Boulware*, 291 F.3d at 265 (same re: alleged markup of a credit report fee).

None of these cases involve claims of unearned, undivided fees paid to and retained by a single person, or a loan discount fee, or a factual finding following summary judgment. There is no "four to three" circuit split for this Court to resolve in this case.

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[40] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 9; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 9 and 16.

II. There Is Not a Circuit Split Because *Cohen* Is Distinguishable.

The more narrow issue presented to this Court is whether Section 8(b) prohibits allegedly unearned, undivided fees paid to a single person. As both Petitioners and the Fifth Circuit acknowledged, the only other circuit court "to address this very specific type of fee (i.e., an undivided, unearned fee) in the context of Section 8(b), is the Second Circuit in the *Cohen* case."[41] The differences between the Second Circuit's *Cohen* decision and the Fifth Circuit's decision here do not present a circuit split for this Court to resolve.

The plaintiff in *Cohen* claimed that her lender violated Section 8(b) by collecting an allegedly unearned, undivided "post-closing fee" in connection with the refinancing of her mortgage. 498 F.3d at 113. The district court dismissed Cohen's Section 8(b) claim for failure to state a claim under Fed. R. Civ. P. 12(b)(6) because (i) the fee at issue was analogous to an "overcharge," which the Second Circuit held in *Kruse* was not prohibited by Section 8(b), and (ii) Cohen failed to plead that the allegedly unearned fee was split between two parties. *Id.* The Second Circuit disagreed. *Id.* It accepted as true the complaint's allegations that the fee was a settlement service charge and the lender provided no services for the "post-closing" fee and, based on these allegations,

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[41] *See* Appellants' Fifth Circuit brief at p.6; *see also* Pet. App. 6a; *Freeman*, 626 F.3d at 802-03.

concluded that Section 8(b) encompassed allegedly unearned, undivided fees when no third party is involved. *Id.* at 114, 126.

A. Unlike the "Post-Closing Fee" in *Cohen*, the Loan Discount Fees Paid by Petitioners Are Not Settlement Service Charges Subject to Section 8(b).

There is no circuit split between *Cohen* and this case because the fees at issue here were not paid for a settlement service. RESPA was enacted to provide consumers "with greater and more timely information on the nature and costs of the settlement process" and to protect consumers "from unnecessarily high settlement charges."[42] Accordingly, Section 8(b) only applies to a portion, split, or percentage of a charge made or received *for the rendering of a real estate settlement service*.[43] "Real estate settlement service" is defined by statute as "any service provided in connection with a real estate settlement."[44] A real estate "settlement" is "the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. This process may also be called 'closing' or 'escrow' in different jurisdictions."[45] Thus, "settlement service

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[42] 12 U.S.C. § 2601(a).

[43] 12 U.S.C. § 2607(b) (emphasis supplied).

[44] 12 U.S.C. § 2602(3).

[45] 24 C.F.R. § 3500.2. The statute provides the following examples of "settlement services": "title searches, title examinations,

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charges" include typical charges paid by borrowers in connection with the closing of their loans, such as title work, inspections, and appraisals.[46]

Some fees charged by lenders are settlement service charges.[47] For example, the statute expressly includes services rendered in connection with the origination of a loan within this definition, such as the taking of loan applications, loan processing, and the underwriting and funding of loans.[48] These administrative services, provided by a lender so that the mortgage ultimately may be executed, are different from the actual *terms* of a loan. *See Wooten*, 626 F.3d at 1193-94; *Greenwald v. First Fed. Sav. & Loan Ass'n*, 446 F. Supp. 620, 625 (D. Mass. 1978). These terms include the interest rate. *Wooten*, 626 F.3d at 1193-94. A loan discount fee is not a "real estate settlement service" because it is part of the pricing of a loan, is related to the interest rate, and is not

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the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, 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), and the handling of the processing, and closing or settlement." 12 U.S.C. § 2602(3).

[46] 24 C.F.R. § 3500.2.

[47] *Id.*

[48] *Id.*

charged for a "service" provided in connection with the execution of a mortgage.

The Eleventh Circuit held just that in *Wooten v. Quicken Loans, Inc.*, which, like this case, involved a loan discount fee. *Id.* at 1189. Specifically, the Eleventh Circuit ruled that a real estate settlement service "does not include the act of negotiating advance interest terms such as points" and that, therefore, loan discount fees cannot constitute real estate settlement services and cannot violate Section 8(b). *Id.* at 1193-94.

Hence, *Wooten* supports the Fifth Circuit's holding below (albeit on a different theory). After *Wooten*, there is no split with *Cohen* because the fees here do not implicate RESPA.

B. Even the Second Circuit Would Have Dismissed Petitioners' Claims.

There also is not a split because the different factual circumstances are what caused the Second and Fifth Circuits to reach purportedly different results. *Cohen* came to the Second Circuit on appeal from a judgment granting a motion to dismiss that required the well-pleaded allegations of the complaint to be accepted as true. *See* 498 F.3d at 114. Here, however, Quicken Loans filed motions for summary judgment and established on the merits that the loan discount fees were not split with another party and

were earned in exchange for the loans Petitioners received.[49] In support of its motions for summary judgment, Quicken Loans submitted competent summary judgment evidence in the form of affidavits demonstrating that the loan discount fees were earned.[50] Specifically, Quicken Loans' affiant attested that the loan discount fees were a component of the pricing of Petitioners' loans and were conditions of and prerequisites to the extensions of credit offered to Petitioners by Quicken Loans.[51] In response, Petitioners admitted that the loan discount fees were a component of the pricing of each loan.[52] Thus, the loan discount fees were *earned*. Section 8(b) does not provide a cause of action for *earned* fees. In contrast,

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[49] Pet. App. 66a-67a.

[50] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶¶ 8 and 11; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 7, 8, 14, and 15.

[51] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶¶ 8 and 11; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 7, 8, 14, and 15.

[52] *Compare* R – USCA5 312-315, Statement of Uncontested Material Facts, ¶¶ 5 and 13, *with* R – USCA5 427-429, Freeman and Bennett Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts, ¶¶ 5 and 13. The Smith Petitioners disputed this fact only because they claimed that the fee in question was not a loan discount fee. *Compare* R – USCA5 248-250, Statement of Uncontested Material Facts, ¶ 7, *with* R – USCA5 430-432, Smith Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts, ¶ 7. However, all Petitioners proceed here as if the fee at issue was a loan discount fee for which it is alleged no service was provided. Petitioners' brief at pp.2 and 6.

because of its immature procedural posture, *Cohen* came to the Second Circuit with the factual assumption that the fee at issue was unearned.

On this record (unlike *Cohen*), Petitioners' claim could only be one of an alleged overcharge – the loan discount fees exceeded the reasonable value of the services provided by Quicken Loans. *See Kruse*, 383 F.3d at 53 (defining overcharges). There is no circuit split in this regard, for every circuit addressing overcharges has held that overcharges are not actionable under Section 8(b), including the Second Circuit in *Cohen* and *Kruse* and the Eleventh Circuit in *Sosa*. *See Cohen*, 498 F.3d at 114; *Kruse*, 383 F.3d at 57; *Sosa*, 348 F.3d at 983; *see also*, *e.g.*, *Martinez,* 598 F.3d at 553-54 (collecting cases).

In sum, seven of the decisions on which Petitioners rely for the alleged circuit split involve claims of marked up settlement service charges at the pleading stage. None involves loan discount fees and none construes Section 8(b) to encompass overcharges. Moreover, the Second Circuit's decision in *Cohen*, which is the only decision addressing unearned, undivided fees, is distinguishable. Accordingly, the Court may leave for another day the issue of whether Section 8(b) applies to markups or undivided, unearned settlement service charges.

III. The Fifth Circuit Correctly Held that Section 8(b) Is Not Ambiguous.

Even though it was unnecessary for the Fifth Circuit to reach the issue, the court nonetheless addressed whether Section 8(b) applies to wholly unearned, undivided fees paid to a single person.[53] Based on the unambiguous language of the statute, the Fifth Circuit held Section 8(b) does not cover unearned, undivided fees, and its decision plainly was correct.[54] First, the court ruled that "the language 'No person shall give and no person shall accept' is not ambiguous as to whether a sole actor's undivided fees are covered. The term 'and' normally means that both of the listed conditions must be satisfied."[55] Thus, the Fifth Circuit held that the use of the conjunctive "and" in the proscription "no person shall give *and* no person shall receive" "indicates that Congress was clearly aiming at an exchange or transaction, not a unilateral act."[56] "Thus, the provision requires two parties each committing an act: one party gives a 'portion, split, or percentage,' and another party receives a 'portion, split, or percentage.'"[57]

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[53] Pet. App. 7a; *see also Freeman*, 626 F.3d at 803.

[54] Pet. App. 7a; *see also Freeman*, 626 F.3d at 803.

[55] Pet. App. 7a; *see also Freeman*, 626 F.3d at 803.

[56] Pet. App. 7a (emphasis supplied) (citing *Boulware*, 291 F.3d at 266); *see also Freeman*, 626 F.3d at 803 (same).

[57] Pet. App. 7a (citing *Boulware*, 291 F.3d at 265); *see also Freeman*, 626 F.3d at 803 (same).

This interpretation is supported by the context of the phrase and the companion provision in Section 8(a). Section 8(a) contains the identical phrase in providing that "no person shall give *and* no person shall accept" kickbacks in exchange for the referral of settlement service business.[58] As the Fifth Circuit correctly held, Section 8(a) "clearly requires two culpable actors" and to "be consistent with RESPA § 8(a), RESPA § 8(b) should require two culpable actors as well."[59]

While the Second Circuit read the law differently, its reasons are not persuasive. In *Cohen*, the Second Circuit paid little attention to this key language of Section 8(b). Instead, the court referenced its prior decision in *Kruse* and summarily dispensed with the position ultimately adopted by the Fifth Circuit stating "we do not assume that a guilty giver and a guilty acceptor must participate in every unlawful unearned charge." *Cohen*, 498 F.3d at 120 (citing *Kruse*, 383 F.3d at 57-58). Even in its decision in *Kruse*, however, the Second Circuit did not evaluate the normal and plain meaning of the word "and." *See Kruse*, 383 F.3d at 57-58. Nor did it comply with this Court's instruction to follow "the established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning." *See Nat'l Credit Union Admin.*

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[58] 12 U.S.C. § 2607(a) (emphasis supplied).

[59] Pet. App. 7a; *see also Freeman*, 626 F.3d at 803.

v. First Nat. Bank & Trust Co., 522 U.S. 479, 501 (1998); *see also Ratzlaf v. United States*, 510 U.S. 135 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). Instead, the Second Circuit ignored the context of the phrase within its companion provision, Section 8(a), and within Section 8 generally. The court surveyed other interpretations by other courts, without undertaking any independent analysis and, based on *dicta* by the Eleventh Circuit, held the word "and" does "not seem to compel" a particular reading and could plausibly be construed as not requiring a culpable giver and acceptor. *Kruse*, 383 F.3d at 57-58.

As to the second key phrase in Section 8(b), the terms "portion," "split" and "percentage" plainly refer to less than the whole of something.[60] Even the Second Circuit in *Cohen* agreed with the "ordinary meaning" of these nouns. *See* 498 F.3d at 117. Based on this "ordinary meaning," the Fifth Circuit held "'any portion, split or percentage' requires that two parties share something."[61]

In *Cohen*, the Second Circuit interpreted the word "any" in the phrase "any portion, split, or percentage" to result in a construction that is opposite to the "ordinary meaning" of these terms, namely that the use of "any" changes the meaning of the terms from "less than the whole of a fee" to "the whole fee."

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[60] Pet. App. 8a-9a; *see also Freeman*, 626 F.3d at 803-04.

[61] Pet. App. 11a; *see also Freeman*, 626 F.3d at 804.

See 498 F.3d at 117-18. As the Fifth Circuit correctly noted, "[a] court stretches the definition of 'portion, split or percentage' to its breaking point to mean 100% of a charge."[62] This type of unwarranted expansion of the terms "portion," "split" and "percentage" is exactly what this Court cautioned courts not to do through the cannon of *noscitur a sociis*. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). All three of the terms at issue mean less than the whole of something and the use of "any" does not result in the opposite effect.

The interpretation suggested by Petitioners also would make Section 8(b) a price-control mechanism – a result that Congress squarely rejected in enacting of the statute in 1974. "Congress considered and explicitly rejected a system of price controls for fees." *See Kuknyo*, 763 F.2d at 271; *see also Kruse*, 383 F.3d at 56-57. Congress did not intend to use RESPA as a means of "fixing rates for real estate settlement charges[.]"[63] This type of price fixing "would infringe on an area that has historically been of State or local concern and, in some instances, would duplicate

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[62] Pet. App. 9a; *see also Freeman*, 626 F.3d at 804. As the Fifth Circuit noted, the Second Circuit also improperly relied upon an expanded construction of "any portion" and "any percentage" in anti-embezzlement statutes when none of those statutes use the three terms included in Section 8(b) portion, *split* and percentage. *See* Pet. App. 9a-10a; *see also Freeman*, 626 F.3d at 803-04.

[63] *See* S. REP. NO. 930866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6545, 6549-50.

existing State regulatory schemes."[64] Petitioners' suggested interpretation of Section 8(b) would result in the exact type of price control mechanism that Congress refused to enact. Accordingly, Section 8(b) does not prohibit overcharges and does not prohibit unearned, undivided fees paid to and retained solely by a single person.

Because the Fifth Circuit concluded that Section 8(b) is unambiguous with respect to unearned, undivided fees, it did not defer to HUD Statement of Policy 2001-1. Instead, the Fifth Circuit specifically cited this Court's guidance and stated: "When the statutory provision is clear on its face, there is no need to look to any regulatory interpretation, such as the HUD 2001 statement."[65] For this Court has long held that a "pure question of statutory construction" is for the courts to decide, and that the judiciary must reject agency interpretations of statutes that are contrary to clear congressional intent. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (citing *Chevron*, 467 U.S. at 843 n.9).

For the sake of completeness, the Fifth Circuit reviewed HUD Statement of Policy 2001-1 and determined that it did not merit any deference.[66]

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[64] *Id.*

[65] Pet. App. 12a (citing *Chevron*, 467 U.S. at 842-43); *see also Freeman*, 626 F.3d at 805 (same).

[66] Pet. App. 12a-14a; *see also Freeman*, 626 F.3d at 805-06.

Although it was not essential to the decision in this case, the Fifth Circuit properly refused to defer to HUD Statement of Policy 2001-1 as it applies to "unearned, undivided fees."[67] That policy statement is simply an agency's interpretation of an unambiguous statutory provision. Moreover, HUD's statement cannot be considered to be a binding authority because it was issued as a commentary on a recent legal decision, without formal rulemaking or any substantial consideration, and is pervaded by considerations and theories that courts of appeal uniformly have held contradict the direct intent of Congress. *See Martinez*, 598 F.3d at 554; *Friedman*, 520 F.3d at 1297; *Santiago*, 417 F.3d at 387; *Cohen*, 498 F.3d at 114; *Kruse*, 383 F.3d at 56-57; *Haug*, 317 F.3d at 836, 838-39; *Krzalic*, 314 F.3d at 881; *Boulware*, 291 F.3d at 267. As this Court has instructed, an agency's interpretation of an ambiguous statute "may also receive substantial deference" under *Chevron* "only '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.'" *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

As the Fifth Circuit determined, HUD's view on the scope of Section 8(b), not its own regulations, is

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[67] Pet. App. 12a-14a; *see also Freeman*, 626 F.3d at 805-06.

not persuasive because it was "perfunctory and conclusory," lacked any concrete reasoning and identified no evidence for its claim that the statement was based on HUD's alleged long-standing interpretation.[68] Thus, the Fifth Circuit correctly rejected HUD's attempt to expand Section 8(b). *See Mead Corp.*, 533 U.S. at 235 (discussing an administrative ruling under a complex regulatory scheme and noting that "[s]uch a ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.") (alteration added). Other circuits that have considered HUD Statement of Policy 2001-1 have rejected it as contrary to the clear text of § 8(b) and entitled to no deference. *See Santiago*, 417 F.3d at 387 ("[B]ecause the plain language of Section 8(b) does not provide for a cause of action for overcharges, it is not necessary for us to reach the question whether HUD's interpretation warrants deference."); *Kruse*, 383 F.3d at 57 ("[W]e cannot, and we therefore do not, defer to this reading of section 8(b) by HUD."); *Haug*, 317 F.3d at 839 ("*Chevron* deference . . . is not due here because we have held that Section 8(b) is unambiguous."); *Krzalic,* 314 F.3d at 881 ("There is not enough play in the statutory joints to allow HUD to impose its own 'interpretation' under the aegis of *Chevron*."); *Boulware,* 291 F.3d at 267 (no deference should be given to HUD because "the text of the statute controls in this case.").

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[68] Pet. App. 13a; *see also Freeman*, 626 F.3d at 806.

IV. The Level of Deference Afforded HUD Statement of Policy 2001-1 Is Not an Independent Basis for Granting Certiorari in this Case.

Petitioners contend that the Court should grant review "to resolve a broader circuit conflict over the *Chevron* status" of HUD Statement of Policy 2001-1 and "similar informal agency interpretations issued in a variety of settings."[69] HUD Statement of Policy 2001-1, however, has no bearing on Petitioners' claims because the loan discount fees they paid are not subject to Section 8(b) – they are not settlement services and are not unearned fees. Further, every circuit to consider HUD Statement of Policy 2001-1 has refused to defer to it in its entirety; no circuit has agreed with HUD that Section 8(b) prohibits overcharges of settlement service charges. *See Cohen*, 498 F.3d at 114; *Kruse*, 383 F.3d at 57; *Sosa*, 348 F.3d at 983; *see also*, *e.g.*, *Martinez,* 598 F.3d at 553-54 (collecting cases). There is no reason for the Court to grant certiorari to address a perceived lack of clarity on deference principles when there is no agency interpretation that applies to Petitioners' claims.

There is nothing in HUD Statement of Policy 2001-1 indicating that loan discount fees should be construed as "real estate settlement service" charges; indeed, the policy statement does not even attempt to define settlement service charges. Thus, alleged

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[69] Petitioners' brief at p.29.

"deference" to HUD Statement of Policy 2001-1 has no relevance here, where Section (8)(b) reaches only settlement service charges.

Further, there is no lack of clarity concerning the *methodology* for considering whether HUD's interpretation of Section 8(b) warrants deference and there is no actual split in authority in the application of that methodology. Circuit courts "agree on the mode of analysis" to apply this Court's deference principles.[70] To the extent that there is variance in the application of that mode of analysis to HUD Statement of Policy 2001-1, that variance is based on *dicta* and on the different types of charges considered and the specific provision(s) of Section 8 involved in a particular case.

Circuit courts that have deferred to HUD Statement of Policy 2001-1 have done so only after perceiving an ambiguity in Section 8. Most of these decisions involve the application of Sections 8(a) or 8(c) to the payment of a particular type of payment that is the central subject of the policy statement, "yield spread premiums." *See Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1259, 1261 (11th Cir. 2002); *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1005-06 (9th Cir. 2002); *Glover v. Standard Fed. Bank*, 283 F.3d 953, 961-62 (8th Cir. 2002). Notably, several circuit courts that have deferred to HUD

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[70] Lisa Shultz Brennan, *How Mead Has Muddled Judicial Review of Agency Actions*, 58 Vand. L. Rev. 1443, 1461 (October 2005).

Statement of Policy 2001-1 with respect to Section 8(a)'s application to yield spread premiums have refused to defer to the same statement in cases involving Section 8(b). *See Friedman*, 520 F.3d at 1298 (distinguishing *Heimmermann*); *Haug*, 317 F.3d at 839 (distinguishing *Glover*). Only after finding an ambiguity have circuit courts deferred to a specific part of HUD Statement of Policy 2001-1 based on principles espoused in this Court's jurisprudence as to when informal agency policy statements should be given deference.

Some circuits have found Section 8(b) ambiguous with respect to very specific categories of charges, like markups, and only then proceeded to determine that HUD Statement of Policy 2001-1 was entitled to deference. *Kruse*, 383 F.3d at 57-58; *cf. also Santiago*, 417 F.3d at 389 n.4 (finding that Section 8(b) unambiguously permitted a cause of action for markups but also noting that deference to HUD Statement of Policy 2001-1 would be appropriate). These cases, however, considered HUD's commentary on markups, but that question is not involved in this case. Assuming *arguendo* that the loan discount fees are settlement service charges and disregarding the unrefuted, competent summary judgment evidence that those fees were earned, this case involves an overcharge, which all circuits agree does not violate Section 8(b). *See*, *e.g.*, *Martinez,* 598 F.3d at 553-54.

The Second Circuit is the only circuit court that has held that Section 8(b) is ambiguous regarding "unearned, undivided fees" (when a service provider

charges and retains an entire fee for which no service is rendered) and afforded deference to HUD Statement of Policy 2001-1 with respect to that type of fee. *Cohen*, 498 F.3d at 113, 124-25. The loan discount fees at issue here, however, were earned, were not settlement service charges, and were not unearned, undivided fees. While the Fifth Circuit undertook an analysis of Section 8(b) as applied to unearned, undivided fees, that analysis was unnecessary.

Because the fees here were earned and were not settlement service charges, any purported conflict regarding the level of deference that should be afforded to HUD Statement of Policy 2001-1 as applied to *unearned*, undivided fees under Section 8(b) is not yet mature and does not warrant this Court's attention.

In short, this case, which involves a unique and particular type of fee, is not the appropriate vehicle to develop this Court's guidance regarding the level of deference to be afforded to agency rules in general or to HUD Statement of Policy 2001-1.

CONCLUSION

The petition for a writ of certiorari should be denied.

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