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 RESPONDENT

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QUESTION PRESENTED

Section 8(b) of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607(b), provides:

> 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.

The question presented is whether this provision applies to a settlement service provider who acts alone and charges a fee for which allegedly no services are performed.

RULE 29.6 DISCLOSURE STATEMENT

Quicken Loans Inc. is owned by Rock Holdings Inc. Neither Quicken Loans Inc. nor Rock Holdings Inc. 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

A. The Statutory Context.

Consumer protection statutes usually strike a balance. How Congress strikes that balance depends on the ill, the range of potential cures and their merits, policy and political concerns, and the era. Petitioners in this case seek to upset the balance Congress struck in the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601–2617 ("RESPA").

Enacting RESPA in 1974, Congress created a framework for the regulation of the residential mortgage business with a central goal of ensuring that settlement costs are fairly disclosed to the consumer. See, *e.g.,* 12 U.S.C. §§ 2601(b)(1) (disclosure is the statute's first listed purpose), 2603 (requiring uniform settlement statements disclosing all charges), 2604(a) (requiring publication of a federal special information booklet), 2604(c) (requiring good faith estimate of closing costs). In many respects this focus on disclosure repeated the approach taken four years earlier in the Truth in Lending Act, 15 U.S.C. §§ 1601–1616; indeed, RESPA required that disclosures under each statute be coordinated. 12 U.S.C. § 2603(a). The rationale for this choice is that informed consumers will understand their proposed closing costs and, if dissatisfied, will take their business elsewhere, thereby encouraging the competitive forces of the market to keep closing costs low.

In addition to its disclosure obligations, RESPA in Section 2607 also outlaws kickbacks and referral fees. These backroom deals between settlement service providers by their nature are not transparent to the consumer and impede the effectiveness of increased loan cost disclosure.

But in increasing consumer protection, Congress struck a balance. Of particular importance here, Congress did not create a right to sue providers for too-high prices, specifically rejecting the alternative approach of regulating settlement service prices, as had been proposed in competing legislation championed by Senator William Proxmire and in proposed but never implemented regulations. See S. 2288, 93rd Cong. (July 1974); U.S. DEP'T OF HOUSING & URBAN DEV. & VETERAN'S ADMIN., REPORT ON MORTGAGE SETTLEMENT COSTS (Mar. 1972) ("HUD-VA Report"); 37 Fed. Reg. 13,186 (July 4, 1972). Every court of appeals to consider the question has concluded that RESPA does not provide any cause of action against a provider for charging "too much."

In obtaining mortgage loans from Quicken Loans, each petitioner agreed to pay a disclosed loan discount fee, as well as certain disclosed closing costs. A loan discount fee, sometimes referred to as "points," is a one-time charge that is part of the lender's pricing made for the loan terms the borrower requests, and typically reduces the loan's interest rate below what the borrower otherwise would have been charged. Petitioners asserted in their complaints that the agreed-upon loan discount fees were entirely "unearned," allegedly because they did not receive the "service" of a lower interest rate. Quicken Loans did not charge any unearned fees as alleged, but the District Court did not reach that issue because it entered summary judgment for Quicken Loans on another ground.

B. Proceedings Below.

Petitioners, three married couples, obtained residential mortgage loans from Quicken Loans in unrelated transactions in early 2007. Joint Appendix ("JA") 8, 27, 78. Quicken Loans was, and is, one of the country's largest non-bank residential mortgage lenders operating nationwide. Varying in amounts between $88,000 and $177,650, the loans each carried interest rates that were fixed for thirty years. JA 62–63 (& Exhs. A, G), 103 (& Exh. A).

Mortgage loans are a differentiated product: loans can contain varying features and terms, including the loan's interest rate and repayment schedule, and there are different types and amounts of closing costs associated with any loan, such as charges for loan origination and title examination. Shortly after applying, each petitioner received a number of specific disclosures describing each of these aspects of the requested loans. One of the charges disclosed at that time, and which was ultimately charged after the loan was approved and processed, was a "loan discount fee."

Loan discount fees are a component, along with the interest rate, of the price of the loan. As HUD itself has described in the consumer handbook RESPA requires, the payment of a loan discount fee typically results in some lowering of the promissory note rate that a borrower otherwise would have paid. HUD, *Shopping For Your Home Loan, HUD's Settlement Cost Booklet*, at 41, 75 Fed. Reg. 423-01 (2010). See also HUD, *Buying Your Home: Settlement Costs and Helpful Information*, at 15 (1997); HUD and other agencies, *Looking for the Best*

Mortgage? Shop, Compare, Negotiate, at 2 (undated).[1] The fee thus enables borrowers to trade off higher up-front costs in favor of a lower monthly payment. Consistent with that usage, loan discount fees usually are tax deductible in the same manner as post-closing mortgage interest is deductible. INTERNAL REVENUE SERV., *Home Mortgage Interest Deduction*, IRS Publication 936, at 5–7 (Dec. 5, 2011).

Loan discount fees are common. Sometimes the payment is used to give the borrower an unusually low rate, what might colloquially be referred to as below "par" or "market." Other times, such as where the borrower's credit history or a desired loan term presents somewhat higher risk to the lender and so would require a higher interest rate, points may reduce the price but only so that the interest rate is closer to "par" or "market." The federal government has accommodated the payment of loan discount fees in a number of ways: HUD's regulations and guidance documents have instructed lenders how to use them and disclose them, HUD's official HUD-1 settlement forms allow them to be charged, and various federal agency consumer handbooks (including HUD handbooks) explain the helpful features of loan discount fees. 24 C.F.R. pt. 3500, App'x A (sample HUD-1 form and written guidance on disclosing points in Line 802); 24 C.F.R. § 201.2;

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[1] Available at, respectively, (i) http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_12892.doc (last visited January 2, 2012), and (ii) www.hud.gov/buying/booklet.pdf. (last visited January 2, 2012).

HUD Mortgagee Letter 94-16; HUD and other agencies, *Looking For the Best Mortgage? Shop, Compare, Negotiate*, at 3; HUD, *Buying Your Home: Settlement Costs and Helpful Information*, at 6, 14–15; HUD, *Shopping For Your Home Loan, HUD's Settlement Cost Booklet*, at 41, 75 Fed. Reg. 423-01; FEDERAL RESERVE BOARD, *Consumer Handbook on Adjustable Rate Mortgages*, at 19, A5, 71 Fed. Reg. 78,437 (2009).

Consistent with RESPA, in each of the three loans here, the loan discount fee was disclosed on the Good Faith Estimate provided to and signed by the petitioners far in advance of closing. JA 62, 63–64 (& Exhs. D, J) (Freeman Estimate signed 20 days before closing and Bennett Estimate signed 13 days before closing); JA 103 (& Exh. D) (Smith Estimate signed 53 days before closing). The estimated fees were presented as a percentage of the loan amount that exactly matched what each petitioner ultimately was charged. *Id.*

At closing, the Freeman and Bennett petitioners' HUD-1s (the federally mandated settlement forms) disclosed a "loan discount fee" charged by Quicken Loans. Petition Appendix ("Pet. App.") 2a; JA 66–72 (reproducing both HUD-1 statements). The Smith petitioners' HUD-1 disclosed a "loan origination fee" which a Quicken Loans manager testified (without contradiction) had been mischaracterized by the settlement company because the charge actually was a loan discount fee. Pet. App. 22a n.4; JA 106–111 (reproducing HUD-1 statement). See also JA 103 (explaining settlement company's error).[2]

Months after the loans closed, petitioners sued Quicken Loans in separate lawsuits in Louisiana state court for alleged violations of Section 2607(b).[3] They each claimed that Quicken Loans had imposed certain charges on them without performing any settlement services in return and hence had accepted fees that were "unearned." JA 8–9, 28, 78–80. Petitioners did not claim that any of the loan discount fees were divided or shared among multiple providers. *Id.* Petitioners also did not claim that the overall charges or rates on the loans had not been disclosed to them or were unreasonable. *Id.* 7–13, 26–37, 77–83.

Petitioners rested their claim on the section of RESPA which 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

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[2] Petitioners and the United States do not refute the point in this Court, and refer to all three couples as having been charged loan discount fees. Brief for Petitioners ("Pet. Br.") 16, 21; Brief for the United States ("U.S. Br.") 28-32. Even if the loan discount fees in this case were for loan origination, in whole or in part, the question presented should yield the same answer, so neither the parties nor the Fifth Circuit found the factual distinction involving the Smiths' loan necessary to discuss.

[3] The suits contained other causes of action under state law, and challenged another fee, but those claims and that fee are not at issue in this Court. Pet. Br. i.

connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b). In suing under that Section petitioners also relied on the Department of Housing and Urban Development's interpretation of the Section as prohibiting unearned fees even when the conduct is unilateral and the fee is not shared or divided. "Real Estate Settlement Procedures Act Statement of Policy 2001-1," 66 Fed. Reg. 53,052 (Oct. 18, 2001)(portions reproduced at Pet. App. 71a-83a).[4]

Quicken Loans removed the cases to District Court, where they were consolidated, and it then moved for summary judgment. Its main argument was that RESPA does not address the allegedly unearned loan discount fees because the statute only reaches conduct involving the sharing or division of charges among two or more settlement service providers, and Quicken Loans did not share the loan discount fees with anyone. JA 54–55, 96–97.

Quicken Loans also proved by affidavit, as an alternative ground for judgment, that the loan discount fee in each instance was not "unearned" at all, because the fee was a component of the price for the loan terms the petitioners had selected. JA 63 (¶ 8), 64 (¶ 15), 104 (¶ 11). Petitioners conceded that the fees were part of the pricing. JA 74 (¶ 5), 75 (¶

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[4] HUD's regulatory authority over Section 2607(b) has recently been reassigned to the Consumer Financial Protection Bureau. Pub. L. No. 111–203, § 1061(b)(7), 124 Stat. 2038, 2039–40 (2010). For ease of discussion, as the other parties have, we refer consistently to HUD rather than to the Bureau.

3), and 113 (¶ 7). In response to the motion, petitioners offered no affidavit explanation why they were claiming that the fees were entirely unearned (though they did cite to documents, with no explanation as to how those materials supported their lawsuit). *Id.* None of the petitioners even attempted to allege or prove that they had asked Quicken Loans for a reduced interest rate that had not been provided. See JA 8 (¶ 5), 28 (¶ 6), and 77–83.

The District Court granted summary judgment on the ground that Section 2607(b) only addresses the sharing or division of a settlement service charge, and does not regulate a lender's charges that it retains. Pet. App. 19a. Because it was undisputed that none of the loan discount fees had been divided with a portion of the fee given to another who had not earned it, the Court did not need to address whether Quicken Loans itself had earned the fees.

The Fifth Circuit affirmed, holding "that the language of [the Section] is unambiguous and does not cover undivided unearned fees." Pet App. 6a, 7a. In so holding, the Court of Appeals joined the conclusion of three other courts of appeal which have construed the statute identically. *Id.* 6a. The Court of Appeals gave four reasons for its conclusion.

First, the Fifth Circuit explained that the language "[n]o person shall give and no person shall accept" unambiguously does not reach a sole actor's undivided fees because the statute's use of the conjunction "and" shows that Congress intended to reach "two parties each committing an act" punishable under the statute: one party giving and another party receiving a "portion, split, or percentage" of the fee at issue. Pet. App. 7a.

Second, the Fifth Circuit ruled that, because Section 2607(a) and Section 2607(b) both begin with identical words—"No person shall give and no person shall accept"—and because Section 2607(a), which forbids kickbacks, clearly requires two culpable parties, the identically-worded Section 2607(b) also should be construed to require two culpable actors. Pet. App. 8a.

Third, the Fifth Circuit concluded that Section 2607(b)'s language "any portion, split, or percentage" "requires that two parties share something" less than the whole. Pet App. 8a.

And fourth, the Fifth Circuit ruled that, "read in its entirely, RESPA is an anti-kickback statute, not an anti-price gouging statute." Pet. App. 10a.

Having found Section 2607(b) to be unambiguous, the Court of Appeals rejected petitioners' argument that it should follow HUD's contrary interpretation in its 2001 Policy Statement. The Court of Appeals held that, "[w]hen the statutory provision is clear on its face, there is no need to look to any regulatory interpretation, such as the HUD 2001 statement." Pet. App. 12a. The Fifth Circuit also ruled that the HUD Policy Statement was not entitled to deference in any event because its informal adoption deprived it of the force of law and did "'not warrant *Chevron*-style deference'" and because the Statement "provides no concrete reasoning for its conclusion." *Id*. 13a. Judge Higginbotham dissented. Although he agreed with the majority that the Policy Statement was not entitled to *Chevron* deference, he concluded that Section 2607(b) should be read to prohibit unearned undivided fees in order to promote "a core objective of RESPA: promoting transparency of costs associated with settlement." *Id*. 17a.

SUMMARY OF ARGUMENT

RESPA Section 2607(b) has a plain meaning that is revealed by the words Congress used and the statute in which the provision appears: it prohibits the sharing or division of a real estate settlement service fee between two providers where the shared portion of the fee is not earned by the recipient. It does not address situations where a borrower claims she was charged a fee that she believes was not earned by the lender and the lender retains that fee.

The plain language of the statute compels this conclusion in a number of different ways.

The law begins with the phrase "No person shall give and no person shall accept," which the Fifth Circuit and three other circuit courts of appeal have all concluded contemplates conduct by two culpable actors. This conclusion is bolstered by RESPA's use in Section 2607(a) of the same formulation in defining the conduct of intentional kickbacks.

The limitation in Section 2607(b) to the giving or accepting of "any portion, split, or percentage of a charge" other than "for services actually performed" also supports the conclusion that this is a fee splitting statute, not an unearned fee statute. The collective concept of a "portion, split, or percentage" connotes the sharing or division of something (here, a charge "made or received"). The natural reading of the words—alone, together, and in context—is that they describe something less than the entirety. Quicken Loans' conduct in charging a loan discount fee as part of its price and retaining that fee cannot reasonably be said to have involved apportioning, splitting or accepting a percentage of the fee.

Section 2607(b) further underscores its narrow focus on backroom deals by describing two separate transactions that each must be met before the law is potentially implicated. First, there must be a "charge made or received for a real estate settlement service." Then, someone must "give" and someone must "accept" "any portion split, or percentage" of that charge. That the law must be read this way is compelled by its structure and by the verbs Congress chose, the former plainly directed at the imposition of charges and the latter at a voluntary transaction with respect to the charges already received.

Statutory context also points solely to the Fifth Circuit's proper construction. RESPA's findings and purposes refers to "referral fees" and a desire to outlaw only "certain" practices, without mentioning or implying that unearned fees generally are addressed. Indeed, Congress in enacting the law expressly commissioned HUD to study the settlement service business more closely and report back as to "the necessity for further legislation."

Legislative history further points towards the conclusion that the only conduct being targeted by Congress in 1974 was the division or sharing of a fee among culpable providers where the shared amount is unearned. In particular, the authoritative committee reports, as well as statements of sponsors and the background against which Congress legislated, confirm the limited reach of Section 2607(b).

Even if this Court were to find Section 2607(b) to be ambiguous, it still should be construed only to reach the division or sharing of a charge between two providers. That is not only the construction which finds the most persuasive and widest support in the language, context and legislative history, but, since RESPA Section 2607(b) is a criminal statute, the rule of lenity should operate to limit the law's reach to that which it clearly encompasses, and no more.

Petitioners and the United States urge that Section 2607(b) is ambiguous and so HUD's contrary view of the Section's reach should be given deference. As an initial matter, the regulation they cite, 24 C.F.R. § 3500.14(c), actually supports the Fifth Circuit's interpretation by its plain terms; their suggestion that this rule instead contains a freestanding prohibition on unearned fees is not consistent with the language or with the regulatory history. While HUD's 2001 Policy Statement, unlike the regulation, is clear in embracing petitioners' position, the Statement is not due *Chevron* deference from this Court, as all three members of the Fifth Circuit panel concluded. The Statement is an interpretation only, not a policy judgment or rule intended to have the force of law. The Court should not defer in any fashion to the Statement, as it provides no reasoned explanation for its conclusion and otherwise lacks the power to persuade.

ARGUMENT

I.

SECTION 2607(b) UNAMBIGUOUSLY REACHES ONLY DIVIDED CHARGES.

A. The Plain Language Of Section 2607(b) Reaches Only Transactions Between Two Or More Providers Involving An Unearned Fee.

Four circuit courts of appeal—the Fourth, Fifth, Seventh, and Eighth—have held that Section 2607(b) only covers cases in which one settlement service provider shares a part of a settlement service charge with another settlement service provider that did nothing to earn that part. These courts have all rejected the argument that a settlement service provider might unilaterally violate Section 2607(b) by charging a borrower an allegedly unearned amount and then retaining the entire amount as part of its compensation. That plain-meaning interpretation of the statute is plainly correct.

1. As the Fifth Circuit recognized, the plain meaning of Section 2607(b)'s opening words—"No person shall give and no person shall accept"—contemplates the actions of two culpable actors, one giving something and the other accepting that thing. The conjunctive "and" typically requires both linked conditions to occur. Pet. App. 7a. Otherwise, there would be no difference reflected in the choice to use

that word rather than "or." Indeed, if Congress had meant to impose civil and criminal penalties for unilateral conduct by a lender in accepting unearned fees from borrowers, the natural way to have done so would have been simply to say that "no person shall give or accept" any compensation for unearned services.[5] Even the United States concedes that, "because someone who 'accepts' money typically accepts it *from* someone else, a violation of Section 2607(b) will ordinarily involve a 'transaction' rather than a purely 'unilateral act.'" U.S. Br. 14; see also *id*. 9 ("[V]iolations of Section 2607(b) typically involve transactions between two (or more) persons rather than wholly unilateral conduct * * * .").[6]

[5] A number of states with statutes like Section 2607(b) have chosen precisely that formulation, and not Congress'. See *e.g.*, MONT. CODE ANN. § 33-25-401(1) ("a person may not * * * give or accept a portion, split or percentage"); N.Y. BANKING LAW §6-m(2)(l) ("no lender, mortgage banker or mortgage broker shall accept or give any fee, kickback, thing of value, portion, split, or percentage of charges"); TEX. INS. CODE ANN. § 2502.052 ("a person may not give or accept any portion, split or percentage of a charge.").

[6] The United States argues that Section 2607(b) should not be read to require two culpable actors because a similarly worded criminal statute—"no person may purchase and no person may sell heroin"—therefore would cover someone who sold heroin to an undercover law enforcement officer "even though the [purchasing] agent himself would not be a culpable party." U.S. Br. 14–15. But the agent in that example *would* be culpable, though he would be immune under an applicable law enforcement exception. 21 U.S.C. § 885(d). In any event, construing the statute as petitioners advocate would not avoid

2. Congress's use of the phrase "portion, split, or percentage" also demonstrates that Section 2607(b) does not reach a provider's full retention of charges paid by the consumer. Those three words connote the disposition of an amount less than the full charge. "Split" undeniably does so, as all here agree. Pet. Br. 19; U.S. Br. 17. So too with "portion" and "percentage." See WEBSTER'S THIRD NEW INT'L DICTIONARY, 1768 (1993) (defining "portion" as "an individual's part or share of something"); *id*. at 1675 (defining "percentage" as "a part of a whole expressed in hundredths").

Read as a whole, the phrase "any portion, split, or percentage" naturally refers to parts of a charge, not the entire amount. Every circuit court to consider this phrase agrees. See *Cohen* v. *JP Morgan Chase & Co.*, 498 F.3d 111, 117 (2d Cir. 2007) (the words "are commonly understood to reference things that have been divided and that are less than a whole"); *Boulware* v. *Crossland Mortg. Corp.*, 291 F.3d 261, 265 (4th Cir. 2002) ("by using th[is] language * * * Congress was clearly aiming at a sharing arrangement rather than a unilateral overcharge"); *Krzalic* v. *Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002) (relying on same phrase to conclude statute was not implicated where "[n]o one agreed to divide a receipt with [the provider]"); *Haug* v. *Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003) (statute "prohibits only transactions in which the

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the even–more surprising result that petitioners themselves would be liable in this case.

defendant shares a 'portion, split, or percentage of any charge' with a third party").

Attempting to create ambiguity where none exists, petitioners wrongly contend that all conduct in dividing a fee is "fully encompassed in 'split' alone." Pet. Br. 19. But the choice of these three words rather than one makes sense in the context of what a provider might do with a "charge made or received for the rendering of a real estate settlement service." A "split" most naturally describes an even division. *Krzalic*, 314 F.3d at 879. "Percentage" addresses uneven divisions, like a commission or an amount off the top. And "portion" picks up the remaining situations where a provider gives away a component of the whole charge, such as a flat dollar amount of the entire fee.

If Congress had intended to reach unilateral action by a lender in accepting the entirety of a fee, it would have said simply "any or all," which is the obvious expression of such an intent. See, *e.g.*, 12 U.S.C. § 1755 ("Board may waive payment of any or all other charges"); 25 U.S.C. § 640d-7 ("Secretary of the Interior is authorized to pay any or all appropriate legal fees"). And it would not have joined the words "portion" and "percentage" with the word "split," the latter of which cannot be tortured into meaning an entire amount.

The traditional canon of construction, *noscitur a sociis*, further reinforces this conclusion. That canon "dictates that words grouped in a list should be given related meaning." *Dole* v. *Steelworkers*, 494 U.S. 26, 36 (1990) (internal quotations and citations omitted).

It applies most forcefully where, as here, the list is made up of terms with a "comparable core of meaning" that are stated in conjunctive (or not entirely disjunctive) terms. *Graham County Soil and Water Conservation Dist.* v. *United States*, 130 S. Ct. 1396, 1403 (2010). The United States contends that the three words "are not so similar that they should be construed in a way that deprives any individual term of its common meaning." U.S. Br. 10. But this argument ignores the common sense meaning of the words. Even if "portion" and "percentage" may in unusual or highly stylized circumstances refer to the entirety of a thing, the ordinary use of both words is to express a part of something larger. These three words do share a "comparable core of meaning" that requires them to be read together, as referring to a part of the whole.

3. Congress' choice to make both givers and acceptors liable makes sense only if fee-splitting arrangements are the statutory object, for otherwise consumers themselves would be liable for "giv[ing]" the unearned fee to their lender or a service provider. Both the Fourth and Seventh Circuits noted this anomaly in petitioners' interpretation of the statute. See *Krzalic*, 314 F.3d at 879 (Posner, J.) ("On the plaintiffs' understanding, they themselves violated the statute because they gave Republic a portion of the fee charged by the county recorder!"); *Boulware*, 291 F.3d at 265 (finding this interpretation to be "irrational" and "perverse"). Congress could not have intended such an absurd result. RESPA's private right of action authorizes the "person or persons charged for the settlement services" to recover

against the "person or persons who violate" Section 2607(b). As the petitioners recognize (Pet. Br. 21 n.16), it would make little sense for a consumer to be liable to herself. There is no anomaly, however, if Section 2607(b) is correctly construed to cover only transactions among settlement service providers.[7]

4. The conclusion that the statute creates liability only when there is a sharing or division of a fee among two culpable providers, a portion of which is unearned, and that it does not apply to a situation where the consumer is the giver of an undivided fee, is further reinforced by the structure of Section 2607(b).

Section 2607(b) identifies two distinct transactions. First, there must be a "charge made or received for the rendering of a real estate settlement service." This is the money paid by the consumer, consistent with Congress' repeated use of the word "charge" to refer to the fees that consumers pay for services. See, *e.g.*, 12 U.S.C. §§ 2601(a), 2603(a),

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[7] It is no answer to this difficulty to say, as petitioners do, that consumers would not be liable for other reasons. Pet. Br. 21 n.16. They first adopt the assertion in the Eleventh Circuit's *Sosa* decision that the consumer is not liable because she always intends to pay for the services but the statute does not provide such an exemption. *Sosa* v. *Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 982 (11th Cir. 2003). Petitioners also claim that their reading is appropriate because consumers could not be civilly liable, since civil recoveries are paid to the person "charged for the settlement service." But it remains that, if consumers can be givers under Section 2607(b), they would be subject to criminal liability. 12 U.S.C. § 2607(d)(1).

2604(c). Once a charge is made or received, someone then must "give" and someone must "accept" "any portion, split, or percentage" of that charge. Liability attaches only to this second transaction, based on whether it is earned.

That there are two transactions contemplated by the Section, and that only the subsequent transaction can give rise to liability, is evident from the different verbs Congress employed: "make" and "receive" juxtaposed with "give" and "accept." Congress would not have used "two distinctly different forms of words for the same purpose," *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 450 (1999)—particularly not within a single sentence, *Pillsbury* v. *United Eng'g Co.*, 342 U.S. 197, 199 (1952). In Section 2607(b) and elsewhere, Congress used verbs connoting obligation to describe transactions between consumers and providers. Providers thus "ma[ke]" or "impose" charges upon consumers, 12 U.S.C. §§ 2603(a), 2607(b), 2610, and consumers "pa[y]" or "incur" those charges, *id.* §§ 2604(d), 2607(d)(2). By contrast, the verbs "give" and "accept" signify a wholly voluntary exchange. See WEBSTER'S THIRD NEW INT'L DICTIONARY 959 (2002) ("give" means "to confer the ownership of without receiving a return: make a present of"); *id.* at 10 ("accept" means "to receive with consent (something given or offered)").

This difference in meaning compels the conclusion that Congress did not intend for Section 2607(b) to cover the consumer's payment of an unearned fee to the provider. Consumers do not freely "give" their money to providers; they pay the necessary charges. On the other hand, it is natural to say that providers engaged in fee splitting are voluntarily "giv[ing]" and "accept[ing]" the money.

That Section 2607(b) speaks of two different transactions also is shown by the verbs' tense. The transaction involving the charge is in the past: the charge has been "made or received." The transaction involving the portion, split, or percentage of the charge is in the future: something no person "shall give" and no person "shall accept." See W. Follett, *Modern American Usage: A Guide* 374-75 (1966) (discussing use of "shall" as referring to future action).

The Fifth Circuit's construction is faithful to this structure, finding liability not on the consumer's payment but instead on what is done with the consumer's payment. Had Congress intended to prohibit all unearned settlement charges, it would have mentioned only the first transaction, between the consumer and the providers and would have said nothing about giving or accepting a part of the charge. Congress might have said, for instance: "No charge shall be made in connection with the settlement other than for services actually performed." Notably, Congress used similar language elsewhere in RESPA when it prohibited certain charges on the consumer. 12 U.S.C. § 2610 ("No fee shall be imposed or charge made upon any other person" for certain mandated disclosures).

But Congress did not do that. Congress chose to regulate the consumer-provider relationship—the making and receiving of the charges—through

RESPA's many disclosure provisions. Section 2607(b) focuses exclusively on what a provider might do with a charge that has already been made: give a portion of the charge to another provider, or accept a portion of the charge from another provider. This second transaction is the only aspect that can be a predicate circumstance to potential liability, and that transaction does not involve the consumer at all.

B. The Statutory Context Confirms The Limited Reach Of Section 2607(b).

RESPA's overall structure and its other provisions strongly support the conclusion that Section 2607(b) does not reach undivided fees. See *Nken* v. *Holder*, 129 S. Ct. 1749, 1756 (2009) (statutory interpretation "turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole'") (citation omitted).

1. Section 2607(b)'s closest neighbor, the anti-kickback provision in Section 2607(a), provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement * * * that business incident to or part of a real estate settlement service * * * shall be referred to any person." That provision applies on its face only to joint conduct. As the Fifth Circuit noted, Congress' use of the identical introductory words in Section 2607(b) shows that Congress also meant for that section to apply to the joint conduct of two or more persons, not to unilateral conduct. Pet. App.

8a.[8] *See also Nijhawan v. Holder*, 129 S. Ct. 2294, 2301 (2010) ("Where, as here, Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations."); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

Petitioners' contention that the Fifth Circuit's reading of Section 2607(b) renders Section 2607(a) "largely surplusage" (Pet. Br. 24) is mistaken. The two provisions are aimed at the same general problem—payments and other arrangements between settlement service providers—but they have different elements and proscribe different conduct. *Boulware*, 291 F.3d at 266. Section 2607(a) prohibits one settlement service provider from accepting any "fee, kickback, or thing of value" from another settlement service provider in exchange for the referral of business "pursuant to an agreement or understanding." Section 2607(b) is both narrower and broader. It is narrower because it reaches only "charges," and therefore would not prohibit the

[8] The United States argues that the Section 2607(a) phrase "pursuant to any agreement or understanding," not the phrase "No person shall give and no person shall accept," is what requires two culpable parties, and the absence of the former phrase from Section 2607(b) means that it can reach unilateral action. U.S. Br. 16. There is no evident reason this is so (and the brief does not explain the point in detail). Moreover, even if the United States is correct about Section 2607(a), the phrase "any portion, split, or percentage" is the functional equivalent in Section 2607(b) to the Section 2607(a) phrase "any agreement or understanding" in confirming that two culpable actors are required under both Sections.

giving and accepting of a "thing of value"—for example, services in-kind, such as free legal work pursuant to an express referral agreement. Section 2607(b) is, at the same time, broader because it prohibits one settlement service provider from paying an unearned fee to another settlement service provider even when there is no evidence (as would be required under Section 2607(a)) that the unearned fee is given in exchange for the referral of business. Thus, Section 2607(b) is a companion provision to Section 2607(a) allowing lawsuits and enforcement actions when the nature of the financial arrangement between two settlement service providers suggests a kickback but where an express referral arrangement is either nonexistent or may be difficult to prove. Sections 2607(a) and (b) are complementary, not redundant.

The United States contends that Section 2607(d) supports a single-person violator theory because it speaks of the "person or persons" who violate the statute. U.S. Br. 15. But Congress has repeatedly used both the singular and the plural in statutes that involve conduct requiring the participation of two or more persons. See, *e.g.*, 18 U.S.C. § 1963(a) ("whoever violates any [RICO] provision," and detailing penalties for "the person" and "such person"); 18 U.S.C. § 1511 (conspiracy statute imposing liability on "whoever" violates it); 18 U.S.C. § 1956 (liability for "any person who conspires"). Moreover, as originally enacted, Sections 2607(a) and 2607(b) had separate liability provisions which identically identified those subject to suit as "any person or persons who violate" the subsection. Pub.

L. No. 93-533, § 8(d), 88 Stat. 1724, 1728 (1974). Since Section 2607(a) always has required two culpable parties, the "person or persons" language that was carried through in a consolidating amendment to Section 2607(d) is no evidence that a single party can violate Section 2607(b). If any clue can be drawn from Section 2607(d), it is that Congress anticipated that all violations of Section 2607 would involve two culpable people, not one, since Section 2607(d) creates only "joint and several" civil liability.

2. The Fifth Circuit's construction finds additional purchase in RESPA's express "findings and purpose." 12 U.S.C. § 2601. Section (a) of that provision states:

> The Congress finds that significant reforms in the real estate settlement process are needed 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*.

(emphasis added). Section (b) of that same provision, stating the Act's purposes, then identifies the abusive practices Congress was intending to address:

> It is the purpose of this chapter to effect certain changes in the settlement

> process for residential real estate that will result—
>
> * * *
>
> (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services * * *

Nowhere did Congress indicate that it was enacting a sweeping federal prohibition against all supposedly unearned fees.

Petitioners and the United States argue that it would be more consistent with RESPA's consumer protection purposes to read Section 2607(b) as a broad unearned-fee prohibition. Pet. Br. 25–28; U.S. Br. 20–23. But "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Bd. of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986); see also *Dolan* v. *United States*, 130 S. Ct. 2533, 2547 (2010) ("'[N]o legislation pursues its purposes at all costs,' and 'it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'") (citation omitted). Congress spoke in precise terms here, using a series of words and phrases that each clearly show that it was intending to enact a limited, though important, provision that addresses only collusive conduct among providers; "the objective of a statute is not a warrant to disregard" those terms.

Mercado v. *Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985).

Moreover, the assumption that interpreting the statute as written is bad policy which will result in the charging of allegedly unearned fees, (Pet. Br. 26–27; U.S. Br. 20–23), fails to give credit to the balancing of approaches Congress took, including its decision to regulate primarily by requiring additional disclosures. This case illustrates the point. Petitioners freely agreed to pay the loan discount fees after the charges were disclosed to them, pursuant to RESPA, multiple times before closing. The fees were earned as a component of the price petitioners willingly paid in order to get the loans that they wanted. JA 63 (¶ 8), 64 (¶ 15), 104 (¶ 11).[9] Indeed, petitioners never sought rescission (a right that two of the three couples could have exercised within three days after closing, no questions asked, 15 U.S.C. § 1635), or otherwise claimed their loans were anything but reasonably priced.[10] Giving effect

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[9] Since the interest rate is a term of the loan, not a service, the payment of loan discount fees is not covered by RESPA. *Wooten* v. *Quicken Loans Inc.*, 626 F.3d 1187 (11th Cir. 2010), *cert. denied*, No. 11-43 (Oct. 3, 2011). The United States' lengthy argument to the contrary (U.S. Br. 28-30) never grapples with the fact there is no "service" involved in the setting of an interest rate (or in decreasing the rate). 626 F.3d at 1194-95.

[10] Much of the *amicus* brief filed by certain State Attorneys General amounts to nothing other than a series of suggestions as to why the law ought to be changed; while Quicken Loans strongly disagrees with *amici*'s comments about the effectiveness or the wisdom of RESPA, the brief is off point, for

to the plain meaning of Section 2607(b) does not leave consumers helpless, for when a lender such as Quicken Loans discloses a charge, "earned" or not, the consumer is well-equipped to take that information into account when choosing between the lender and its competitors.[11]

It is clear that Congress intended to take only a measured step in this complicated field. When it enacted RESPA in 1974, Congress directed HUD to report back to it in three to five years regarding "the necessity for further legislation in this area." RESPA, Pub. L. No. 93-533, § 14(a), 88 Stat. 1724, 1730 (1974) (Section repealed 1996). Among other things, Congress specifically asked HUD to consider whether "Federal regulation of the charges for real estate settlement services in federally related mortgage transactions is necessary and desirable." *Id.* In this way, Congress explicitly deferred consideration of more comprehensive measures for another time, after further study could be made of the issues. The admitted limitations on the steps Congress was taking provides important support for the limited construction made by the Fifth Circuit.

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the only issue in this case is what the statute was intended to mean when it was enacted in 1974.

[11] Quicken Loans provided evidence in the District Court that the loan discount fees were a component of the price, and so were earned. JA 63 (¶ 8), 64 (¶ 15), 104 (¶ 11). The United States' speculation that the fee was "duplicative" (U.S. Br. 32) is not to the contrary, for the brief does not even identify any fee it supposedly duplicated.

C. The History Of RESPA Shows That Section 2607(b) Was Meant To Forbid Only The Splitting Of Fees.

If the Court concludes that the words and context of Section 2607(b) do not fully answer the question in this case, the legislative history sheds a "reliable light" on Congress' understanding of the law at the time of its passage. *Exxon Mobil Corp*. v. *Allapattah Servs*., *Inc*., 545 U.S. 546, 568 (2005). In the history, the Court will find repeated and unequivocally-expressed intention that the sole reach of Section 2607(b) was to prevent fee collusion between two culpable providers.

1. Congressional concern over settlement costs traces its roots to 1970 when, as part of a bill to increase the availability of funds for mortgages, Congress directed HUD and the Veteran's Administration to prepare a study with recommendations for reducing and standardizing closing costs. Emergency Home Finance Act, Pub. L. No. 91-351, § 701(b), 84 Stat. 450, 462 (1970). In 1972, the resulting HUD-VA Report was issued within a month of a four-part, front-page *Washington Post* exposé on hidden kickback and referral payment arrangements among settlement providers in the Washington, D.C. area. HUD-VA, REPORT ON MORTGAGE SETTLEMENT COSTS (Mar. 1972); Ronald Kessler, *The Settlement Squeeze*, Parts I-IV, *Washington Post*, Jan. 9-12, 1972, § A, at 1. Both the HUD-VA Report and the *Post* articles highlighted the practice of settlement providers—particularly title companies—surreptitiously sharing portions of

borrower-paid fees with other settlement providers—typically lawyers.

2. About a month after the *Post* articles appeared, and the day after HUD Secretary George C. Romney's Congressional testimony on findings in the HUD-VA Report,[12] Representative Wright Patman, the Chairman of the House Banking Committee, introduced the "Real Estate Settlement Cost Reform Act of 1972." H.R. 13337, 92nd Cong. (Feb. 23, 1972). In line with the specific focus of the Report and the *Post* articles, Rep. Patman's bill (in relevant part) focused exclusively on prohibiting lawyers from receiving any commission for title insurance, out of a concern that attorneys were performing no services yet sharing in the fees title companies collected from consumers. See *id*. § 103(a) ("Prohibition Against Certain Attorneys Receiving Title Insurance Commissions").

A substitute bill eventually passed the House Banking Committee, which, for the first time, introduced the language prohibiting the giving or receiving of any "portion, split or percentage" of any charge for title insurance other than for services actually performed. H.R. 16704, 92nd Cong. (1972);

[12] Though the HUD-VA Report is post-dated, it was submitted to Congress prior to HUD Secretary Romney's February 22, 1972 testimony before a subcommittee of the House Banking Committee. *Real Estate Settlement Costs*, *FHA Mortgage Foreclosures*, *Housing Abandonment*, *And Site Selection Policies*, *Hearing On H.R. 13337 Before The Subcomm. On Housing Of The H. Comm. On Banking And Currency,* 92nd Cong. 20, 735 (1972).

H.R. Rep. 92-1429, at 88, 158 (Sept. 21, 1972). While expanding the provision beyond lawyers, the bill continued to focus only on the sharing of unearned moneys between settlement providers: "Any person who gives and any person who receives any portion, split or percentage of any or all charges for *title insurance* in connection with any real estate settlement involving a federally-related mortgage loan, other than for services actually performed in the issuance of such *title insurance*, shall be jointly and severally liable to the person or persons charged for the portion, split, or percentage in an amount equal to three times the portion, split or percentage." H.R. 16704, § 907 (emphasis added).

3. After this bill failed to pass the House in 1972, it was reintroduced there in 1973. The relevant portion of the 1973 version was expanded to apply to collusion regarding any settlement service fee, not just title insurance. H.R. 9989, 93rd Cong., § 106(b) (Aug. 3, 1973). A companion bill, with identical fee-splitting language, was introduced later in the Senate. S. 3164, 93rd Cong., § 7(b) (Mar. 13, 1974). Thus, the evolution of the bills—first addressing fees split between title companies and lawyers, then fees split between title companies and any other provider, and finally any settlement fees split between any settlement providers—reveals a consistent, and limited, purpose.

The House and Senate Committee Reports on the bills confirm that both Chambers intended Section 2607(b) to prohibit only undisclosed fee splits between providers. The Senate Report clearly identified Section 2607 as an anti-collusion measure aimed exclusively at interactions between service providers:

> Section [2607] is intended to prohibit all kickback or referral fee arrangements whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business. The section also prohibits a person or company that renders a settlement service from *giving or rebating any portion of the charge to any other person* except in return for services actually performed."

S. Rep. No. 93-866, at 5 (1974), 1974 U.S. Code Cong. & Admin. News 6546, 6551 (emphasis added). The House Committee Report contains the exact same statement on the scope of Section 2607. H.R. Rep. No. 93-1177, at 7 (1974). Both Reports then list representative prohibited acts, all of which involve the sharing of a fee between two settlement providers, including where "a title insurance company may give 10% or more of the title insurance premium to an attorney who may perform no services," and where "an attorney may give a portion of his fee to another attorney, lender or realtor who simply refers a prospective client to him." S. Rep. No. 93-866, at 5; H.R. Rep. No. 93-1177, at 7.[13]

[13] The final bill that passed both Chambers was S. 3164, which for Section 2607 purposes was identical to the House bill. Compare H.R. 9989, 93rd Cong., § 106(b) with RESPA, Pub. L. No. 93-533, § 9, 88 Stat. 1724, 1727-28 (1974).

The requirement of two culpable parties was also explicitly emphasized by the bill's sponsors in both Chambers. After the initial debate and passage of the House version, but before the passage of the final bill that came out of the Conference Committee, House sponsor Rep. Blackburn entered a written statement into the Congressional Record to emphasize (to members concerned about the scope of civil liability) that two settlement providers are required for a violation of Section 2607(b):

> The House Banking Committee report makes clear that [Section 2607(b)] was intended to deal only with fee-splitting arrangements among participants in the settlement process * * *
>
> When Section [2607(b)] says that no person shall give a portion of the fee to anyone else except for services actually performed, *it is clear that the word 'person' does not refer to the homebuyer or seller himself* who is purchasing a settlement service.

120 Cong. Rec. 29,442–43 (Aug. 20, 1974) (Written Statement of Rep. Blackburn) (emphasis added). See also 120 Cong. Rec. 6,586 (Mar. 13, 1974) (Statement of Sen. Brock, Senate sponsor) (Section 2607(b) intended to "prohibit any fee-splitting among persons who render settlement services").

4. Other aspects of the history further support the conclusion Section 2607(b) was intended to address only provider relationships, not direct charges. In enacting RESPA, Congress considered in

detail and expressly rejected the alternative that the amount of settlement service charges be determined and regulated by the government. That alternative was first laid before Congress in the Congressionally-mandated 1972 HUD-VA Report, which recommended the development and implementation of standards for fixing maximum charges for settlement costs. HUD-VA Report, at 3.[14] Senator William Proxmire introduced legislation, in direct competition for legislative favor with the bill that became RESPA, that would have required HUD to do just that. S. 2288, 93rd Cong. (July 1974); S. Rep. 93-866, at 2. The Proxmire proposal was seriously considered, and addressed directly in RESPA's Senate Report as a possible alternative to the bill ultimately enacted. S. Rep. 93-866, at 3.

Congress, however, rejected the rate regulation option, in favor of "regulat[ing] the underlying business relationships and procedures of which the costs are a function." S. Rep. 93-866, at 3. Instead of direct rate regulation, RESPA directed HUD to submit a report addressing "whether Federal regulation of the charges for real estate services * * * is necessary and desirable," and, if so, giving "a description and analysis of the regulation regime [HUD] believes Congress should adopt." Pub. L. No.

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[14] The 1970 statute which had commissioned the HUD-VA study gave HUD the authority to set limits on settlement costs for FHA and VA loans. Pub. L. No. 91-351, § 701(a), 84 Stat. 450, 461. Although HUD issued proposed rate regulations for six metropolitan areas, 37 Fed. Reg. 13,186 (July 4, 1972), the regulations never became effective.

93-533, § 14. HUD's report, issued in 1981, recommended the elimination of substantially all of RESPA in favor of a system of regulated, lender-packaged closing costs. HUD, REPORT TO CONGRESS ON THE NEED FOR FURTHER LEGISLATION IN THE AREA OF REAL ESTATE SETTLEMENTS, at IV-1 (Sept. 1981). Congress never adopted HUD's recommendation.

Congress' rejection of legislative attempts at settlement cost rate regulation, and its lack of further action after receiving HUD's 1981 follow-up report, further support the conclusion that the purpose of RESPA was not to regulate a wholly-retained charge by a single party, but instead to bring more transparency to the settlement process while at the same time regulating the "underlying business relationships" that lead to backroom kickbacks and fee splits.

5. In contrast to this detailed history, or perhaps because of it, petitioners do not discuss the legislative history. Pet. Br. 16–28. The government mentions it only in passing, citing two comments in the introductory parts of the committee reports that stated that RESPA addresses "kickbacks and unearned fees." U.S. Br. 23. But the reports' reference is equivocal, because Section 2607(b) under any view outlaws unearned fees of some sort, and so the citation does not answer the issue in this case.[15]

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[15] For the same reason, the label placed on Section 2607, "Prohibitions Against Kickbacks and Unearned Fees," does not point persuasively towards either party's position in this case. *But see* Pet. Br. 24, U.S. Br. 22.

It also provides no license to ignore the more specific expressions of intent contained in those same reports, and elsewhere, which compel the conclusion that Section 2607(b) was never intended to be a blanket unearned fee statute.

D. The Arguments For A Contrary Interpretation Of Section 2607(b) Are Unpersuasive.

1. Petitioners offer a panoply of arguments for reading Section 2607(b) to prohibit unearned undivided fees. They focus primarily on the phrase "any portion, split, or percentage." Pet. Br. 17–20. They argue that the phrase contemplates unilateral action by a service provider who receives all of the settlement service charge. As they point out, the words "portion" and "percentage" can, in limited circumstances, include the entirety of something. But that argument ignores the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U.S. 129, 132 (1993). The susceptibility of the words "portion" and "percentage" to alternative meanings "does not render the word[s] * * * whenever [they are] used, ambiguous." *Id*. at 131; *accord Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1066

(2009). The context here forecloses petitioners' inventive construction.[16]

The modifier "any" does not convert these three words connoting a division into words meaning the entirety of a thing. Putting "any" in front of them does not rob them of their common meaning, or make them ambiguous as the Second Circuit ultimately found. *Cohen*, 498 F.3d at 117. In normal English usage, which should control here, one would most naturally use the terms "any portion" or "any percentage" to refer to a part of something. *E.g.*, *DePierre* v. *United States*, 131 S. Ct. 2225, 2226 (2011) (adopting "[t]he most natural reading of" the statute); *Schindler Elevator Corp*. v. *United States ex rel*. *Kirk*, 131 S. Ct. 1885, 1892 (2011) (giving the text "its most natural reading").

Petitioners are not helped by Congress' use of the word "portion" in embezzlement statutes. Pet. Br. 13, 17. Those statutes, like the ones mentioned in *Cohen* forbidding a federal official from accepting "any portion of the money" from a person making a customs seizure, or a lender from collecting from a student "any portion of the interest" on a student loan payable by the government (498 F.3d at 118), all contemplate on their face the activity of a single person acting alone. As the Second Circuit was forced to acknowledge in *Cohen*, construing the word

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[16] That interpretation also should be rejected because it would render one of those two words surplusage. *Bd. of Trs. of Leland Stanford Junior Univ.* v. *Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011); *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001).

"portion" in those statutes as not proscribing the acceptance of "the whole of the moneys at issue * * * would appear to border on the absurd." *Id.* But the use of the word "portion" in these other statutes is irrelevant to the interpretation of the word "portion" when it appears in a statute contemplating two culpable actors ("no person shall give and no person shall accept") and when it is joined with the words "split" and "percentage."

Statutes that use the word "percentage" explicitly to include 100 percent, mentioned by the United States (U.S. Br. 18), are no more help to petitioners. Each of these statutes speaks of a "percentage" of something—*e.g.*, a contribution to a retirement fund (5 U.S.C. § 8348(g)), a vested right in accrued employer contributions to a pension plan (29 U.S.C. § 1053(a)(2)(A)(iii)), land planted to upland cotton eligible for a farm subsidy (7 U.S.C. § 1428(b)) – that typically changes over time and may reach 100%. These elaborate statutory schemes expressly involve different percentages prescribed at different times and, even if one of the enumerated percentages happens to be 100%, the fact remains that the word "percentage" in common usage normally means less than the entire amount. Section 2607(b) involves a single transaction and does not mention specific percentages, but instead uses the word "percentage" side by side with "split" and "portion," and thus the normal, everyday meaning of the word—"a part of a whole expressed in hundreds" (WEBSTER'S THIRD NEW INT'L DICTIONARY, 1675 (1993))—should be presumed to be the one Congress intended.

2. The United States contends that construing Section 2607(b) to apply only to transactions between service providers is "misconceived" because an initially lawful acceptance of a fee would become unlawful if the recipient then "shared the money with another culpable actor." U.S. Br. 15. The point does not go beyond the stylized example because the hypothetical plainly involves two transactions: the initial receipt of the fee that is earned (presumably, from the borrower) and the subsequent split of that fee into parts that are earned and unearned, with an unearned part given to and accepted by another. The second transaction is proscribed because that is precisely the misconduct against which the statute is aimed: it forbids the sharing of an unearned part with "another culpable actor." That the second transaction is illegal does not mean that the first was, or that the first somehow would be converted into an illegal transaction by what is later done with the money.

The United States also argues that no policy rationale exists for distinguishing joint from unilateral action under Section 2607(b). U.S. Br. 11. That is not so. In the context of this statute, unilateral conduct is different because it already is being regulated by RESPA's disclosure rules, whereas Section 2607 targets backroom deals not disclosed to the consumer. Like the Truth in Lending Act passed in the same era, the balance Congress struck in RESPA regulates the consumer-service provider relationship primarily through disclosure, including a required itemization of settlement service charges at the very start and at the very end of a real estate transaction. See 12 U.S.C. §§ 2604(c) (good faith estimate of charges), 2603(b) (closing statement). Empowered by this information, the consumer can react to unilateral pricing conduct by shopping, comparing, and negotiating. See HUD, *Looking For the Best Mortgage? Shop*, *Compare*, *Negotiate*. Section 2607 complements the disclosure regime by regulating "underlying business relationships" among providers that are not revealed on the HUD-1. S. Rep. 93-866, at 3. It is sensible in light of this overall regulatory structure not to turn Section 2607(b) into a substantive regulation on the direct relationship between borrowers and lenders.

3. Petitioners also dispute the Fifth Circuit's reading of the phrase "no person shall give and no person shall accept" as plainly requiring "an exchange or transaction, not a unilateral act." Pet. App. 7a, *quoted in* Pet. Br. 20. They embrace the Eleventh Circuit's ruling in *Sosa*, that the word "and" within the phrase unambiguously creates two separate provisions that may be violated independently. 348 F.3d at 982. Though the Eleventh Circuit in *Sosa* found that any contrary reading "rests on a misunderstanding of English grammar," *id.*—the four courts of appeal that read Section 2607(b) as requiring two culpable actors disagree with the conclusion. Pet. App. 7a; *Haug*, 317 F.3d at 836; *Krzalic*, 314 F.3d at 879; *Boulware*, 291 F.3d at 266. Even the courts of appeal favoring petitioners' position do not share the *Sosa* court's assertion the result is compelled by the rules of grammar. *Cohen*, 498 F.3d at 116–20; *Santiago* v.

GMAC Mortg. Group, Inc., 417 F.3d 384, 388 (3d Cir. 2005); *Kruse* v. *Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 58 (2d Cir. 2004).

The idea, advanced in *Sosa*, that a contrary construction that reads the law as requiring both a culpable giver and acceptor would lead to irrational results is also incorrect. The *Sosa* court postulated the situation in which someone tries to give a kickback, but the intended recipient refuses to accept it, and the court found it odd that the kickback offerror "would not have violated *subsection 8(b)*, because there was no culpable acceptor." *Sosa*, 348 F.3d at 983. But that result is not irrational at all, for failed attempts to give or receive unearned fees do not increase settlement charges.

E. Petitioners' Construction Is Disfavored For It Would Allow Direct Regulation Of What A Provider Could Charge, Which Every Court of Appeals Has Found Is Not Within The Reach Of RESPA.

Petitioners' proposed construction of Section 2607(b) is incorrect for the further reason that it would create liability for conduct that reaches far beyond wholly unearned charges. If it prohibits accepting a *wholly* unearned charge, because, as petitioners reason, Congress meant to outlaw all "unearned" fees, there seems little reason not to conclude that Section 2607(b) also prohibits imposing *any amount* of a charge that can be described as unearned. HUD has articulated precisely this view of Section 2607(b), finding "legally indistinguishable," and illegal, (1) "markups" (where one provider marks up another provider's invoice, while providing no further services), (2) "overcharges" (where a provider makes an unreasonable charge for services the provider supplies itself), and (3) unearned, undivided fees. 66 Fed. Reg. at 53,057. The statute cannot bear this construction, however, as every court to have considered the issue has concluded.

The courts of appeal are unanimous in holding (directly or by necessary implication) that Section 2607(b) does not regulate, or prohibit, overcharges.[17] As the Second Circuit explained in detail in *Kruse*, Section 2607(b) on its face does not provide for such regulation. As detailed above, history shows that Congress made a deliberate choice in 1974 to enact RESPA rather than competing proposals for direct price regulation, and commissioned HUD to study whether such regulation should be introduced in the future. 383 F.3d at 56–57. The unanimous view of the courts of appeal on this point all came in the face of HUD's contrary opinion that the unreasonable

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[17] *Martinez* v. *Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 554 (9th Cir. 2010); *Friedman* v. *Mkt. St. Mortg. Corp.*, 520 F.3d 1289, 1296 (11th Cir. 2008); *Santiago*, 417 F.3d at 387; *Kruse*, 383 F.3d at 56. The Fourth, Seventh, and Eighth Circuit decisions have considered alleged markups only but the courts speak interchangeably of markups and overcharges and the rationales of their rulings would reach overcharges as well as markups. *Haug*, 317 F.3d at 836; *Krzalic*, 314 F.3d at 879; *Boulware*, 291 F.3d at 265. Since the Fifth Circuit in the case at bar held that unilateral conduct is not reached by Section 2607(b), the necessary implication is that overcharges are also not reached by the law. Pet. App. 5a-6a.

portion of a provider's charge is "unearned," and prohibited, because (in HUD's view) Section 2607(b) is meant to outlaw all unearned fees.

That Section 2607(b) cannot reach overcharges logically leads to the conclusion that the Section also does not cover either markups or charges for allegedly unperformed services. Nothing in the language or history of Section 2607(b) illuminates any manner in which Congress might have meant to distinguish among the ways in which a service provider might unilaterally impose fees, outlawing some but permitting others. Rather, as discussed, the statute addresses that issue through requiring detailed and repeated fee disclosures.

The conclusion that Section 2607(b) does not reach unilateral conduct is underscored by the facts of the case at bar. It was admitted in the District Court that the loan discount fees at issue were part of the pricing of the loan for the terms petitioners selected. JA 54–55, 96–97. If petitioners are correct about the reach of the law, the District Court on remand will not be able to decide the ultimate question of whether each loan discount fee was "unearned" without deciding whether the total price charged to petitioners was, in each of the three instances, too high. Such an inquiry is wholly inconsistent with RESPA, and is precisely the kind of standardless, *post hoc* judicial ratemaking that the courts of appeal have rejected. *Martinez*, 598 F.3d at 554; *Friedman*, 520 F.3d at 1296; *Santiago*, 417 F.3d at 387; *Kruse*, 383 F.3d at 56.

If the statute applied to unilateral charges, every alleged markup or charge for unperformed services would present the question whether the provider actually performed services justifying compensation; for HUD, that means services that are substantial enough to meet its test of not being nominal or duplicative. 24 C.F.R. § 3500.14(c); 66 Fed. Reg. at 53,059. That in turn will lead to the "reasonableness" (or price control) inquiry that Congress did not intend.[18] Petitioners' construction embraces this type of inquiry, and is the wrong construction for that reason.

II.

IF SECTION 2607(b) IS AMBIGUOUS, IT SHOULD BE CONSTRUED NOT TO REACH UNDIVIDED CHARGES.

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[18] It will also lead to other results Congress could never have intended. In *Sosa*, after holding that an alleged markup of messenger fees was actionable under Section 2607(b), the court of appeals nonetheless affirmed the dismissal of the complaint because the court did "not believe that the borrowers could credibly" allege that the lender had performed no services because it had after all arranged for the messenger. 348 F.3d at 983. That analytical approach, which is likely to apply to every alleged mark-up and charge in unperformed services case, would mean that a charge of $10 for truly unperformed services would be illegal while a $90 fee for arranging for a $10 service is legal. That irrational outcome should not be ascribed to Congress.

A. The Fifth Circuit's Interpretation Is Well Supported And Consistent With The Rule of Lenity.

Even if the Court finds that Section 2607(b) is ambiguous in its reach, it should affirm the Fifth Circuit's decision (and that of a majority of the courts of appeal) that the statute only applies to conduct of two or more culpable actors. As the Fifth Circuit explained, and as further discussed herein, this interpretation finds support in multiple words and phrases contained in Section 2607(b), is most consistent with the larger context of RESPA and its other provisions, and is the only reading that finds any substantial support in legislative history. Section 2607(b) remains an effective provision under this construction, but one that is not broader than Congress intended.

Apart from these factors, the Court should resolve any ambiguity in favor of the Fifth Circuit's construction because limiting Section 2607(b) as the court did there is appropriate under the rule of lenity. A violation of Section 2607(b) carries the potential for criminal penalties in addition to civil liability. 12 U.S.C. § 2607(d)(1) (maximum penalty of one year imprisonment and $10,000 fine). If Section 2607(b) is indeed ambiguous, the rule of lenity requires the Court to construe the statute narrowly. *United States* v. *Bass,* 404 U.S. 336, 348 (1971) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."). That is so even when the issue arises in a civil case such as this one. *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325

(2011), *citing Leocal* v. *Ashcroft*, 543 U.S. 1, 12 n. 8 (2004).

Applying that rule, any ambiguity in Section 2607(b) as to whether it only reaches conduct by two culpable parties or reaches more broadly should be resolved in favor of the narrower construction. Under that construction, the Fifth Circuit's conclusion as to the proper scope of Section 2607(b) should be affirmed.

B. HUD's Regulatory Guidance Does Not Support Resolving Any Ambiguity In Section 2607(b) In Petitioners' Favor.

Petitioners contend that HUD has construed Section 2607(b) to apply to unilateral charges in two sources—HUD's RESPA regulation (known as Regulation X, 24 C.F.R. pt. 3500) and its Policy Statement—and further contend that both sources are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Pet. Br. 29–41. That is not correct. By its plain terms, Regulation X prohibits only unearned splits of fees, and so supports the Fifth Circuit's interpretation, not petitioners'. To the extent that either Regulation X or the Policy Statement read Section 2607(b) differently, they are not entitled to deference.

1. The text of Regulation X confirms the Fifth Circuit's interpretation of Section 2607(b). The part of the regulation that addresses Section 2607(b) provides HUD's own description of what it proscribes: "*No split of charges* except for actual services performed." 24 C.F.R. § 3500.14(c)

(emphasis added). This Court has previously looked to headings to guide its interpretive task, see *INS* v. *Nat'l Ctr. for Immigrants' Rights*, *Inc.*, 502 U.S. 183, 189 (1991), and here the heading strongly indicates that HUD viewed Section 2607(b) as applying only to "split[s] of charges," not to all unearned fees.

Other portions of Regulation X reinforce this interpretation. To take one telling example, Regulation X authorizes HUD to "investigate high prices to see if they are the result of a referral fee or a split of a fee," but does not mention mounting investigations into so-called unearned fees. 24 C.F.R. § 3500.14(g)(2). It is hard to imagine that HUD would have delineated its investigatory authority while omitting an entire class of conduct unless the agency did not believe that conduct (first-party charges) violated RESPA.

The final sentence of Section 3500.14(c) is consistent with the Fifth Circuit's interpretation as well. It provides that Regulation X's proscriptions may not "be avoided by creating an arrangement wherein the purchaser of services splits the fee." 24 C.F.R. § 3500.14(c). If all unearned first-party fees were prohibited under Regulation X, it would make little sense to specify that service providers may not "avoid[ ]" that prohibition by having the customer divide a third-party fee into unearned first-party fees. Unearned fees would be covered no matter how they were distributed. The sentence instead is an ancillary prohibition to prevent service providers from circumventing the rule, applicable to them, against "giv[ing]" an unearned portion of a fee to a third party by having the customer, rather than the provider, split, and then give, the fee.[19]

Petitioners nevertheless contend that Regulation X prohibits all unearned fees, because Section 3500.14(c) states, in the middle of the paragraph: "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." 24 C.F.R. § 3500.14(c). The quoted line cannot bear the weight petitioners place on it. The sentence stands as part of the section labeled "No split of charges," and has no further elaboration on its meaning. This context gives every indication that the sentence is not meant to be the type of sweeping rule petitioners advocate. An administrative agency, just like Congress, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes." *Whitman* v. *Am. Trucking Ass'ns*, *Inc.*, 531 U.S. 457, 467–68 (2001). If HUD had intended to give Section 2607(b) a wide application it surely would have afforded the issue more extensive treatment in the regulation.

The better view is that the quoted sentence was meant solely to clarify the statutory phrase of

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[19] Appendix B to Regulation X further undercuts petitioners' interpretation. The Appendix contains various illustrations designed to "provide additional guidance on the meaning and coverage of the provisions of RESPA." 24 C.F.R. pt. 3500, App'x B. Not *a single one* of the fourteen illustrations involves unilateral conduct.

Section 2607(b) that precedes it in the regulation's previous sentence, "charge * * * other than for services actually performed." RESPA and Regulation X contains no other explanation for what that phrase means. It is a natural reading of the regulation as intending to provide that definition, namely, a "charge * * * for which no or nominal services are performed or for which duplicative fees are charged."

The history of the 1992 amendment to Regulation X, when this language first appeared, confirms this reading. HUD indicated several times in the notice of proposed rulemaking and the preamble to the final regulation that it viewed Section 2607(b) as prohibiting only the splitting of fees other than for services actually performed.[20] The proposed version of the rule did not signal a different understanding; it merely parroted the statute. See 53 Fed. Reg. at 17,438. After reviewing the comments, HUD decided to "add[ ] some language clarifying what constitutes payment and services for purposes of Section [2607]." 57 Fed. Reg. at 49,605. That "clarifying" language to describe "what constitutes payment and services" included the sentence petitioners now highlight. That sentence simply describes the circumstances

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[20] See 57 Fed. Reg. 49,600 (Nov. 2, 1992) ("Section [2607] of RESPA * * * prohibits the splitting of a charge for a settlement service, other than for services actually performed (i.e., no payment of unearned fees")); 53 Fed. Reg. 17,424 (May 16, 1988) (same); *id.*, at 17,431 ("Section [2607](b) * * * prohibits splitting of charges"); *id.*, at 17,432 ("text of Section [2607](b)" prohibits "split of charges").

where a fee is considered unearned—*i.e.*, when "no or nominal services are performed" or when "duplicative fees are charged."[21]

2. Even had this sentence in Section 3500.14(c) been intended to prohibit unilateral conduct, it would not be entitled to deference under *Chevron*. The "ultimate question" under *Chevron* is "whether Congress would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority." *Long Island Care at Home*, *Ltd*. v. *Coke*, 551 U.S. 158, 173 (2007) (emphasis omitted). Here, Congress left no gap to fill: it spoke directly to the issue of what practices are prohibited under Section 2607(b). Whatever remaining ambiguity might conceivably be pointed to is not the type of ambiguity that invites agencies to fill the statutory interstices with their own expert policy judgments. See *Krzalic*, 314 F.3d at 883 (Easterbrook, J., concurring) ("Agencies' interpretive role stems from delegation of authority, not raw ambiguity."). *Compare, e.g.*, *Gonzales* v. *Oregon*, 546 U.S. 243, 258 (2006) (phrase was "ambiguous in the relevant sense" because it was "a generality, susceptible to more precise definition and

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[21] The example at 24 C.F.R. § 3500.14(g)(3), which petitioners cite as evidence in support of their interpretation, was likewise added to clarify what constitutes a payment for services rendered. The scenario corresponds to Illustration Four in Appendix B, which makes it clear that the lawyer in the example is splitting a fee with a separate entity, a title insurance company. See 24 C.F.R. pt. 3500, App'x B.

open to varying constructions"), with *Carcieri*, 129 S. Ct. at 1069 (Breyer, J. concurring) (where Congress "focused directly upon [the] language [at issue], believing it definitively resolved a specific underlying difficulty; and nothing in the history indicated that departmental expertise should play a role" in determining the meaning of the terms, agency's interpretation was "not entitled to *Chevron* deference, despite linguistic ambiguity") and *Barber* v. *Thomas*, 130 S. Ct. 2499, 2516 (2010) (Kennedy, J., dissenting) (similar). Defining the conduct Section 2607(b) prohibits calls for a legal judgment, not a policy judgment. There is consequently neither need nor warrant for the Court to defer to HUD's interpretation of Section 2607(b). See *Negusie* v. *Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part) ("Certain aspects of statutory interpretation remain within the purview of the courts, even when the statute is not entirely clear, while others are properly understood as delegated by Congress to an expert and accountable administrative body.").

Moreover, to the extent that Regulation X purports to set forth a new theory of liability under Section 2607(b), it is not binding on this Court because it is both procedurally defective and arbitrary and capricious. See *United States* v. *Mead Corp*., 533 U.S. 218, 227 (2001) (a regulation made pursuant to delegated lawmaking authority "is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute"). As noted above, the proposed version of Regulation X that introduced the language on which petitioners rely did not contain that sentence and the proposed rule otherwise gave no indication that HUD was considering an interpretation of Section 2607(b) that would apply the law to undivided fees. If the sentence really does what petitioners say it does, then the regulation was not "reasonably foreseeable" and so was procedurally defective. *Long Island Care at Home*, 551 U.S. at 175. Moreover, if petitioners are correct, HUD's failure to give any explanation for that interpretation of Section 2607(b) renders the regulation arbitrary and capricious. See *Judulang* v. *Holder*, 132 S. Ct. 476, 479, 483, n. 7 (2011) ("When an administrative agency sets policy, it must provide a reasoned explanation for its action."). These defects deprive Regulation X of binding legal force. At a minimum, this Court should not construe the regulation in a fashion that would require it to be struck down.

3. In marked contrast to Regulation X, HUD's 2001 Policy Statement clearly set forth the agency's position that Section 2607(b) applies to unilateral conduct. But the Policy Statement is not entitled to *Chevron* deference. As petitioners correctly recognize, "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." *Mead*, 533 U.S. at 226–27. The Policy Statement does not meet that test because it does not carry the force of law.

The Policy Statement was issued as an interpretation of Section 2607(b), explicitly labeled as "guidance," and without notice-and-comment procedures. 66 Fed. Reg. 53,052, 53,053. Petitioners are correct that the absence of notice-and-comment procedures is not by itself dispositive of whether the agency is taking an action with the force of law, but it is "significant * * * in pointing to *Chevron* authority." *Mead*, 533 U.S. at 230–31; *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 714 (2011). HUD was able to bypass notice-and-comment because the Administrative Procedure Act and HUD's own regulations exempt "interpretive rules." 5 U.S.C. § 553(b)(A); 24 C.F.R. § 10.1. See *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) ("an interpretive rule [is] 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'"), *quoting Chrysler Corp*. v. *Brown*, 441 U.S. 281, 302, n.31 (1979)). HUD's decision to bypass notice-and-comment procedures and instead issue a statement of policy has important implications.

Unlike substantive rules, interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Shalala,* 514 U.S. at 99; see also Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 432-33 (5th ed. 2010). Interpretive rules do not represent an exercise of "delegated lawmaking powers" entitled to *Chevron* deference. *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991). As the Court put it in *Mead*, "interpretive rules * * * enjoy no *Chevron* status as a class." 533 U.S. at 232.

See also, *e.g.*, *Long Island Care at Home*, 551 U.S. at 172 ("an 'interpretive' regulation * * * used, not to fill a statutory 'gap,' but simply to describe an agency's view of what a statute means * * * may 'persuade' a reviewing court, but will not necessarily 'bind' a reviewing court") (citations omitted); *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) ("interpretations contained in policy statements * * * do not warrant *Chevron*-style deference"). Having decided to issue an interpretation rather than promulgate a regulation, HUD chose for the interpretation not to carry the force of law.

The statutory provision authorizing the Secretary of HUD to issue "interpretations" of RESPA does not alter that conclusion. 12 U.S.C. § 2617(a). As an initial matter, this particular interpretation was issued and signed by an Assistant Secretary (66 Fed. Reg. 53,052, 53,059), and so does not gain any special authority from Section 2617(a).[22] Moreover, even if it qualifies under that provision, *Chevron* deference attaches only to the exercise of delegated *lawmaking* authority, on the theory that expert agencies are better situated than courts to make the policy judgments that necessarily arise during lawmaking. *Mead*, 533 U.S. at 232–33; *Chevron*, 467 U.S. at 843–44. The Policy Statement is plainly not an exercise

[22] See David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 236 (2001); see also *Keys v. Barnhart*, 347 F.3d 990, 994 (7th Cir. 2003) ("it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions").

of delegated lawmaking authority; rather, in HUD's own words, it is "guidance" and a "formal pronouncement of [HUD's] interpretation of relevant statutory and regulatory provisions." 66 Fed. Reg. at 53,052.

A grant of interpretive authority does not imply that Congress intended for the agency's interpretations to have the force of law. The Attorney General, for instance, has a broad grant of interpretive authority, see 28 U.S.C. §§ 511–13, 521, yet his opinions on legal matters do not ordinarily receive *Chevron* deference. See, *e.g.*, *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment); *United States* v. *Project on Gov't Oversight*, 616 F.3d 544, 551 (D.C. Cir. 2010). Without more, an express grant to an agency to do what agencies otherwise do—interpret the statutes they administer—should not be construed to grant power to make law without process.

But petitioners contend that there is more, suggesting that Congress expected that interpretations by HUD in policy statements would carry the force of law because 12 U.S.C. § 2617(b) shields from liability parties who act "in good faith in conformity with any rule, regulation, or interpretation [of RESPA] by the Secretary or the Attorney General." Pet. Br. 36. The argument has it exactly backwards. If Congress intended that HUD's interpretations would *be* the law, it would not have been necessary to provide immunity for good faith compliance with them. Indeed, by limiting such immunity only to delineated circumstances, *i.e.* where the party has actually relied, in good faith, Congress clearly understood that some interpretations would turn out not to be the law. The Section is best understood as what it is: a fairness principle granting a safe harbor, to ensure that if a person or provider actually relies on an official interpretation, she or it has a good defense against the government (notwithstanding the bar on estoppel) and against a private party.[23]

4. HUD's views expressed in the Policy Statement are not persuasive, and so not deserving of deference on a lesser standard than *Chevron*'s.

The Policy Statement goes to great lengths to portray its interpretation as one of long standing, seeking the patina often given well-worn administrative approaches. Petitioners rely on this consistent interpretation argument to otherwise support their reading of the law. Pet. 15. As an initial matter, even had HUD been consistent over the years, it would have been consistently wrong.

[23] *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 567–68 (1980), construing a similar provision in the Truth in Lending Act, concluded that creditors who had not disclosed certain rebate practices had a good defense in private litigation because the conduct had been approved by the Federal Reserve. It does not control the construction of RESPA here, not only because the case preceded much of the modern law as to administrative deference, but because it primarily concerned an administrative interpretation of the Federal Reserve's own regulations and the Court found of especial significance that the agency was directly involved in the creation of the law and had been delegated "broad administrative lawmaking power" by Congress to define the scope, extent and content of disclosures. *Id.*

Public Employees Ret. Sys. v. *Betts,* 492 U.S. 158, 170-71 (1989) ("Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.").

In any case, HUD's interpretive position has been far from unwavering. As discussed, the only notice-and-comment regulation implementing Section 2607(b) labels the section exactly as we would: "No split of charges except for actual services performed." As the Seventh Circuit noted, the heading "expresses clearly that HUD did not attempt to expand liability past situations involving fee splitting between the fee collector and a third party." *Echevarria* v. *Chicago Title & Trust Co.*, 256 F.3d 623, 628 (7th Cir. 2001). The explanation accompanying the regulation, both as proposed and in final form, also adopted this narrow reading of the Section (53 Fed. Reg. at 17,424, 17,431, 17,432), as did HUD in its congressionally-mandated report to Congress on RESPA's implementation. 1981 HUD REPORT, at I-15. The indications of consistency identified in the Policy Statement or in the briefs of petitioners and the United States, including letters, booklets, reports of the HUD Inspector General (which is independent of HUD), website FAQs, withdrawn interpretations, and Federal Register notices for regulations never fully implemented, do not show a clearly-defined position at the agency. For example, the oldest of these sources describes the prohibitions of Section 2607 as "aimed primarily at" kickbacks. 41 Fed. Reg. 20,280, 20,289 (May 14, 1976). In examining many of these authorities prior to the Policy Statement, the Seventh Circuit found that HUD had not committed to the position that Section 2607(b) addresses all unearned fees. *Echevarria,* 256 F.3d at 628.

When the Policy Statement actually explains why its interpretation is correct, its analysis is "perfunctory," as the court observed in *Krzalic*: "[HUD] gives no reason except that HUD has always regarded [marked up] fees as forbidden by the statute, though previously it had failed to make this clear. No evidence or interpretive methodology is mentioned; no abuse pointed to that might justify the contorted interpretation urged by HUD." *Krzalic*, 314 F.3d at 881 (Posner, J.); see also *id*. 883 (Easterbrook, J., concurring). Apart from its reliance on itself, HUD does articulate the view that the word "or" in the phrase "any portion, split, or percentage," causes it to conclude that Section 2607(b) "forbids the paying or accepting of any portion or percentage of a settlement service [charge]—including up to 100%—that is unearned," even if the entire charge "is retained by a single person." 66 Fed. Reg. at 53,058. The point is but a variation on petitioners' theme that the words portion and percentage can mean all, and so is equally unpersuasive for the reasons discussed above.

Petitioners attempt to bolster the Policy Statement by pointing out it was issued formally through the Federal Register by or for statutorily-described officials. But petitioners are simply wrong when they say this means the agency's position as to Section 2607(b) was "developed in a formal and deliberative process." Pet. Br. 36. No such "process" is revealed in the Statement itself and there was no advance notice or proposal suggesting a process ever occurred as to that part of the Statement. See *Krzalic*, 314 F.3d at 881 ("One fine day the policy statement simply appeared in the Federal Register").[24]

Petitioners' remaining arguments contending that the Policy Statement is persuasive do not add to its force. Petitioners contend that HUD has expertise in the settlement service field, but that point is of limited support because subject-matter agencies always meet that test. Finally, the argument that the agency's construction should be obeyed because Congress acquiesced in it fails because, as discussed above and this Court is aware, HUD's interpretation of Section 2607(b) and that of the federal courts have been inconsistent at best.

5. Petitioners and the government suggest in passing that the Policy Statement is entitled to deference because it authoritatively interprets Regulation X. Pet. Br. 31; U.S. Br. 26 (citing *Auer* v. *Robbins*, 519 U.S. 452 (1997)). That is wrong for three reasons. First, the Policy Statement is not primarily an interpretation of Regulation X. Rather, the Statement concentrates on the statute, and

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[24] In marked and instructive contrast, the Policy Statement also addresses the legality under Section 2607(a) of certain payments to mortgage brokers, and is stated to be a clarification of an earlier policy statement which had been issued at Congressional direction and only after "HUD worked with industry groups, federal agencies, consumer groups and other interested parties in collectively producing" that statement. 66 Fed. Reg. at 53,052-53.

purports to interpret the law. *Auer* simply is not implicated.

Second, so-called *Auer* deference is unwarranted when the agency's current interpretation "runs counter to the 'intent at the time of the regulation's promulgation.'" *Gonzales*, 546 U.S. at 258 (quoting *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994)). The relevant portion of Regulation X was intended to "clarify[ ] what constitutes payment and services for purposes of Section [2607]," not to address the issue of unilateral conduct. 57 Fed. Reg. at 49,605. HUD itself limited the regulatory reach of the section to "No split of charges."

Finally, HUD's interpretation of Regulation X is not entitled to deference because Regulation X gives little instruction on the central issue in this case: whether Section 2607(b) reaches undivided unearned charges. *Cf. Gonzales*, 546 U.S. at 257. HUD cannot "under the guise of interpreting a regulation * * * create *de facto* a new regulation." *Christensen*, 529 U.S. at 588. If HUD's interpretation warrants *Auer* deference, it would confirm widespread fears that *Auer* "encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); see also *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 654–80 (1996). The agency cannot smuggle a radical new interpretation of Section 2607(b), a section that carries criminal penalties, no less, into a regulation that plainly was not designed for that purpose. *Auer* does not require the Court to agree that the government may employ such a tactic here; to the extent the *Auer* principles suggest that it should, the Court should limit or overrule that case.

CONCLUSION

The Court should affirm the judgment of the Fifth Circuit.

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