No. 10-1042

In the Supreme Court of the United States

TAMMY FORET FREEMAN, ET AL., PETITIONERS

v.

QUICKEN LOANS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Real Estate Settlement Procedures Act of 1974 provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. 2607(b). The question presented is as follows:

Whether, to establish a violation of Section 2607(b), a plaintiff must demonstrate that an unearned fee for a real estate settlement service was divided between two or more persons.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 9
A. The court of appeals erred in holding that 12 U.S.C. 2607(b) prohibits only unearned fees that are shared by two or more parties 9
B. The circuits are squarely in conflict regarding the interpretation of 12 U.S.C. 2607(b), and this case is a suitable vehicle for resolving the conflict . . . 15
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Barnhart v. *Walton*, 535 U.S. 212 (2002) 14
Boulware v. *Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2002) 7, 15
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 14
Cohen v. *JP Morgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007) 7, 15, 16
Echevarria v. *Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001) 4
Friedman v. *Market St. Mortgage Corp.*, 520 F.3d 1289 (11th Cir. 2008) 20
Haug v. *Bank of Am., N.A.*, 317 F.3d 832 (8th Cir. 2003) 7, 15
Kruse v. *Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004) 7, 14, 16, 20
Krzalic v. *Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002), cert. denied, 539 U.S. 958 (2003) 7, 15

Cases—Continued: Page

Martinez v. *Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549 (9th Cir. 2010) 20

McNeill v. *United States*, 131 S. Ct. 2218 (2011) 11

Oncale v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) 12

Pennsylvania Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998) 12

Santiago v. *GMAC Mortgage Group, Inc.*, 417 F.3d 384 (3d Cir. 2005) 7, 13, 15, 16, 20

Sosa v. *Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (11th Cir. 2003) 7, 9, 10, 15, 16

United States v. *Comstock*, 130 S. Ct. 1949 (2010) 19

United States v. *Graham Mortgage Corp.*, 740 F.2d 414 (6th Cir. 1984) 17, 18

United States Nat'l Bank v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993) 12

Wooten v. *Quicken Loans, Inc.*, 626 F.3d 1187 (11th Cir. 2010), petition for cert. pending, No. 11-43 (filed July 6, 2011) 19

Constitution, statutes and regulations:

U.S. Const. Art. III 2

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376:

§ 1061(b)(7), 124 Stat. 2038 3

§ 1061(d), 124 Stat. 2039 3

§ 1062, 124 Stat. 2039-2040 3

§ 1098, 124 Stat. 2103-2104 3

§ 1100H, 124 Stat. 2113 3

Statutes and regulations—Continued: Page

Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 908(a), 106 Stat. 3873 (12 U.S.C. 2602(3)) 18
Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq.* 1
§ 8, 88 Stat. 1727 12
§ 8(b), 88 Stat. 1727 12
12 U.S.C. 2601(a) 1
12 U.S.C. 2601(b) 12
12 U.S.C. 2601(b)(2) 12
12 U.S.C. 2602(1) 2
12 U.S.C. 2602(3) 19
12 U.S.C. 2603(a) 5, 19
12 U.S.C. 2607 .... 1, 4, 12
12 U.S.C. 2607(a) 1, 2, 8, 10, 13, 15
12 U.S.C. 2607(b) .... *passim*
12 U.S.C. 2607(c)(1) 13
12 U.S.C. 2607(c)(2) 13
12 U.S.C. 2607(d) 2
12 U.S.C. 2607(d)(1) 2
12 U.S.C. 2607(d)(2) 2
12 U.S.C. 2607(d)(4) 2
12 U.S.C. 2610 12
12 U.S.C. 2617(a) 2, 14, 15
1 U.S.C. 112 12
1 U.S.C. 204(a) 12

Regulations—Continued: Page

24 C.F.R.:
Pt. 3500 3
Section 3500.2(b) 18
Section 3500.4(a)(1)(ii) 3, 14
Section 3500.8 5
Section 3500.14(c) 4, 11, 14
App. A 5, 18, 19
40 Fed. Reg. 22,456 (1975) (24 C.F.R. Pt. 82, App. A (1976)) 17

Miscellaneous:

41 Fed. Reg. (1976):
p. 20,284 17
p. 20,289 3
57 Fed. Reg. 49,604 (1992) 3, 14
61 Fed. Reg. 29,249 (1996) 4
66 Fed. Reg. (2001):
p. 53,057 . . . . . . 4, 5
p. 53,058 . . . . . . 5, 11, 14
76 Fed. Reg. (2011):
p. 43,570 3
p. 43,571 3
H.R. Rep. No. 1177, 93d Cong., 2d Sess. (1974) 14
H.R. Rep. No. 760, 102d Cong., 2d Sess. (1992) 18
S. Rep. No. 866, 93d Cong., 2d Sess. (1974) 13

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. a. Congress enacted the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, to ensure that "consumers * * * 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." 12 U.S.C. 2601(a). To that end, RESPA includes a "[p]rohibition against kickbacks and unearned fees." 12 U.S.C. 2607. Subsections (a) and (b)

of Section 2607 establish distinct prohibitions on abusive conduct related to the provision of real estate settlement services.

Section 2607(a) of Title 12 addresses kickbacks and provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. 2607(a). Section 2607(b) addresses unearned fees and 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.

12 U.S.C. 2607(b).[1]

Congress authorized the Department of Housing and Urban Development (HUD) to administer RESPA. Section 2617(a) authorized HUD to "prescribe such rules and regulations" and "make such interpretations" as are "necessary to achieve the purposes of [RESPA]."[2]

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[1] The criteria for identifying "federally related" mortgage loans are set forth in 12 U.S.C. 2602(1).

[2] Congress authorized enforcement of Section 2607 through, *inter alia*, criminal prosecutions and HUD actions for injunctive relief. 12 U.S.C. 2607(d)(1) and (4). Private parties may also bring actions for damages to remedy kickback and unearned-fee violations. 12 U.S.C. 2607(d)(2). The Court has granted certiorari on the question whether a private Section 2607(d) plaintiff has standing to sue under Article III

HUD's regulations promulgated under that authority are codified at 24 C.F.R. Pt. 3500. Under 24 C.F.R. 3500.4(a)(1)(ii), policy statements published by HUD in the *Federal Register* are also "official interpretations" of RESPA "upon which the public may rely." 57 Fed. Reg. 49,604 (1992).

On July 21, 2011, HUD's consumer protection functions relating to RESPA were transferred to the Consumer Financial Protection Bureau (the Bureau). See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061(b)(7) and (d), 1062, 1098, 1100H, 124 Stat. 2038, 2039-2040, 2103-2104, 2113. On the same date, the Bureau issued a notice stating that it would enforce HUD's RESPA regulations, 24 C.F.R. Pt. 3500, and that, pending further Bureau action, it would also apply HUD's previously issued official policy statements regarding RESPA. 76 Fed. Reg. 43,570, 43,571 (2011).

b. HUD consistently interpreted Section 2607(b) to prohibit all unearned fees, regardless of whether those fees are divided between two or more people. For example, HUD's 1976 consumer information booklet explained that, in addition to RESPA's prohibition of kickbacks, "[i]t is also illegal to charge or accept a fee or part of a fee where no service has actually been performed." 41 Fed. Reg. 20,289 (1976). In 1992, after notice-and-comment rulemaking, HUD adopted a regulation stating that "[a] charge by a person for which no or nominal services are performed or for which duplica-

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in the absence of a claim that the alleged RESPA violation affected the price, quality, or other characteristics of the settlement services provided. See *First Am. Fin. Corp.* v. *Edwards*, No. 10-708, cert. granted, No. 10-708 (June 20, 2011). That standing question is not implicated in this case.

tive fees are charged is an unearned fee and violates [Section 2607]." 24 C.F.R. 3500.14(c). HUD reiterated that interpretation in other rulemakings. See, *e.g.*, 61 Fed. Reg. 29,249 (1996) ("[N]o person is allowed to receive 'any portion' of charges for settlement services, except for services actually performed. * * * [T]wo persons are not required for [Section 2607(b)] to be violated.").

In 2001, in response to the Seventh Circuit's decision in *Echevarria* v. *Chicago Title & Trust Co.*, 256 F.3d 623 (2001), HUD issued a policy statement indicating that HUD "specifically interprets [Section 2607(b)] as not being limited to situations where at least two persons split or share an unearned fee." 66 Fed. Reg. 53,057.[3] The policy statement gave four non-exclusive examples of unearned fees:

> (1) [t]wo or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one settlement service provider charges the consumer a fee where no, nominal, or duplicative work is done, or [(4)] the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

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[3] In *Echevarria*, the Seventh Circuit held that Section 2607(b) is violated only when two or more parties split an unearned fee. 256 F.3d at 626-627. The court suggested, however, that it might reconsider its holding in a future case if HUD were to make "a formal commitment * * * to an opposing position." *Id.* at 630.

Ibid. The policy statement explained that, because the "proscription [in Section 2607(b)] against 'any portion, split, or percentage' of an unearned charge for settlement services is written in the disjunctive, the prohibition is not limited to a split." *Id.* at 53,058. Thus, 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, whether the entire charge is divided or split among more than one person or entity or is retained by a single person." *Ibid.*

RESPA also required HUD, in consultation with certain other federal officials, to "develop and prescribe a standard form for the statement of settlement costs," which "shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement." 12 U.S.C. 2603(a). To carry out that statutory mandate, HUD developed a "[u]niform settlement statement" known as the "HUD-1" form. That form requires disclosure, "[f]or each separately identified settlement service in connection with the transaction," of "the name of the person ultimately receiving the payment" and "the total amount paid to such person." 24 C.F.R. Pt. 3500, App. A; see 24 C.F.R. 3500.8.

2. Petitioners obtained mortgage loans from respondent Quicken Loans, Inc. Petitioners contend that respondent charged them fees for which no services were provided, in violation of Section 2607(b). Specifically, the Freemans and the Bennetts allege that they were charged loan discount fees of $980 and $1100, respectively, but that respondent did not give them lower interest rates in return. Pet. App. 20a-21a & n.2, 22a & n.6. The Smiths allege that they were charged a loan origination fee of more than $5100 that was duplicative

of the loan processing fee that they were also charged; or, alternatively, that the $5100 charge was a loan discount fee for which they did not receive a lower interest rate. *Id.* at 21a-22a & n.4.

Petitioners filed separate actions in state court. Respondent removed the suits to federal court, where the cases were consolidated. Pet. App. 3a. Respondent moved for summary judgment on the ground that petitioners' claims are not cognizable under Section 2607(b) because the allegedly unearned fees were not split with another party. *Id.* at 23a-24a.

3. The district court granted summary judgment for respondent. Pet. App. 19a-70a. The court noted that "several circuit courts have split on the issue of whether Section [2607(b)] provides a claim in a situation where a *single* settlement services provider retains unearned fees." *Id.* at 43a. After reviewing those decisions, the court concluded that "the plain language of Section [2607(b)] requires an allegation that the challenged fees have been split in some fashion." *Id.* at 66a (emphasis omitted). Because petitioners did not contend that respondent had split the allegedly unearned loan discount fees with another party, *id.* at 66a, 69a, the court concluded that no violation of Section 2607(b) had occurred, *id.* at 67a, 69a.

4. The court of appeals affirmed. Pet. App. 1a-15a.

a. The court of appeals explained that the circuits are in conflict on the question whether Section 2607(b) prohibits a settlement service provider from marking up the charge for a settlement service provided by a third party, furnishing no additional service, and retaining the entire amount of the mark-up. Pet. App. 6a. The Fourth, Seventh, and Eighth Circuits have held that Section 2607(b) "requires two culpable parties, a giver

and a receiver of the unlawful fee, rendering mark-ups by a sole services provider not actionable." *Ibid.* (citing *Boulware* v. *Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2002); *Krzalic* v. *Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002), cert. denied, 539 U.S. 958 (2003); *Haug* v. *Bank of Am., N.A.*, 317 F.3d 832 (8th Cir. 2003)). In contrast, "[t]he Second, Third, and Eleventh Circuits have rejected the two-party requirement and held that RESPA [Section 2607(b)] prohibits mark-ups." *Ibid.* (citing *Kruse* v. *Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004); *Santiago* v. *GMAC Mortgage Group, Inc.*, 417 F.3d 384 (3d Cir. 2005), *Sosa* v. *Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (11th Cir. 2003)).

The court of appeals further explained that the Second Circuit has specifically addressed the question whether Section 2607(b) prohibits a settlement service provider from simply charging and collecting an unearned fee (rather than marking up a fee that was actually earned by someone else). Pet. App. 6a (citing *Cohen* v. *JP Morgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007)). The court noted that the Second Circuit in *Cohen* had held such conduct to be covered. See *ibid.* The court assumed that the Fourth, Seventh, and Eighth Circuits, which require two culpable actors even in the context of a mark-up, "would not find undivided unearned charges actionable." *Id.* at 6a-7a.

The court of appeals concluded that Section 2607(b) does not cover undivided, unearned fees. Pet. App. 7a. First, the court stated that the language of Section 2607(b)—"[n]o person shall give and no person shall accept"—indicates that Congress was "aiming at an exchange or transaction, not a unilateral act." *Ibid.* (quoting *Boulware*, 291 F.3d at 266). Second, the court ex-

plained that the anti-kickback provision of RESPA, which provides that "[n]o person shall give and no person shall accept" a kickback, see 12 U.S.C. 2607(a), "clearly requires two culpable actors." Pet. App. 8a. The court inferred that, to be consistent with that provision, Section 2607(b) "should require two culpable actors as well." *Ibid.* Third, the court determined that the language "any portion, split, or percentage" in Section 2607(b) "requires that two parties share something," because "[t]he definitions of all three words require less than 100% or the whole of something." *Id.* at 8a-9a. Finally, the court explained that, "when read in its entirety, RESPA is an anti-kickback statute." *Id.* at 10a. The court noted that the statute's "purpose" section "explicitly and exclusively prohibits kickbacks and referral fees," but does not mention "a general prohibition on * * * unearned fees or other forms of price abuse." *Ibid.* (emphasis omitted).

The court of appeals concluded that because Section 2607(b) is "clear on its face," it had "no need to look to any regulatory interpretation, such as the HUD 2001 [policy] statement." Pet. App. 12a. The court also stated that the HUD policy statement did not have the "force of law" because it was not adopted through notice-and-comment rulemaking, and that the court found the policy statement "unpersuasive" in any event. *Id.* at 13a.

b. Judge Higginbotham dissented. Pet. App. 15a-18a. He concluded that the phrase "any portion, split, or percentage of any charge . . . other than for services actually performed" is ambiguous with respect to Congress's intent to prohibit unearned, undivided fees. *Id.* at 17a. In his view, "[p]rohibiting such fees strikes at a core objective of RESPA: promoting transparency of

costs associated with settlement" and "reducing abuses by those in the mortgage industry through charging borrowers fees for work not actually performed." *Ibid.* Judge Higginbotham further explained that adopting this interpretation "would not lead * * * to a rate-setting regime" because "the reasonable fee for nothing is nothing," and thus "[w]hen the fee is entirely unearned, the court is not forced to determine the reasonableness of a fee." *Id.* at 17a-18a.

DISCUSSION

The court of appeals' decision is inconsistent with RESPA and with HUD's longstanding regulations and policy statement interpreting Section 2607(b), which the Bureau has adopted. The decision also implicates and deepens an entrenched conflict among the courts of appeals. The Court should grant the petition for a writ of certiorari and resolve this important issue so that RESPA will be enforced uniformly nationwide.

A. The Court Of Appeals Erred In Holding That 12 U.S.C. 2607(b) Prohibits Only Unearned Fees That Are Shared By Two Or More Parties

1. The court of appeals erred in concluding that a violation of Section 2607(b) requires "two parties each committing [a prohibited] act." Pet. App. 7a. The statutory text, which provides that "[n]o person shall give and no person shall accept" any unearned settlement charges, 12 U.S.C. 2607(b), prohibits two separate actions: giving an unearned fee, and accepting an unearned fee. As the Eleventh Circuit explained in *Sosa* v. *Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (2003), "[g]iving a portion of a charge is prohibited regardless of whether there is a culpable acceptor, and accepting a

portion of a charge is prohibited regardless of whether there is a culpable giver." *Id.* at 982.

In construing Section 2607(b), the court of appeals relied in part on RESPA's anti-kickback provision (12 U.S.C. 2607(a)), which contains the same "[n]o person shall give and no person shall accept" language, and which "clearly requires two culpable actors." Pet. App. 8a. The court's reliance on Section 2607(a) was misconceived. Section 2607(a) prohibits the payment and acceptance of "any fee, kickback, or thing of value *pursuant to any agreement or understanding* * * * that business * * * shall be referred to any person." 12 U.S.C. 2607(a) (emphasis added). It is the language italicized above, rather than Section 2607(a)'s "[n]o person shall give and no person shall accept" language, that specifically requires two culpable parties. Section 2607(b), by contrast, simply prohibits giving or accepting "any charge * * * for the rendering of a real estate settlement service * * * other than for services actually performed," without reference to any "agreement or understanding." Such conduct does not necessarily require two or more participants. See *Sosa*, 348 F.3d at 981-982 (explaining that Section 2607(b) is intended "to close any loopholes," and that, "[r]ead together, [Sections 2607(a) and 2607(b)] create a broad prohibition against fees that serve solely to increase the cost of settlements to consumers.").

2. The court of appeals was also wrong in reading Section 2607(b)'s reference to "any portion, split, or percentage of any charge," 12 U.S.C. 2607(b), to "require[] that two parties share something." Pet. App. 8a. Although common usage suggests that a "split" of a charge is a fee shared by two or more persons, the terms "portion" and "percentage" do not necessarily have the same

connotation. As HUD explained in its policy statement, RESPA's reference to any "portion" or "percentage" of an unearned settlement service charge "includ[es] up to 100% * * * whether the entire charge is divided or split among more than one person or entity or is retained by a single person." 66 Fed. Reg. at 53,058. Congress's use of the broad term "any" portion, split, or percentage supports this interpretation. Thus, under HUD's longstanding RESPA regulations, "[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 [Section 2607(b)]." 24 C.F.R. 3500.14(c).

The court of appeals' interpretation would lead to absurd results. See *McNeill* v. *United States*, 131 S. Ct. 2218, 2223 (2011) (courts should avoid absurd results when interpreting statutes). Under that approach, for example, Section 2607(b) would be violated when a lender charges a borrower $250 for a title search provided by a third party for $200, and the lender and third party split the $50 unearned fee. However, if the lender keeps the entire $50 unearned fee, the court of appeals would find no violation. And if the lender collects $250 from the borrower for a title search and no title search is performed at all, the court of appeals would likewise conclude that no violation had occurred. Given the statute's prohibition of accepting "any portion, split, or percentage of any charge * * * other than for services actually performed," 12 U.S.C. 2607(b), Congress could not have intended such disparate outcomes.

3. Contrary to the court of appeals' suggestion (Pet. App. 10a), RESPA is not exclusively an anti-kickback statute. Although Congress identified "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services" as one

of RESPA's purposes, 12 U.S.C. 2601(b)(2), Section 2607(a)'s ban on kickbacks is only one of the prohibitions the statute imposes. If Congress's statement of purposes were treated as exhaustive, other substantive provisions of RESPA—such as the prohibition of fees for preparing truth-in-lending statements, 12 U.S.C. 2610—would be unenforceable because they are not specifically listed among the statute's purposes in Section 2601(b). Congress's own characterization of Section 2607 in its title, "Prohibition against kickbacks and unearned fees," Real Estate Settlement Procedures Act of 1974 (RESPA), Pub. L. No. 93-533, § 8, 88 Stat. 1727, reinforces the conclusion that RESPA is not exclusively "an anti-kickback statute," Pet. App. 10a.[4]

This Court has repeatedly explained that the omission of particular conduct from a statute's "purpose" section is "irrelevant" when the statute's operative provisions unambiguously address such conduct. *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998); see also *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). Section 2607(b) unambiguously addresses conduct broader than "kickbacks" and

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[4] The title of Section 2607(b), "Splitting charges," does not appear in the Statutes at Large. See RESPA, § 8(b), 88 Stat. 1727. Because Title 12 of the United States Code has not yet been "enacted into positive law," 1 U.S.C. 204(a), the Statutes at Large provide the "legal evidence of laws," 1 U.S.C. 112. Thus, contrary to respondent's suggestion (Br. in Opp. 5-6), the title of Section 2607(b) in the United States Code is due no weight. See *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993).

"referral fees": it prohibits charges "other than for services actually performed." 12 U.S.C. 2607(b); see *Santiago* v. *GMAC Mortgage Group, Inc.*, 417 F.3d 384, 389 (3d Cir. 2005) (Section 2607(a) applies to kickbacks, whereas Section 2607(b) applies to "a situation other than kickbacks").[5]

The court of appeals was also wrong in stating that RESPA's legislative history cannot "be fairly read to cover undivided [unearned] fees." Pet. App. 11a n.9. The court below relied on the Senate Report's statement that Section 2607 "is intended to prohibit all kickbacks or referral fee arrangements." *Ibid.* (emphasis omitted) (quoting S. Rep. No. 866, 93d Cong., 2d Sess. 1 (1974) (Senate Report)). The Senate Report states that one of the purposes of the bill subsequently enacted as RESPA was the elimination of "kickbacks and unearned fees," Senate Report 1, and the same report also identifies, as one of the "problem areas" that RESPA was intended to address, "[a]busive and unreasonable practices within the real estate settlement process that increase settlement costs to home buyers *without providing any real benefits to them*." *Id.* at 2 (emphasis added). The report further states that, "[b]y dealing directly with such problems as kickbacks, *unearned fees*, and unreasonable escrow account requirements, the Committee believes that [RESPA] will ensure that the costs to the American home buying public will not be unreasonably or unnecessarily inflated by abusive practices." *Id.* at 3 (emphasis

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[5] Section 2607(c) further supports that reading of the statute by providing a safe harbor for specified fees and "bona fide" compensation paid for goods or services "actually rendered," "actually performed," or "actually furnished." 12 U.S.C. 2607(c)(1) and (2). If unearned fees were beyond RESPA's reach, as the court of appeals concluded, that safe harbor would be unnecessary.

added). The House Report reiterates those views. H.R. Rep. No. 1177, 93d Cong., 2d Sess. 3, 4 (1974).

4. To the extent that the text of Section 2607(b) is unclear, HUD's longstanding interpretation is entitled to deference. When a statute is ambiguous, a court must determine if the agency's interpretation is based on "a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). If Congress has expressly delegated authority to the agency "to elucidate a specific provision of the statute by regulation," those regulations are to be given "controlling weight" unless they are arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 844.

Pursuant to its statutory authority, 12 U.S.C. 2617(a), HUD determined through notice-and-comment rulemaking that "[a] charge by a person for which no or nominal services are performed * * * is an unearned fee and violates [Section 2607(b)]." 24 C.F.R. 3500.14(c). In stating that it would not defer to HUD's policy statement because it was not adopted through notice-and-comment rulemaking (Pet. App. 13a), the court of appeals overlooked that regulation. *Chevron* deference may be appropriate, moreover, even when agency interpretations are reached "through means less formal than 'notice and comment' rulemaking." *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002). HUD's policy statement specifically addressing the question of undivided, unearned fees, 66 Fed. Reg. at 53,058, is an official agency interpretation warranting *Chevron* deference. See 24 C.F.R. 3500.4(a)(1)(ii) (policy statements published in the *Federal Register* are interpretations for purposes of Section 2617(a)); 57 Fed. Reg. at 49,604 (Section 2617(a) gave HUD authority to render "official interpretations" by means other than regulations); see also *Kruse* v.

Wells Fargo Home Mortgage, Inc., 383 F.3d 49, 58-61 (2d Cir. 2004) (deferring to HUD's policy statement).

B. The Circuits Are Squarely In Conflict Regarding The Interpretation Of 12 U.S.C. 2607(b), And This Case Is A Suitable Vehicle For Resolving The Conflict

1. As the court of appeals observed (Pet. App. 6a), the Fourth, Seventh, and Eighth Circuits have held that Section 2607(b) is violated only when two culpable parties share an unearned fee. See *Boulware* v. *Crossland Mortgage Corp.*, 291 F.3d 261, 265 (4th Cir. 2002); *Krzalic* v. *Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002), cert. denied, 539 U.S. 958 (2003); *Haug* v. *Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003)). In contrast, the Second, Third, and Eleventh Circuits have held that Section 2607(b) is violated when a party marks up the fee for a settlement service provided by a third party and retains the entire unearned portion of the fee. See *Kruse*, 383 F.3d at 62; *Santiago*, 417 F.3d at 389; *Sosa*, 348 F.3d at 982-983. The Second Circuit also has held that Section 2607(b) prohibits undivided, unearned fees charged by a settlement service provider. *Cohen* v. *JP Morgan Chase & Co.*, 498 F.3d 111, 113, 124-125 (2007).

All of those cases except for *Cohen* involved situations in which the settlement-service provider marked up the cost of a service actually provided by a third party, thereby obtaining a fee for which it performed no service. The question in those cases was whether the settlement-service provider could be held liable under Section 2607(b) if it retained the entire unearned fee for itself rather than sharing it with the third party. Here and in *Cohen*, by contrast, no third party was involved in the allegedly unlawful conduct, and the question is

whether an undivided, unearned fee violates Section 2607(b). Respondent contends (Br. in Opp. 4) that, because of that factual difference, there is no "entrenched" conflict among the circuits.

Respondent's argument is incorrect, because the reasoning of the courts of appeals that have held mark-ups to be covered applies *a fortiori* to the situation presented here. The rationale for treating a mark-up as a fee "other than for services actually performed," 12 U.S.C. 2607(b), is that the settlement-service provider itself performs no services in return for the money it receives, even though the mark-up nominally corresponds to services performed by a third party. *Santiago*, 417 F.3d at 389; *Kruse*, 383 F.3d at 62; *Sosa*, 348 F.3d at 982-983. If, as the Second, Third, and Eleventh Circuits have held (and as HUD consistently concluded), charges of that character are fees "other than for services actually performed," Section 2607(b) applies even more clearly to fees for purported services that are not performed at all. The court of appeals' decision in this case therefore directly implicates the entrenched circuit split concerning the application of Section 2607(b) to mark-ups by settlement service providers. The conflicting decisions of seven courts of appeals demonstrate that the question presented has been thoroughly ventilated and warrants the Court's review.[6]

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[6] Moreover, even if it were logically possible to separate the six circuit holdings in the mark-up cases from the undivided, unearned fee scenario here, the court of appeals' ruling directly conflicts with the Second Circuit's decision in *Cohen*. See 498 F.3d at 126 ("HUD reasonably construes [Section 2607(b)] to prohibit 'one service provider' from charging the consumer a fee for which 'no . . . work is done,'" and plaintiff "adequately states a claim * * * by alleging that [defendant] collected an undivided unearned fee.").

2. Respondent contends (Br. in Opp. 17-21) that the Court should not review the decision below because the court of appeals could have granted summary judgment to respondent on other grounds. Specifically, respondent contends that loan discount fees fall outside Section 2607(b) because they are not fees for "settlement services," and that the fees in this case were earned. Neither of those alternative arguments would prevent the Court from reaching the question presented in this case.

a. Respondent contends (Br. in Opp. 17-19) that the loan discount fees in this case are not covered by Section 2607(b) because they are not charges for "settlement services." That is incorrect. HUD has consistently interpreted RESPA to include loan discount fees as charges for settlement services. For example, beginning in 1975, HUD identified (i) fees charged for processing or originating a loan and (ii) loan discount fees (*i.e.*, points) as "settlement charges" that were required to be recorded separately on lines 801 and 802 of the HUD-1 form. 40 Fed. Reg. 22,456 (1975) (24 C.F.R. Pt. 82, App. A (1976)); see 41 Fed. Reg. at 20,284 (loan origination fee "covers the lender's administrative costs in processing the loan," and loan discount fee is "a one-time charge made by the lender to compensate for making a loan at a lower interest rate than would be otherwise charged").

Notwithstanding HUD's expressed view as to the range of "settlement services" covered by RESPA, the Sixth Circuit reached a contrary conclusion in *United States* v. *Graham Mortgage Corp.*, 740 F.2d 414 (1984). *Graham Mortgage* involved a criminal prosecution in which the defendants were charged with giving and receiving unlawful kickbacks through "the making of mortgage loans at a reduced charge of points in ex-

change for referrals of mortgage loan applicants." *Id.* at 415-416. The defendants argued that RESPA did not prohibit their conduct because "the making of a mortgage loan is not 'a real estate settlement service.'" *Id.* at 416. The Sixth Circuit concluded that RESPA's text was ambiguous on that coverage question, *id.* at 417-419; that the legislative history did not resolve the ambiguity, *id.* at 419-421; and that HUD's interpretation of the term "settlement service" as encompassing the making of mortgage loans was not entitled to deference, *id.* at 421-423. The court then applied the rule of lenity and vacated the defendants' convictions. *Id.* at 423.

Congress responded to *Graham Mortgage* by amending RESPA's definition of "settlement services" specifically to include "the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans)." Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 908(a), 106 Stat. 3873 (12 U.S.C. 2602(3)); see H.R. Rep. No. 760, 102d Cong., 2d Sess. 158 (1992) ("[M]ortgage lending must be included as a settlement service to preserve the effectiveness of RESPA as a consumer protection statute."). HUD's most recent regulations mirror the statutory definition and also include as settlement services the "[p]rovision of any services related to the origination, processing or funding of a federally related mortgage loan." 24 C.F.R. 3500.2(b). Thus, on the HUD-1 form under "Section L. Settlement Charges," line 801 should reflect any fee charged by the lender for originating the loan, "including administrative and processing services," and line 802 should show the "charge (points) for the specific interest rate chosen." 24 C.F.R. Pt. 3500, App. A.

In support of its argument that loan discount fees are not charges for "settlement services," respondent relies on *Wooten* v. *Quicken Loans, Inc.*, 626 F.3d 1187 (2010), petition for cert. pending, No. 11-43 (filed July 6, 2011), in which the Eleventh Circuit held that a loan discount fee is not a charge for a "settlement service" under RESPA. *Id.* at 1189, 1195. *Wooten* is inconsistent with RESPA and with HUD's longstanding interpretation of the statute and regulations governing the required disclosure of settlement charges on the HUD-1 form, 24 C.F.R. Pt. 3500, App. A; see 12 U.S.C. 2603(a). Loan discount fees are charges for a "[s]ettlement service," *i.e.*, the "funding of [a] loan[]." 12 U.S.C. 2602(3).

In any event, neither the court of appeals nor the district court passed upon respondents' proposed alternative ground for dismissal of the complaints, see Pet. App. 4a n.1; *id.* at 66a-67a, 69a, and the issue is not logically antecedent to the question presented by the petition. If the Court grants certiorari and holds that an undivided, unearned fee can violate Section 2607(b), the court of appeals can consider on remand respondent's alternative argument that a loan discount fee is not a charge for a settlement service. See, *e.g.*, *United States* v. *Comstock*, 130 S. Ct. 1949, 1965 (2010) (reversing court of appeals' judgment "with respect to Congress' power to enact [the statute at issue]," and stating that respondents were free to pursue on remand any other claims they had preserved).

b. Respondent further contends that the loan discount fees charged to petitioners were "conditions of and prerequisites" to funding petitioners' loans, and that the fees were therefore "earned." Br. in Opp. 19-21 (emphasis omitted). According to respondent (*id.* at 21), petitioners are at most complaining that they were "over-

charge[d]" for the reasonable value of their loans. As respondent notes (*ibid.*), all courts of appeals to have considered the issue have concluded that Section 2607(b) does not "impose price controls and therefore does not prohibit 'overcharges.'" *Kruse*, 383 F.3d at 57; see also *Martinez* v. *Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549, 554 (9th Cir. 2010); *Friedman* v. *Market St. Mortgage Corp.*, 520 F.3d 1289, 1291-1297 (11th Cir. 2008); *Santiago*, 417 F.3d at 387-388.

As explained above, respondent's extension of credit to petitioners—*i.e.*, its origination and processing of the loans—was itself a "real estate settlement service" within the meaning of RESPA. As a "component of the pricing of Petitioners' loans" (Br. in Opp. 20), the discount and origination fees at issue in this case thus bore *some* nexus to settlement services that respondent "actually performed." 12 U.S.C. 2607(b). HUD has long construed Section 2607(b), however, as prohibiting "duplicative" fees—*i.e.*, the imposition of two or more distinct charges for what is in substance the same service. See pp. 3, 4, *supra*. By way of analogy, a "duplicative" fee is "unearned," even though it bears some nexus to a service that is actually rendered, because the buyer receives no added increment of value beyond the service for which he has already paid. Under that approach, although a loan discount fee might be viewed as an overcharge if it is simply exorbitant in relation to the interest-rate reduction it procures, a discount fee that procures *no* interest-rate reduction would be a fee "other than for services actually performed," 12 U.S.C. 2607(b), even if overcharges are assumed to fall outside Section 2607(b)'s coverage.

In any event, contrary to respondent's suggestion (Br. in Opp. 19-21), neither of the courts below made a

finding that the challenged loan discount fees were earned. The district court and the court of appeals concluded that respondent was entitled to summary judgment as a matter of law because respondent did not split the allegedly *unearned* fees with any other party. See Pet. App. 2a, 5a-6a (characterizing this case as involving undivided, unearned fees, not overcharges). That legal conclusion implicates a well-developed circuit split and warrants this Court's review. If this Court grants certiorari and reverses the judgment below, the court of appeals can consider on remand respondent's argument that the loan discount fees were earned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2011