No. 10-1042

In the Supreme Court of the United States

TAMMY FORET FREEMAN, ET AL., PETITIONERS

v.

QUICKEN LOANS, INC.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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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.

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INTEREST OF THE UNITED STATES

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, is a consumer-protection statute that prohibits, *inter alia*, giving and accepting "any portion, split, or percentage of any charge" for a settlement service "other than for services actually performed." 12 U.S.C. 2607(b). Congress authorized the Department of Housing and Urban Development (HUD) to administer RESPA, and to "prescribe such rules and regulations" and "make such interpretations" as are "necessary to achieve the purposes of [RESPA]." 12 U.S.C. 2617(a).

HUD consistently interpreted Section 2607(b) to prohibit all unearned fees, regardless of whether such fees are divided between two or more parties. Earlier this

year, HUD's consumer-protection functions relating to RESPA were transferred to the Consumer Financial Protection Bureau (CFPB), and the CFPB has adopted HUD's longstanding interpretation of Section 2607(b).

Unearned fees disserve RESPA's purposes by increasing settlement costs and potentially putting home ownership beyond the reach of many Americans. The United States therefore has a substantial interest in the resolution of the question presented. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. Congress enacted RESPA 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 prohibit two distinct forms of abusive conduct related to the provision of real estate settlement services.[1]

Section 2607(a) 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

[1] RESPA defines "[s]ettlement services" to include "any service provided in connection with a real estate settlement including, but not limited to," title searches, title insurance, attorney services, document preparation, credit reports, appraisals, property surveys, and "the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans)." 12 U.S.C. 2602(3).

> 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).[2] 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). RESPA also emphasizes, however, that "[n]othing in [Section 2607] shall be construed as prohibiting" certain payments and practices, such as "the payment to any person of * * * compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. 2607(c)(2).[3]

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

[3] RESPA authorizes enforcement of Section 2607 through, *inter alia*, criminal prosecutions and actions for injunctive relief brought by the CFPB, HUD, or the Attorney General or insurance commissioner of any State. 12 U.S.C. 2607(d)(1) and (4); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, § 1098, 124 Stat. 2038, 2103-2104. 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 an individual who brings suit under Section 2607(d)(2) for an alleged kickback violation has standing to sue under Article III in the absence of an allegation that the kickback affected the price, quality, or other characteristics of the settlement services provided. See *First Am. Fin. Corp.* v. *Edwards*, No. 10-708 (argued Nov. 28, 2011). Because petitioners in this case allege that they were charged unlawful fees, and thus

b. Congress authorized 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]." HUD's regulations promulgated under that authority are codified at 24 C.F.R. Pt. 3500. In addition, under 24 C.F.R. 3500.4(a)(1)(ii), policy statements published by HUD in the *Federal Register* are "official interpretations" of RESPA pursuant to Section 2617(a) "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 CFPB. 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 CFPB issued a notice stating that it would enforce HUD's RESPA regulations, 24 C.F.R. Pt. 3500, and that, pending further CFPB action, it would also apply HUD's previously issued official policy statements regarding RESPA. 76 Fed. Reg. 43,570, 43,571 (2011).

c. 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 1975 consumer information booklet, required by 12 U.S.C. 2604, advised that "[y]ou should be charged only for services actually performed." 40 Fed. Reg. 22,459 (1975). HUD's 1976 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

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that the RESPA violation affected the price of the settlement services they received, the standing question presented in *Edwards* is not implicated here.

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 duplicative 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.[4] 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

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[4] 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.

> 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.

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.*

d. RESPA further 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 uniform 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 allege 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, respec-

tively, but that respondent did not give them lower interest rates in return. Pet. App. 20a-21a & n.2, 22a & n.6; J.A. 8-9 (Freeman Compl. paras. 5-6); J.A. 28 (Bennett Compl. paras. 6-7). The Smiths allege that they were charged a "loan origination" fee of more than $5100, as well as a $575 loan "processing fee," and that "no, nominal or duplicative service was provided" in connection with the loan origination fee. Pet. App. 21a-22a & n.4; J.A. 78-79 (Smith Compl. paras. 5, 7).

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 concluded that Section 2607(b) does not "provide[] a claim in a situation where a single settlement services provider retains unearned fees," *id.* at 43a, because "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 concluded that Section 2607(b) does not prohibit the acceptance of 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* v. *Crossland Mortgage Corp.*, 291 F.3d 261, 266 (4th Cir. 2002)). Second, the court explained that RESPA's anti-kickback provision, which states that "[n]o person shall give and no person shall accept" a kickback, 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." Pet. App. 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," the court had "no need to look to any regulatory interpretation, such as the HUD 2001 [policy] statement." Pet. App. 12a (citation omitted). The court also stated that the HUD policy statement did not have the "force of law" because it had not been adopted through notice-and-comment rulemaking, and that the court found the policy statement "unpersuasive" in any event. *Id.* at 12a-13a (citation omitted).

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 undivided unearned 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.

SUMMARY OF ARGUMENT

A. 1. a. Section 2607(b) provides that "[n]o person shall give and no person shall accept" any unearned settlement charges. 12 U.S.C. 2607(b). By its plain terms, the text of Section 2607(b) prohibits two separate actions: giving an unearned fee, and accepting an unearned fee. Thus, giving an unearned portion of a charge is prohibited even if there is no culpable acceptor, and accepting an unearned charge is prohibited even if there is no culpable giver. Although violations of Section 2607(b) typically involve transactions between two (or more) parties rather than wholly unilateral conduct, Section 2607(b) does not require that both parties be culpable actors. Rather, Section 2607(b) unambiguously covers the acceptance of unearned fees from the consumer herself.

Section 2607(d) provides further textual support for the conclusion that Section 2607(b) prohibits the acceptance of unearned fees, even if those fees are not shared with another party. Section 2607(d) prescribes penalties

for the "*person or* persons" who violate RESPA's prohibitions on kickbacks and unearned fees, showing that a single culpable party can violate Section 2607(b).

b. The text of RESPA's anti-kickback provision, 12 U.S.C. 2607(a), does not support the court of appeals' conclusion that a violation of Section 2607(b) requires two or more culpable parties. Although Section 2607(a) contains the same "[n]o person shall give and no person shall accept language" as Section 2607(b), Section 2607(a) prohibits payment and acceptance of kickbacks "pursuant to any agreement or understanding * * * that business * * * shall be referred to any person." It is the requirement of an "agreement or understanding," not the "[n]o person shall give and no person shall accept" language, that specifically requires two culpable parties; and that requirement has no counterpart in Section 2607(b).

c. Section 2607(b)'s reference to "any portion, split, or percentage" also does not suggest that two culpable parties must share an unearned fee in order to violate that provision. Although the term "split" is commonly understood to mean that something is shared between two or more people, "portion" and "percentage" do not have the same connotation. The canon of construction *noscitur a sociis*, which states that terms in a list should be given related meanings, does not apply here. Section 2607(b)'s reference to "portion, split, or percentage" is written in the disjunctive, and the words are not so similar that they should be construed in a way that deprives any individual term of its common meaning. Section 2607(b)'s broad language makes clear that a settlement service provider cannot escape liability by sharing an unearned fee with another culpable party, but it does

not suggest that the fee *must* be divided in that manner in order for liability to attach.

d. The court of appeals' interpretation would lead to absurd results. There is no plausible policy rationale for immunizing a settlement services provider's acceptance of an unearned mark-up, or a fee for a service that has not been provided, simply because the provider keeps the entire fee for itself rather than sharing it with another culpable party.

2. RESPA's purpose to protect consumers from unnecessarily high settlement charges caused by abusive practices further supports the conclusion that Section 2607(b) prohibits undivided, unearned fees. Although the list of RESPA's purposes set forth in Section 2601(b) specifically refers to kickbacks but not to unearned fees, that omission from the statute's "purpose" section is irrelevant given Section 2607(b)'s unambiguous prohibition of accepting unearned fees. RESPA's legislative history confirms that Congress was concerned with abusive settlement practices, such as unearned fees, in addition to kickbacks.

B. Any ambiguity in the text of Section 2607(b) has been resolved by HUD's regulation and policy statement interpreting that provision, which are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).

Congress authorized HUD to promulgate "rules and regulations" and to make "interpretations" that are necessary to achieve RESPA's purposes. 12 U.S.C. 2617(a). HUD used both of those interpretive mechanisms to clarify the scope of Section 2607(b). 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). HUD also issued an official interpretation in the form of a policy statement, which specifically states that Section 2607(b) prohibits all unearned fees, regardless of whether they are shared. HUD's interpretations are based on a permissible construction of the statute, and they are entitled to controlling weight under *Chevron*.

C. 1. Under a correct interpretation of Section 2607(b), respondent was not entitled to summary judgment. Some of the petitioners in this case allege that respondent charged them loan discount fees without providing a corresponding reduction in their interest rates, and other petitioners allege that respondent charged them a loan origination fee that was duplicative of a loan processing fee that they had also been charged at settlement. If petitioners can prove those allegations, respondent violated Section 2607(b) by accepting a "portion * * * or percentage" of the fees that petitioners were charged, without "actually perform[ing]" any services in return. 12 U.S.C. 2607(b). For purposes of Section 2607(b), it is irrelevant that respondent retained the entire amount of those fees, rather than splitting the fees with another person.

2. The Court should not affirm the court of appeals' decision based on the alternative grounds that respondent asserts support the judgment below. Respondent contends that loan discount fees are not fees for settlement services, and that the fees in this case were earned. The courts below did not decide those issues, and they will remain open on remand if this Court holds that Section 2607(b) encompasses undivided unearned fees.

In any event, respondent's alternative contentions lack merit. RESPA's definition of "[s]ettlement ser-

vices" (12 U.S.C. 2602(3)) includes the originating, underwriting, and funding of loans, and HUD's settlement forms include a line-item to indicate points for the specific interest rate chosen. A loan discount fee is thus a charge for a "settlement service" under RESPA. Similarly, the fees in this case were not earned simply because they bore some connection to a settlement service (loan funding) that respondent actually performed. A discount fee that procures no actual interest-rate reduction is a fee "other than for services actually performed." 12 U.S.C. 2607(b).

ARGUMENT

A PERSON WHO ACCEPTS AN UNEARNED FEE FOR A REAL ESTATE SETTLEMENT SERVICE VIOLATES SECTION 2607(b) REGARDLESS OF WHETHER THE UNEARNED FEE IS DIVIDED BETWEEN TWO OR MORE CULPABLE ACTORS

A. Section 2607(b) Prohibits The Acceptance Of Undivided Unearned Fees

1. Section 2607(b) unambiguously prohibits the acceptance of an unearned fee for rendering a real estate settlement service, whether or not the fee is shared with any other culpable actor

a. Determining the scope of Section 2607(b) "begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation omitted). Section 2607(b) states that "[n]o person shall give and no person shall accept" any unearned settlement charges. 12 U.S.C. 2607(b). As used in Section 2607(b), the word "and" is a "coordinating junction" that "link[s] independent ideas." *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct.

1068, 1078 (2011); see *Ron Pair*, 489 U.S. at 241 (phrase preceding "and" is "independent of the language that follows"). A statute providing that "no person may purchase and no person may sell heroin" would clearly prohibit two distinct acts: buying heroin and selling it. By its plain terms, Section 2607(b) similarly prohibits two separate actions: giving an unearned fee, and accepting an unearned fee.

To be sure, because a person 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." Pet. App. 7a (quoting *Boulware* v. *Crossland Mortgage Corp.*, 291 F.3d 261, 266 (4th Cir. 2002)). In this case, petitioners allege that respondent "accept[ed]" the unearned fees from petitioners themselves, the alleged victims of the Section 2607(b) violation. Cf. 12 U.S.C. 2607(d)(2) (providing that any person who violates Section 2607(b) "shall be * * * liable to the person or persons charged for the settlement service involved in the violation"). Because Section 2607(b)'s prohibition on the "accept[ance]" of unearned settlement charges is not limited to fees accepted from any particular category of persons, the prohibition unambiguously covers acceptance of such charges from consumers.

In concluding that respondent's alleged acceptance of unearned fees from petitioners did not violate Section 2607(b), the court of appeals did not simply read that provision to require a transaction between two different persons. Rather, the court imposed the further requirement that "two *culpable* actors" must participate in the violation. Pet. App. 8a (emphasis added). The ordinary understanding of the verb "accept" provides no support for that construction of the statute. Thus, although a

sale of heroin requires both a buyer and seller, the hypothetical statute described above would unambiguously cover a person who sold heroin to (or purchased heroin from) an undercover law-enforcement agent, even though the agent himself would not be a culpable party. Similarly under Section 2607(b), "[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." *Sosa* v. *Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 982 (11th Cir. 2003).

In some circumstances, two or more culpable persons may violate Section 2607(b) with respect to the same unearned fee, as when two or more persons share the unearned portion of a charge for a settlement service. See 66 Fed. Reg. at 53,057. Nothing in the statute's text, however, limits violations to that scenario and *requires* two or more culpable actors for every violation. The court of appeals' interpretation of Section 2607(b) is particularly misconceived because it would make liability for "accept[ing]" an unearned fee contingent on the recipient's subsequent disposition of the money. Under the court of appeals' approach, respondent could potentially have been held liable if, after charging the fees at issue in this case, it had shared the money with another culpable actor. There is no plausible textual rationale for concluding that an initially lawful "accept[ance]" of money can be rendered unlawful by events that occur after the fee has been accepted.

Section 2607(b)'s prohibition of undivided unearned fees is further reflected in the text of Section 2607(d). That provision establishes penalties for the "*person or* persons" who violate RESPA's provisions prohibiting kickbacks and unearned fees in connection with real

estate settlement services. 12 U.S.C. 2607(d)(1), (2), and (3) (emphasis added). Section 2607(d) thus reinforces the conclusion that a violation of Section 2607(b) can involve a single culpable actor.

b. In construing Section 2607(b) to require two culpable parties, the court of appeals relied in part on RESPA's anti-kickback provision, 12 U.S.C. 2607(a). The court explained that Section 2607(a) contains the same "[n]o person shall give and no person shall accept" language as Section 2607(b), and that Section 2607(a) "clearly requires two culpable actors." Pet. App. 8a. The court inferred from those features of Section 2607(a) that Section 2607(b) requires two culpable actors as well. *Ibid.* That inference is unwarranted.

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 the "[n]o person shall give and no person shall accept" language in Section 2607(a), that specifically requires two culpable parties. By contrast, Section 2607(b) contains no reference to any "agreement or understanding," and it prohibits different conduct that does not require two or more culpable participants.

One important respect in which the two prohibitions differ concerns the likely payor of the two types of fees. Although kickbacks and referral fees may have the ultimate effect of increasing the cost to consumers of settlement services, a kickback is typically paid by one settlement service provider to another, rather than by the consumer herself. By contrast, as the allegations in this case reflect, "charges made or received for the rendering of a real estate settlement service * * * other than

for services actually performed," 12 U.S.C. 2607(b), are often paid directly by the consumer. To read into Section 2607(b) the limitations associated with kickbacks and referral fees would thus reduce arbitrarily the provision's coverage and its effectiveness in combating abusive settlement-service practices.

c. In concluding that a violation of Section 2607(b) requires two culpable parties, the court of appeals read the statute'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. That reading of the statute is incorrect.

i. Because RESPA does not define "portion," "split," or "percentage," it is appropriate to consider the "ordinary usage" of those terms. *FCC* v. *AT&T*, *Inc.*, 131 S. Ct. 1177, 1182 (2011). Although common usage suggests that a "split" of a charge is a fee shared by two or more persons, the terms "portion" and "percentage" need not have the same connotation. Section 2607(b)'s broad language makes clear that a settlement service provider *can* be held liable for accepting less than the whole of an unearned fee—*i.e.*, that it cannot escape liability by sharing the fee with another culpable party. Section 2607(b) does not suggest, however, that the unearned fee *must* be divided in that manner in order for liability to attach.

A person can accept a "portion * * * of any charge" that is not "for services actually performed," without sharing that unearned fee with any other party. 12 U.S.C. 2607(b). If at settlement a lender charges the consumer $100 for an appraisal provided by a third party, but the third party's actual charge for the appraisal was $75 and the lender retains the extra $25 without providing any additional service, the lender has

violated RESPA's plain terms. Under those circumstances, the lender has accepted a "portion" of a "charge" for a settlement service (*i.e.*, the $25 mark-up) "other than for services actually performed," 12 U.S.C. 2607(b), even though no other culpable party has shared the unearned portion of the fee.

Similarly, the United States Code is replete with references in many different contexts to a "percentage" that can include 100%. See, *e.g.*, 5 U.S.C. 8348(g) (Supp. IV 2010) (civil service retirement and disability fund); 5 U.S.C. 8351(b)(2)(B) (thrift savings plan); 7 U.S.C. 1428(b) (Supp. IV 2010) (farm subsidies); 12 U.S.C. 1467a(m)(7)(B)(ii)(II) (savings associations); 12 U.S.C. 1706c(b)(2) (mortgage insurance); 12 U.S.C. 1709(w)(1)(A) (mortgage insurance); 12 U.S.C. 1715r(c)(2) (Supp. III 2009) (mortgage insurance); 20 U.S.C. 1022d(a)(1)(B)(i) (Supp. III 2009) (education grants); 26 U.S.C. 45F(d)(2)(A) (employer-provided child care credit); 26 U.S.C. 143(m)(4)(C)(i) (mortgage revenue bonds); 29 U.S.C. 1053(a)(2)(A)(iii) (pension plans); 42 U.S.C. 1395w-23(k)(4)(B)(i) (Supp. III 2009) (Medicare+Choice organizations).

Congress's use of the broad term "any" preceding "portion, split, or percentage" supports the understanding that "portion" and "percentage" can include the whole. See, *e.g.*, *HUD* v. *Rucker*, 535 U.S. 125, 131 (2002) ("[T]he word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind.") (citation and some internal quotation marks omitted). Thus, RESPA's reference to "any portion * * * or percentage" of an unearned settlement service charge "includ[es] up to 100%" of such a charge, "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.

ii. That the words "portion" and "percentage" appear in a list with "split" does not mean that all three of those terms must "require less than 100% of the whole of something," as the court of appeals concluded. See Pet. App. 9a. To support that conclusion, the court of appeals invoked the canon of construction *noscitur a sociis*, which "'dictates that words grouped in a list should be given related meaning.'" *Ibid.* (quoting *Dole* v. *Steelworkers*, 494 U.S. 26, 36 (1990)). The court's reliance on that canon was misplaced.

This Court has repeatedly explained that the *noscitur a sociis* canon does not prescribe an "invariable rule." *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1403 (2010) (quoting *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 519 (1923)). The terms "portion," "split," and "percentage" are not synonymous, nor is the fit between them "so tight or so self-evident" that any one of them should be "rob[bed] * * * of 'its independent and ordinary significance.'" *Ibid.* (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 338-339 (1979)). Section 2607(b)'s prohibition against accepting any portion, split or percentage is "written in the disjunctive," and the prohibition therefore is "not limited to a split." 66 Fed. Reg. at 53,058. If a person accepts any portion or percentage of a settlement charge—including the entire unearned portion of that fee or 100% of a wholly unearned fee—other than for services actually performed, he has violated Section 2607(b).

d. Finally, the court of appeals' interpretation of Section 2607(b) 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 the court of appeals' approach, a lender would violate Section 2607(b) if it charged a borrower $250 for a title search provided by a third party for $200 and then split the $50 unearned fee with the third party. If the lender kept the entire $50 unearned fee, however, the court of appeals would find no violation. And if the lender collected $250 from the borrower for a title search but no title search was performed, the court would likewise conclude that no violation had occurred. Under that approach, the kinds and amounts of unearned fees that a lender (or other settlement service provider) could charge a consumer would be limited only by the lender's creativity.

2. Construing Section 2607(b) to prohibit undivided unearned fees furthers RESPA's purpose of protecting consumers from unnecessarily high settlement charges caused by certain abusive practices

a. Congress enacted RESPA 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). Interpreting Section 2607(b) to prohibit settlement service providers from charging consumers unearned fees is consistent with Congress's overarching intent to "protect[] [consumers] from unnecessarily high settlement charges caused by certain abusive practices." *Ibid.*

b. In concluding that RESPA is exclusively an anti-kickback statute (Pet. App. 10a), the court of appeals relied in part on Congress's identification of "the elimination of kickbacks or referral fees" as one of RESPA's

"purpose[s]." 12 U.S.C. 2601(b)(2).[5] Section 2601(b)'s list of statutory "purpose[s]," however, cannot reasonably be viewed as exhaustive. If it were, then other substantive RESPA provisions—such as the prohibition of fees for preparing truth-in-lending statements, 12 U.S.C. 2610, or the prohibition on sellers requiring the use of their chosen title company, 12 U.S.C. 2608—would be unenforceable because Section 2601(b) does not specifically identify the elimination of such practices as "purpose[s]" of RESPA.[6]

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 that conduct. See, *e.g.*, *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

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[5] Section 2601(b) provides:

> It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result—
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> (1) in more effective advance disclosure to home buyers and sellers of settlement costs;
> (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;
> (3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and
> (4) in significant reform and modernization of local recordkeeping of land title information.

[6] Both of those requirements were enacted in the initial 1974 version of RESPA, along with the statement of purposes. See Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, §§ 9, 12, 88 Stat. 1724, 1728, 1729.

our laws rather than the principal concerns of our legislators by which we are governed."). Section 2607(b) unambiguously encompasses conduct different from "kickbacks" and "referral fees." In particular, Section 2607(b) encompasses a broad range of unearned fees that the violator obtains directly from the consumer rather than from another settlement service provider. See pp. 13-20, *supra*.

Congress's own characterization of Section 2607 in its title, "Prohibition against kickbacks and unearned fees," RESPA § 8, 88 Stat. 1727, assumes that the two categories of payments are not identical and thus reinforces the conclusion that RESPA is not exclusively "an anti-kickback statute," Pet. App. 10a.[7] 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, that safe harbor would be unnecessary.

c. 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 relied on the Senate Report's statement that Section 2607 "'is intended to prohibit all kickback or

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[7] By contrast, the title of Section 2607(b) in the United States Code, "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 fee arrangements.'" *Ibid.* (emphasis omitted) (quoting S. Rep. No. 866, 93d Cong., 2d Sess. 6 (1974) (Senate Report)). That Senate Report stated at the outset, however, that one of the purposes of the bill subsequently enacted as RESPA was the elimination of "kickbacks *and unearned fees*." Senate Report 1 (emphasis added). The report also identified, as one of the "problem areas" that RESPA was intended to address, *id.* at 3, "[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 stated further that, "[b]y dealing directly with such problems as kickbacks, *unearned fees*, and unreasonable escrow account requirements, * * * [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 added). The House Report reiterated those views. H.R. Rep. No. 1177, 93d Cong., 2d Sess. 3, 4 (1974).

B. Any Ambiguity In The Text Of Section 2607(b) Is Resolved By HUD's Longstanding Interpretation, Which Is Entitled To Judicial Deference

To the extent that Section 2607(b)'s text is unclear, HUD's longstanding interpretation is entitled to deference.[8] When a statute is ambiguous, a court must deter-

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[8] 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

mine whether 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," any regulations promulgated pursuant to that grant of power are to be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844; see *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001) (agency's interpretation of its statute is entitled to *Chevron* deference if Congress has delegated authority to the agency "to make rules carrying the force of law," and interpretation was "promulgated in the exercise of that authority").

1. Congress authorized HUD "to prescribe such rules and regulations" and "to make such interpretations" as "may be necessary to achieve the purposes of [RESPA]." 12 U.S.C. 2617(a). Exercising that authority, 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). Undivided, unearned fees fall squarely within that agency interpretation, which should be given controlling weight. 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

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settlement service provided by a third party and retains the entire unearned portion of the fee. See *Kruse* v. *Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 61-62 (2d Cir. 2004); *Santiago* v. *GMAC Mortgage Group, Inc.*, 417 F.3d 384, 389 (3d Cir. 2005); *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).

appeals overlooked HUD's regulation interpreting the same provision.

2. In addition to that regulation, HUD issued a policy statement that specifically sets forth the agency's consistent, longstanding view that Section 2607(b) prohibits all unearned fees, whether or not those fees are shared with another person. 66 Fed. Reg. at 53,058. Like the regulation, that policy statement is an official agency interpretation that is entitled to *Chevron* deference.

This Court has made clear that *Chevron* deference may be appropriate even when an agency interpretation is reached "through means less formal than 'notice and comment' rulemaking." *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002); see *Mead*, 533 U.S. at 230-231; *Kruse* v. *Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 58-61 (2d Cir. 2004) (deferring to HUD's policy statement).[9] RESPA's grant of interpretive authority to HUD is unusually broad. Section 2617(a) authorized HUD not only to "prescribe * * * rules and regulations," but also to "make * * * interpretations" that are "necessary to achieve the purposes of [RESPA]." See 57 Fed. Reg. at 49,604 (Section 2617(a) gave HUD authority to render "official interpretations" by means other than regulations). To implement that authority,

[9] The court of appeals relied on this Court's statement in *Christensen* v. *Harris County*, 529 U.S. 576 (2000), that "interpretations contained in policy statements * * * lack the force of law" and "do not warrant *Chevron*-style deference." *Id.* at 587; see Pet. App. 12a-13a. In *Barnhart*, however, the Court declined to read *Christensen* as establishing "an absolute rule" that an interpretation reached through "means less formal than 'notice and comment' rulemaking" is "automatically deprive[d] * * * of the judicial deference otherwise its due." 535 U.S. at 221-222.

HUD established by regulation a procedure through which it rendered "official interpretations" in the form of "statement[s] of policy" published in the *Federal Register*. See 24 C.F.R. 3500.4(a)(1)(ii). And, insofar as the policy statement construes HUD's own regulations, see 66 Fed. Reg. at 53,057-53,059, it is "controlling." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted).

3. Another provision of RESPA confirms Congress's intent that HUD's interpretation of the statute—whether in a regulation or a policy statement—would be afforded *Chevron* deference. Section 2617(b) states that a party is not liable for any RESPA violation committed "in good faith in conformity with any [HUD] rule, regulation, or interpretation," even if such rule, regulation, or interpretation is subsequently amended, rescinded, or declared invalid by a court or other authority. 12 U.S.C. 2617(b). Section 2617(b) parallels a provision added to the Truth in Lending Act (TILA) in the same year that RESPA was enacted. See Pub. L. No. 93-495, § 406, 88 Stat. 1518 (15 U.S.C. 1640(f)).

In *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980), the Court explained that the purpose of the analogous TILA provision was to promote resolution of "interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Id.* at 568. Enactment of that provision, the Court concluded, "signal[ed] an unmistakable congressional decision to treat administrative rulemaking and interpretation under [the statute] as authoritative." *Id.* at 567-568; see *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1615 (2010) (citing similar language in the Fair Debt Collection Practices Act, 15 U.S.C. 1692k(e), as evidence of Congress's expectation that Federal Trade Commission would resolve ambigu-

ities in that statute). Section 2617(b) reflects Congress's similar intent that HUD's interpretations of RESPA would be entitled to substantial weight. And by broadly drafting Section 2617(b) to encompass "any [HUD] rule, regulation, *or interpretation*," 12 U.S.C. 2617(b) (emphasis added), Congress made clear that HUD need not promulgate a regulation in order for its interpretation of RESPA to be treated as authoritative.

C. The Courts Below Erred In Holding That Respondent Was Entitled To Summary Judgment

1. Under a correct interpretation of Section 2607(b), respondent was not entitled to summary judgment. The Freemans and the Bennetts allege that respondent charged them "loan discount fee[s]" but provided no corresponding reductions in the interest rates on their mortgage loans. Pet. App. 20a-21a, 22a; J.A. 8-9 (Freeman Compl. paras. 5-6); J.A. 28 (Bennett Compl. paras. 6-7). The Smiths similarly allege that respondent charged them a "loan origination" fee that was duplicative of the "processing fee" that they were charged and for which no or only nominal service was provided. Pet. App. 2a-3a; J.A. 78-79 (Smith Compl., paras. 5, 7). If petitioners can prove those allegations, respondent violated Section 2607(b) by accepting a "portion * * * or percentage"—the entirety or 100%—of the loan discount and loan origination fees that petitioners were charged, without "actually perform[ing]" any services in return.

2. In its brief in opposition, respondent contended that the grant of summary judgment in its favor is independently supported by two alternative rationales. 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. The Court should not address those issues, which will remain open to the courts below on remand if the Court holds that Section 2607(b) encompasses undivided unearned fees. In any event, respondent's alternative arguments lack merit.

a. Respondent has asserted (Br. in Opp. 18) that it did not violate Section 2607(b) by charging petitioners loan discount fees without providing anything in return because loan discount fees are not fees for "[s]ettlement services," but rather are "part of the pricing of a loan." *Ibid.* Neither the court of appeals nor the district court addressed that 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 here. If the Court holds that an undivided unearned fee can violate Section 2607(b), the court of appeals may 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).[10]

In any event, respondent's argument is contrary to RESPA's definition of "[s]ettlement services," 12 U.S.C. 2602(3), and HUD's consistent interpretation of the statute. Beginning in 1975, HUD identified (i) fees charged

[10] The Eleventh Circuit is thus far the only court of appeals to address whether a loan discount fee is a charge for a "settlement service" under RESPA. With little discussion of HUD's interpretation, that court held that such fees are not covered by RESPA. *Wooten* v. *Quicken Loans, Inc.*, 626 F.3d 1187, 1189, 1195 (2010). On October 3, 2011, the Court denied certiorari in *Wooten* (No. 11-43).

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. at 22,456 (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 exchange 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 "[s]ettlement services" 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 "[s]ettlement 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)). As the House Report explained, "mortgage lending must be included as a settlement service to preserve the effectiveness of RESPA as a consumer protection statute." H.R. Rep. No. 760, 102d Cong., 2d Sess. 158 (1992).

HUD's current 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," "except any charge for the specific interest rate chosen (points)." 24 C.F.R. Pt. 3500, App. A. Line 802 should show the "charge (points) for the specific interest rate chosen." *Ibid.* The sum of lines 801 and 802 are reflected on line 803 as the borrower's "adjusted origination charges," which "states the net amount of the loan origination charges." *Ibid.*

Discount points are best understood as one of the charges for the funding of the loan. In exchange for the funding, the borrower pays two charges that are structured differently—interest (over time) and origination and points (at closing). Because the funding of a federally related mortgage loan is a "settlement service" under RESPA, a discount fee is a "charge made or received for the rendering of a real estate settlement service" and is therefore covered by Section 2607(b).

b. Respondent has further asserted (Br. in Opp. 19-21) that, because the loan discount fees charged to peti-

tioners were "conditions of and prerequisites" to funding petitioners' loans, the fees were "earned." *Id.* at 20 (emphasis omitted). According to respondent (*id.* at 21), petitioners are, at most, complaining that they were "overcharge[d]" for the reasonable value of their loans. As respondent notes (*ibid.*), all courts of appeals to have ruled on the issue have held that Section 2607(b) does not "impose price controls and therefore does not prohibit 'overcharges'" for services actually provided. *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.

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 court of appeals and the district court both 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); *id.* at 66a-67a, 69a (same). If this Court reverses the judgment below, the court of appeals can consider on remand respondent's alternative argument that the loan discount fees were earned.

In any event, when a lender provides a loan with the same interest rate it would have charged in the absence of discount points, those points cannot be viewed as an earned charge for the funding of the loan. Respondent is wrong in suggesting that the discount and origination fees at issue here bore a sufficient connection to settlement services that respondent "actually performed," 12

U.S.C. 2607(b), simply because those fees were a "component of the pricing of Petitioners' loans." Br. in Opp. 20. HUD has long construed Section 2607(b) as prohibiting "duplicative" fees for essentially the same service. 24 C.F.R. 3500.14(c). A "duplicative" fee is therefore "unearned," even though it bears some relation to a service that is actually rendered, because the buyer receives no added value beyond the service for which she has already paid. Thus, 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.[11]

[11] As Judge Higginbotham noted in dissent, prohibiting undivided unearned fees "would not lead * * * to a rate-setting regime." Pet. App. 17a-18a. First, as Judge Higginbotham explained, "the reasonable fee for nothing is nothing," and thus "[w]hen [a] fee is entirely unearned, the court is not forced to determine the reasonableness of a fee." *Ibid.* Second, if the potential for Section 2607(b) to operate as a rate-setting regime is perceived as a problem, requiring that the unearned fee be divided between two or more parties to violate Section 2607(b) would not be a solution. Under the court of appeals' approach, a settlement service provider would violate Section 2607(b) by splitting an unearned fee with another culpable actor after it initially lawfully "accept[ed]" the unearned fee from the consumer. That interpretation likewise requires a determination of whether the fee was "unearned."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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