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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 AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, THE HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE, INDEPENDENT COMMUNITY BANKERS OF AMERICA, AND MORTGAGE BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

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

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BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, THE HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE, INDEPENDENT COMMUNITY BANKERS OF AMERICA, AND MORTGAGE BANKERS ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENT

American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, The Housing Policy Council of the Financial Services Roundtable, Independent Community Bankers of America, and Mortgage Bankers Association respectfully submit this brief as amici curiae in support of respondent.[1]

INTEREST OF AMICI CURIAE

The American Bankers Association (ABA) is the principal national trade association of the banking industry in the United States. Its members are banks of all sizes and types, including national and state

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

chartered banks; community, regional, and money center banks and holding companies; savings banks and associations; and trust companies. Member banks of the ABA are located in each of the 50 states and the District of Columbia, and collectively they account for approximately 90% of the domestic assets of the banking industry in the United States.

The American Financial Services Association (AFSA) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single office, independently owned consumer finance companies. The association represents financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA has provided services to its members for more than 90 years.

The Consumer Bankers Association (CBA) is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

The Consumer Mortgage Coalition is an industry trade group representing national residential mortgage lenders, servicers, and service providers. Its members participate in every stage of the home financing process, from providing loan information and taking loan applications to processing and funding loans, to purchasing loans from brokers and other lenders, and to pooling loans for sale on the secondary market as mortgaged backed securities. The Coalition acts to pursue reform of the mortgage origination process, to assure that consumers are properly informed when making credit choices, and to reduce abusive lending practices. It participates in almost every aspect of federal legislative activity and regulatory rulemaking relating to the mortgage industry.

The Housing Policy Council of the Financial Services Roundtable is made up of thirty-two companies that are among the nation's leaders in mortgage finance. Member companies originate seventy-five percent of the mortgages for American home buyers and provide mortgage insurance and servicing to the majority of American home owners.

The Independent Community Bankers of America is a trade association that represents nearly 5,000 community banks of all sizes and charter types nationwide. ICBA member community banks seek to improve cities and towns by using local dollars to help families purchase homes. ICBA member community banks are actively engaged in the business of residential mortgage lending in the communities that they serve. ICBA members hold more than $1 trillion in

assets, $900 billion in deposits, and $700 billion in loans to consumers, small business and the agricultural community.

The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the nation. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's website: www.mortgagebankers.org.

Amici's members are subject to the Real Estate Settlement Procedures Act, and have a strong interest in the construction and application of the laws governing the mortgage lending industry on behalf of their members and the consumers they serve.

INTRODUCTION

Congress enacted the Real Estate Settlement Procedures Act (RESPA) to assure more effective advance disclosure to home buyers and sellers of settlement costs and the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services; to reduce the amounts home buyers are required to place in escrow accounts established to ensure the payment of real estate taxes and insurance; and to reform and modernize local recordkeeping of land title information.

To that end, borrowers must be provided an initial, itemized good faith estimate of costs, and then, at closing, a final HUD-1 settlement statement of the actual costs. The good faith estimate informs the borrower of the estimated costs of the home loan at the time of mortgage application. The HUD-1 allows the borrower to compare those estimated costs against the actual costs. And, in Section 8 of RESPA, 12 U.S.C. § 2607, Congress prohibited "certain abusive practices"—namely, kickbacks, referral fees, and fee splits—that inflate the costs of settlement services and are generally hidden or obscured from the borrower.

Contrary to petitioners' contention, Congress did not enact RESPA, and particularly Section 2607(b), as a broad antifraud and federal rate-setting scheme for residential lending. Had it done so, Congress would have deprived consumers of significant loan pricing options that amici's members provide.

Indeed, the mortgage industry has responded to consumer demands by providing an array of flexible and sound options for paying the costs of the mortgage loan, including closing costs, through up-front charges, interest rates and points, or a combination. Points and other rate- or loan-pricing-related charges are available to consumers to lower monthly payments and make homeownership options more affordable and flexible. Adoption of petitioners' rate-setting construction of Section 2607(b) would dramatically and negatively affect the availability of these consumer-driven pricing terms.

Congress struck a careful balance in enacting RESPA: it sought to ensure that borrowers possessed sufficient information to make informed borrowing decisions, without restricting the choices available to consumers or undermining the ability of lenders, and market conditions, to appropriately price credit.

Consistent with the fact that Congress did not intend for Section 2607(b) to dictate the cost of credit, Section 2607(b)—by its express terms—does not permit after-the-fact challenges to fees and costs charged and retained by lenders solely on the ground that they are "unearned" or too high. Instead, it prohibits only *divided* charges for which no service is provided. Moreover, although the Court need not reach the issue to resolve the question presented, the United States is incorrect in asserting in its amicus brief that Section 2607(b) covers points—points are an integral

part of the pricing of the loan, not a charge for "settlement service."

STATEMENT

In this case, each petitioner asserts that Quicken Loans violated RESPA by charging loan discount fees, which are often synonymous with points, without providing a discount. To correctly decide the narrow "undivided charges" question on which the Court granted review, amici believe certain background principles are fundamental: *first*, the ability to offer innovative mortgage pricing terms is essential to meet consumer demand, and *second*, loan discount fees or "points"—which generally allow borrowers to obtain a certain interest rate—are a key component of the mortgage pricing flexibility that lenders can offer. As amici explain *infra*, Section 2607(b) was not intended to regulate, or set the rates for, the various types of mortgage pricing options that consumers demand and lenders provide.

Loan discount fees—or points—are an important mechanism in which lenders have enhanced consumer choice. As HUD has recognized, points constitute an amount "paid to the lender or broker for the loan [that is] often linked to the interest rate." U.S. Dep't of Hous. & Urban Dev., *Looking for the Best Mortgage* 3, *available at* http://hud.gov/buying/booklet.pdf [hereinafter HUD, *Looking for the Best Mortgage*] (defining points); *see also id.* at 6 (recognizing that points "may be called loan discount points").

Generally speaking, points are up-front money paid to the lender, which otherwise would have been charged as part of the interest rate. Each point generally costs 1% of the principal being financed. *See* Holden Lewis, *Paying Mortgage Discount Points: A Primer*, *available at* http://www.bankrate.com/brm/news/mortgages/20060126a1.asp. Points are treated as interest for some revenue purposes by the IRS, and thus are tax deductible. *See* IRS Pub. 936, 2010 WL 5056310 (I.R.S. Nov. 30, 2010).[2]

Sometimes, a borrower pays points to obtain a loan at a specific interest rate below the rate the lender otherwise would offer that particular borrower. U.S. Dep't of Hous. & Urban Dev., *HUD-398-H[4]*, *Buying Your Home: Settlement Costs and Information* 14-15 (1997), *available at* portal.hud.gov/hudportal/documents/huddoc?id=DOC_12893.pdf (hereinafter HUD, *Buying Your Home*). Thus, if a borrower wants a lower rate than that quoted by the lender, the buyer may have the opportunity to buy down the interest rate of the loan by paying "discount points" to the lender. The amount of the discount can vary, but "usually the more points you pay, the lower the rate." HUD, *Looking for the Best Mortgage*, *supra*, at 3; *see*

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[2] As the Department of Housing and Urban Development Booklet, *Looking for the Best Mortgage*, recognizes, "in some cases, the money needed to pay points can be borrowed." HUD, *Looking for the Best Mortgage*, *supra*, at 5. When that occurs, the money will be repaid over the life of the loan.

also id. (stating that points are "often linked to the interest rate").

For example, a lender might offer a borrower a 30-year fixed rate mortgage for $200,000 at 6 percent interest with no points. The monthly principal and interest payment would be $1199.10. If the borrower paid 2 points up front to the lender (at a cost of $4000), however, the lender might agree to bring the interest rate down to 5.5 percent, making the monthly payment $1135.58. The savings difference would be $63.52 per month for the life of the loan.

Other times, the payment of a certain number of points may be tied to a lender's *initial* interest rate offer, rather than to a reduced or below-market interest rate. For example, a lender may conclude that a potential borrower's credit-worthiness requires a certain number of points to be paid in order to obtain a given interest rate. HUD, *Buying Your Home*, *supra*, at 14-15. Or a lender's advertised interest rate may require points to be paid—e.g., 5.5 percent with 1 point—and that particular lender might not offer pricing on that loan without points. Points also may account in particular transactions for such things as an extended period for which the borrower has "locked" in the interest rate before the loan closing—which can be particularly useful to the borrower during periods of rising interest rates, or where there is an elongated period before closing. In these situations, points still are an integral component of the pricing of the loan.

These pricing options provide borrowers with greater flexibility, and assist lenders in meeting consumer demand for affordable housing. Indeed, different borrowers have different needs. Borrowers interested in keeping a mortgage for an extended period of time may express a preference for obtaining a lower interest rate, even when such rates may be conditioned on the payment of more points. Conversely, borrowers who routinely look to refinance in periods of declining interest rates may prefer to pay fewer or no points, for an incrementally higher interest rate.

The use of points also may allow borrowers to obtain specific mortgage products not otherwise available to them. For example, different mortgage products (fixed, adjustable, hybrid fixed and adjustable, interest only, balloon, short maturity v. long maturity) typically require separate underwriting and qualifying criteria. Some borrowers interested in tailoring a particular type of loan to their unique financial needs may only qualify for that loan if they agree to pay points to offset the increased credit risks.

In all of these circumstances, the "points," discount or otherwise, are part of the pricing of the loan.

SUMMARY OF ARGUMENT

In enacting RESPA, Congress did not create a rate-setting statute. But acceptance of petitioners' contentions effectively would convert Section 2607(b) into just such a rate-setting provision.

A. Congress expressly considered and rejected a rate regulation scheme. In doing so, Congress recognized that there were "two basic approaches" it could take to solve the problems associated with settlement practices in enacting RESPA—(1) regulate the costs directly or (2) regulate the underlying business relationships by requiring disclosures and proscribing specific practices. As RESPA's text and history confirm, Congress adopted the latter approach. It determined that enacting a system of price regulations—where the government rather than the market and consumer demand determined the available mortgage products and prices—would be "both unwise and unworkable." The Court should not now reach out to do what Congress expressly rejected. Doing so would be particularly unwise because it would require ad hoc judicial administration of the statute, would increase substantially the number of lawsuits under RESPA, and would harm consumers by increasing the cost and decreasing the availability of credit and mortgage options.

B. On the narrow question before the Court, there can be no liability under Section 2607(b) when the charge being challenged was undivided. Section 2607(b)'s plain language requires *two* culpable actors:

one party must "give" *and* another party must "accept" some part of the charge. Moreover, Congress used the words "portion," "split," and "percentage"—each of which indicates something less than a whole.

C. Even if Section 2607(b) applies to undivided charges, loan discount fees—or points—cannot be the basis for liability because they are part of the loan's pricing. Although the Court need not reach this issue to resolve the question presented, amici nevertheless address it to respond to the contrary assertion made by the United States. *See* U.S. Br. 28-30.

Points—as a pricing term of the mortgage—are not subject to Section 2607(b). By its express terms, Section 2607(b) applies only to "a real estate *settlement service* in connection with a transaction involving a federally related mortgage loan other than for services actually performed," which does not include points. 12 U.S.C. § 2607(b) (emphasis added). As defined by the statute, "settlement services" are best understood as tasks done or arranged by the lender or a service provider in order to originate or to close the loan or any related real estate transaction. *Id.* § 2602(3). Thus, Congress listed as examples of settlement services activities such as "loan processing," "title examinations," "the preparation of documents," and "property surveys." *Ibid.* Because none of these enumerated tasks go to anything beyond the administrative process of closing a mortgage, Section 2607(b) cannot be understood to apply to the pricing of the loan itself, which does not involve settlement services.

ARGUMENT

IN ENACTING RESPA, CONGRESS DID NOT CREATE A RATE-SETTING STATUTE FOR THE PRICING OF MORTGAGES

A. Congress Considered, But Rejected As Bad Policy, Legislation That Would Have Regulated Loan Pricing And Restricted The Mortgage Options Available To Consumers

In enacting RESPA, Congress rejected competing legislation that would have created a rate-setting scheme for mortgages. Congress recognized that a federal regulatory system of real estate price controls would be unworkable and undesirable. Congress thus did not intend for RESPA to impose a maximum amount that lenders could charge.

1. When RESPA was introduced in Congress, the Senate had been considering competing legislation that contained price control provisions. This bill, S. 2288, would have expanded the narrow pricing authority that Congress previously had granted HUD and the Veterans Administration in the Emergency Home Finance Act of 1970.[3] The proposed legislation would have conferred on the agencies the broad ability to regulate settlement charges in the industry generally. *See* S. Rep. No. 93-866 at 1-3, *reprinted in*

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[3] Emergency Home Finance Act of 1970, P.L. 91-351, § 701, 84 Stat. 461, 461-462 (directing HUD and the VA to prescribe settlement costs standards for certain FHA-VA mortgage transactions).

1974 U.S.C.C.A.N. at 6546-6548. Specifically, unlike RESPA, S. 2288 would have empowered HUD to "establish the maximum amounts of the charges to be imposed upon the borrower and seller for services incident to or a part of a real estate settlement . . . which shall be designed to reflect the reasonable charges for necessary services . . . and to assure that settlement costs do not exceed such reasonable charges." S. 2288, 93rd Cong. § 4(a)(1) (1973).

There can be little doubt that Congress understood the stark choice before it in these two competing bills. The Senate and House Reports recognized that "there are two basic approaches that can be taken in solving the problems of settlement costs." S. Rep. No. 93-866 at 3, *reprinted in* 1974 U.S.C.C.A.N. at 6548. Congress knew it could either "regulate the costs directly"—as the rejected legislation aimed to do—or "regulate the underlying business relationships"—as RESPA does. *Ibid.* Faced with that choice, Congress rejected the settlement price control approach of S. 2288 in favor of the more measured, disclosure-driven approach of RESPA.

Indeed, Congress actually *repealed* the limited price control authority that it previously had given HUD and the Veterans Administration under the Emergency Home Finance Act of 1970. *See* Pub. L. No. 93-533, § 14, 88 Stat. 1730 (previously codified at 12 U.S.C. § 2612(b)(2) (1996) (repealed as obsolete by Pub. L. No. 104-208, § 2103(h), 110 Stat. 3009 (1996)). Congress instead replaced that prior, limited authority with the directive that HUD should study over

five years "whether Federal regulation of the charges for real estate settlement services . . . is necessary and desirable," and if so provide "a description and analysis of the regulation scheme [HUD] believes that Congress should adopt." *Ibid.*

2. Moreover, the legislative history concerning RESPA itself further shows that it was not intended to regulate the costs of settlement services.

The Report of the Senate Banking, Housing and Urban Affairs Committee described that Section 2607(b) intended to make unlawful

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

S. Rep. No. 93-866 at 5, *reprinted in* 1974 U.S.C.C.A.N. at 6551; *see also* 120 Cong. Rec. 29,442-29,443 (Aug. 20, 1974) (statement of Rep. Blackburn) (explaining that RESPA "intended to deal only with fee-splitting arrangements among participants in the settlement process" and that it would not impose liability simply because "the homebuyer believes that the charge made to him is in excess of the reasonable value of the services rendered").

The Senate Report further recognized that federal rate regulation of settlement charges "would be both unwise and unworkable" and enumerated five trenchant problems with such a regulatory scheme. S. Rep. No. 93-866 at 7, *reprinted in* 1974 U.S.C.C.A.N. at 6553.

First, the report acknowledged that federal rate control required "clear and convincing findings that settlement charges are unreasonably high on a widespread basis . . . and there is no other more practical way to deal with the problem." *Ibid. Second*, the report concluded that there were more "practical ways to deal with the problem." *Ibid. Third*, the abuses were not so pervasive and widespread to warrant "plac[ing] tens of thousands of individuals or businesses that supply settlement services under Federal rate-making." *Ibid. Fourth*, the report noted that such federal rate-making oversight would require a "large bureaucracy" to avoid "arbitrary and unfair decisions that may result if rates are set in the absence of the usual rate-setting safeguards." *Ibid. Fifth*, it recognized that such federal rate-setting power "would infringe on an area that has historically been of State or local concern and, in some instances, would duplicate existing State regulatory schemes." *Ibid.*

These reasons demonstrate that the decision to implement a federal rate-making regime of settlement costs—which petitioners, in effect, ask this Court to impose—should be a question of legislative judgment, not judicial decision making.

B. Section 2607(b) Applies Only To Divided Fees

The text of Section 2607(b) confirms that Congress did not intend to regulate the *amount* that a borrower can be charged for any particular service. Rather, that provision was aimed at prohibiting only certain fee shifting arrangements. This Court should not resurrect the very bill that Congress rejected.

1. The plain language of Section 2607(b) does not impose liability where a charge for a settlement service is not divided. Section 2607(b) provides:

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

12 U.S.C. § 2607(b). Petitioners' contention that Section 2607(b) imposes liability on a lender who retains an undivided charge reads several statutory requirements out of the statute.

First, liability under Section 2607(b) requires *two* culpable actors: one party must "give" *and* another party must "accept" some part of the charge. The use of "and" to conjoin "no person shall give" with "no person shall accept" requires that both conditions must be present. *Crooks v. Harrelson*, 282 U.S. 55, 59 (1930) (where provision contains two conditions separated by "and," it must be read in the conjunctive,

and "may not be read as though stated disjunctively").

Second, Congress used the words "portion," "split," and "percentage." These words, which are undefined by the statute, commonly are understood to mean something less than the whole. *See, e.g.*, *American Heritage Dictionary* 1412 (3rd ed. 1992) (defining "portion" as "[a] section or quantity within a larger thing"); *id.* at 1739 (defining a "split" as "[s]omething divided"); *id.* at 1343 (defining "percentage" as "[a] fraction or ratio with 100 understood as the denominator"). Read together, the phrase "any portion, split, or percentage" most naturally refers to a part of the disputed charge, rather than the whole charge. *See Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 8 (1985) ("it is a familiar principle of statutory construction that words grouped in a list should be given related meaning") (internal citations and quotations omitted).

2. The imposition of liability for unilateral conduct also would run counter to the broader statutory scheme.

If liability can be imposed under RESPA for receiving an undivided fee, petitioners themselves would be just as liable—for "giving" an undivided, unearned fee—as several courts have recognized. *See, e.g.*, *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002). Such a construction would be "irrational" and "perverse." *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 265 (4th Cir. 2002). Petitioners

acknowledge that it would make no sense for them to be liable for giving the fee to the lender. But they offer no justification in the statutory text as to how Section 2607(b) could be construed to impose liability on their lender while allowing them to evade liability.

3. Moreover, Congress's express purposes demonstrate that Congress intended RESPA to prohibit certain practices. The law proscribes conduct by two or more culpable parties, not unilateral conduct like that at issue here. In enacting RESPA, Congress sought to "effect certain changes in the settlement process for residential real estate that will result . . . in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601. Congress expressed no purpose about prohibiting undivided, unearned fees that might increase the costs of settlement services.

Indeed, imposition of liability under RESPA for any unearned, undivided fees for settlement services would be particularly incongruous in light of Congress's common-sense concern over *how* the value of such services could be determined under a federal rate-setting regime. Far from being subject to administrative rule making as to what constitutes a just and reasonable rate, the "value" for settlement services would be determined by judges and juries through litigation.

Such an ad hoc, standardless judicial administration of the reasonableness of charges cannot be what

Congress intended. This is particularly the case given that HUD-1 statements, which list the charges at closing, typically are completed by third party settlement agents (closing counsel in some States, escrow agents in others), not by the lender, and reflect substantial regional variation in the settlement services charged and how those charges are described. *See, e.g.*, Fed. Reserve Bd., *A Consumer's Guide To Mortgage Settlement Costs* 20-22 & nn.1-7, *available at* http://www.federalreserve.gov/pubs/settlement/mortgage_settlement.pdf.[4]

These variations, combined with other differences in prices charged and services rendered, often would require judges to conduct individualized, fact-sensitive inquiries.

Under this system, lenders would have a nearly impossible task of attempting to determine, ex ante, the likelihood that their charges would be found excessive and thus unearned under petitioners' standard. If the lender were to guess wrong, it might be subject not only to treble damages, costs, and attorneys fees, *see* 12 U.S.C. § 2607(d)(2), (5), but also the threat of criminal sanctions of up to 1 year in prison and a $10,000 fine per offense, *see id.* § 2607(d)(1).

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[4] Under these circumstances, it would be particularly improper for the Section 2607(b) analysis to turn on the description of the charge—e.g., "discount points," "points," etc.—ultimately used on the HUD-1 by these third parties.

These concerns are not inchoate. RESPA, through its remedies, already creates a strong incentive for borrowers to commence suit. If the Court authorizes plaintiffs to bring RESPA claims for *any* purportedly unearned fee, almost every borrower engaged in some dispute with a lender would have a strong incentive to sue under Section 2607(b) on the grounds that some lender-imposed fee was excessive and thus unearned. Congress could not have intended, sub silentio, to create broad incentives for such frivolous and expensive suits.

4. Most importantly, such a federal rate-setting regime would harm consumers by increasing the cost, reducing the number of choices consumers have, and decreasing the availability, of credit. If lenders were potentially subject to federal rate-setting lawsuits, lenders would need to account for the additional expenses and increased risks associated with each transaction. Lenders also might determine that certain cost-saving lending products are no longer feasible due to RESPA. That might result in borrowers facing higher interest rates. And some lenders, for fear of possible rate-setting litigation, might abandon certain markets or types of lending transactions—particularly those with increased risk of borrower default and corresponding litigation.

C. Even If Section 2607(b) Applies To Undivided Charges, It Does Not Apply To Loan Pricing

Although the Court need not reach the issue to resolve the question presented, Section 2607(b) does not cover the pricing of loans—including points—but is directed only to fees charged for "real estate settlement service[s]." 12 U.S.C. § 2607(b). The United States argues otherwise, by contending that points are a "settlement service." U.S. Br. 28-30. That argument cannot be reconciled with the text or purpose of the statute.

1. Section 2607(b) is expressly limited to a "charge" 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) (emphasis added). RESPA defines the term "settlement service" as "any service provided in connection with a real estate settlement." 12 U.S.C. § 2602(3). This includes, inter alia, "title searches," "title examinations," "the preparation of documents," "property surveys," and "the rendering of credit reports or appraisals." *Ibid.*; *see also* 24 C.F.R. § 3500.2.

None of these enumerated examples relates to the pricing of the underlying loan, such as the interest rate charged, the points paid, the amount of principal borrowed, or the repayment period. Rather, each service is a service done (or arranged) by a lender or third party that benefits the borrower or

seller by helping to ensure that the loan is made and closed. *See, e.g.*, *Black's Law Dictionary* 1491 (9th ed. 2009) ("service" is "the act of doing something useful for a person or company, usu[ally] for a fee"). Thus, even though the list is not exhaustive, it nevertheless limits the scope of "settlement service[s]" to similar arrangements. *Cf. Samantar v. Yousuf*, 130 S. Ct. 2278, 2287-2288 (2010) ("Even if the list in § 1603(a) is merely illustrative, it still suggests that 'foreign state' does not encompass officials, because the types of defendants listed are all entities"); *Begay v. United States*, 553 U.S. 137, 142 (2008) (recognizing that "[t]o give effect . . . to every clause and word of this statute," the Court must read the examples as limiting the scope of the provision to offenses "that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves") (internal citations and quotations omitted).

2. The findings of the statute confirm that Congress sought to regulate business practices relating to settlement costs under Section 2607(b), not the specific pricing terms of a mortgage, such as points or the interest rate that the borrower must pay the lender as the mortgage is amortized. Congress recognized that, because borrowers often did not know, or understand, the settlement services for which they were paying at closing, "significant reforms in the real estate settlement process" were necessary. 12 U.S.C. § 2601. Specifically, Congress sought to

> insure that consumers throughout the Nation are provided with greater and more

> timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country.

Ibid. Thus, Congress addressed one aspect of the real estate process—settlement costs—primarily through certain methods, namely increased disclosures and elimination of referral fees and kickbacks.

Far from broadly regulating the price of credit, Section 2603(a), for example, requires that lenders provide borrowers with a standard disclosure form, the HUD-1. That form must "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) (emphasis added). Section 2607(a) prohibits compensation for referrals of "business incident to or a part of a *real estate settlement service*." 12 U.S.C. § 2607(a) (emphasis added).

3. To be sure, as the United States points out (U.S. Br. 29-30), Congress expanded the definition of "settlement service[s]" in 1992 to encompass certain loan *origination* fees. *See* Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 908(a), 106 Stat. 3873. Congress broadened that definition—and thus the scope of Section 2607(b)—in response to the Sixth Circuit's ruling in *United States v. Graham Mortgage Corp.*, 740 F.2d 414 (6th Cir. 1984). In *Graham*, the Sixth Circuit had held that a loan origination fee was not a settlement service.

But contrary to the government's assertion (U.S. Br. 28-29), that amendment did not broaden the definition of settlement services beyond the tasks involved in making the loan to—for the first time—cover pricing terms, like interest and points. Congress simply included as a "service" "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); 24 C.F.R. § 3500.2. A charge for those services—whether called a loan origination fee, underwriting fee, processing fee, document preparation fee or the like—is just another "fee charged by a lender to cover the *administrative costs* of making a loan." *Wooten v. Quicken Loans, Inc.*, 626 F.3d 1187, 1194 (11th Cir. 2010) (emphasis in original) (quoting *Black's Law Dictionary* 690 (9th ed. 2009)), cert. denied, 181 L. Ed. 2d 140 (2011). That amended text does not convert the loan's maturity, interest rate, points, or other pricing terms into services cognizable under Section 2607(b).

In short, a borrower should not be permitted to maintain a claim under Section 2607(b) on the ground that they paid points for which they did not receive a reduction, or a significant enough reduction, in interest rate. Because points, like the interest rate, are not tied to any particular administrative service, but rather are part of the negotiated price of the loan itself, they are substantive terms of the "loan agreement, not a service provided to borrowers."

Wooten, 626 F.3d at 1195. They are not settlement services covered by Section 2607(b). *Ibid.*

CONCLUSION

For the reasons set forth above and in the brief for respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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