

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TAMMY FORET FREEMAN, ET VIR., :

4 Petitioners : No. 10-1042

5 v. :

6 QUICKEN LOANS, INC. :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, February 21, 2012

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:11 a.m.

14 APPEARANCES:

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16 Petitioners.

17 ANN O'CONNELL, ESQ., Assistant to the Solicitor
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20 Petitioners.

21 THOMAS M. HEFFERON, ESQ., Washington, D.C.; for
22 Respondent.

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1 P R O C E E D I N G S

2 (10:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 10-1042, Freeman v. Quicken
5 Loans.

6 Mr. Russell.

7 ORAL ARGUMENT OF KEVIN K. RUSSELL

8 ON BEHALF OF THE PETITIONERS

9 MR. RUSSELL: Mr. Chief Justice, and may it
10 please the Court:

11 For decades, the agency Congress charged
12 with administering the Real Estate Settlement Procedures
13 Act has construed that statute as prohibiting a lender
14 from accepting a charge for a real estate settlement
15 service it didn't provide, whether it accepts that
16 charge directly from a consumer or indirectly through
17 another service provider, and whether it shares that fee
18 with another provider or keeps it all for itself.

19 That interpretation is eminently reasonable
20 and is entitled to deference. And in fact --

21 JUSTICE GINSBURG: Mr. Russell, when you say
22 the agency in charge, am I right in thinking that HUD
23 and its successor -- they don't have any
24 suit-commencement authority?

25 MR. RUSSELL: HUD does have authority to

1 bring suits for injunctive relief for violations of
2 2607(b), and -- if that answers your question.

3 JUSTICE GINSBURG: For injunctive relief?

4 MR. RUSSELL: For injunctive relief. That's
5 correct. And that agency has long construed the
6 language of this provision as reaching all unearned fees
7 whether divided or not, and that interpretation of the
8 language we think is eminently reasonable.

9 JUSTICE SCALIA: Reaching all? I didn't
10 understand you. You said it too fast. As reaching
11 all -- something fees, whether permitted --

12 MR. RUSSELL: All unearned fees, whether
13 split --

14 JUSTICE SCALIA: Unearned fees
15 whether provided or not.

16 MR. RUSSELL: Whether split or not.

17 JUSTICE BREYER: How does this -- just -- may
18 be a side issue, but I don't see how this is a fee for
19 service. I mean, I thought points is simply a way of
20 paying more money up front and getting a lower interest
21 rate later. It isn't supposed to be for any service;
22 it's simply a question of -- of a loan term, how much
23 you borrow and what the interest rate is.

24 MR. RUSSELL: Well, you're right. I do
25 think it's a side issue because the courts below didn't

1 decide that, and Quicken didn't --

2 JUSTICE BREYER: So, what are we supposed to
3 do -- decide theoretically, in the context of a case
4 that does not involve paying a fee for a service that
5 doesn't exist, whether you can pay for a service that
6 doesn't exist?

7 MR. RUSSELL: I think you can take it on the
8 same assumption that the court of appeals did, that the
9 fee was unearned, and decide the question presented.

10 But to answer your question, Congress
11 amended the statute specifically to overrule the Sixth
12 Circuit's decision in Graham, which held that loan
13 discount fees were not covered by the statute, in that
14 case involving a kickback. I know Quicken argues that
15 that case involved origination fees. We don't think
16 that's correct. But this is -- this is an issue you
17 could have an entire case about.

18 JUSTICE BREYER: How?

19 MR. RUSSELL: And -- but --

20 JUSTICE BREYER: What's -- what's the
21 argument on the other side? A point is a way of paying
22 more money, i.e., borrowing less. Since you pay more,
23 that means you borrow less. And so, your interest rate
24 is lower because you've borrowed less. Now, what's the
25 argument on the other side?

1 MR. RUSSELL: The argument is Congress
2 specifically defined the term "real estate settlement
3 service" to include the origination of the loan, which
4 includes but is not limited to the funding of the loan.
5 And it did that in order to encompass kickbacks, at the
6 very least, involving loan discount points, which was
7 what is at issue in Graham.

8 Now, you can have debates -- and we will
9 have in this case eventually debates about what does it
10 mean for a loan discount fee to be unearned. But for
11 present purposes, the circuit split arose here in the much
12 more common circumstance, when there are unearned fees
13 for appraisals and courier fees, and -- and that's what
14 the lower court decided on the basis of. And it did
15 so --

16 JUSTICE SCALIA: Well, I suppose if -- if
17 the lower court could have been wrong for either one of
18 two reasons, we don't have to decide which of the two
19 we -- we're precluded from considering, right?

20 MR. RUSSELL: No, I don't think you're
21 precluded from considering -- I --

22 JUSTICE SCALIA: I mean, it's -- it would be
23 just as well to say that the question presented here
24 decides the case as it would be to say that the question
25 raised by Justice Breyer decides the case, right?

1 MR. RUSSELL: Right. I --

2 JUSTICE SCALIA: And is there any reason to
3 put the one before the other?

4 MR. RUSSELL: There are several reasons.
5 One is the lower courts did not address this question.
6 Quicken hasn't briefed it to any extent. Quicken
7 doesn't ask you to decide it on the base of that
8 question. We haven't briefed it. It's a complicated
9 question that involves interpretation of another
10 provision of the statute that Congress amended to deal
11 specifically with this problem. And it wouldn't
12 solve -- it wouldn't resolve the circuit conflict that
13 the Court granted cert to decide.

14 And so, if I could turn to that, if you look
15 at the language of the statute, which is reproduced on
16 page 6a of the -- the blue brief, in the words of the
17 statute, a lender who charges an unearned fee, accepts,
18 within the meaning of the statute, a portion, split, or
19 percentage, i.e., 100 percent, of a charge that was made
20 for the rendering of a covered real estate settlement
21 service other than for services actually performed.

22 CHIEF JUSTICE ROBERTS: I -- your argument
23 that "percentage" can include 100 percent is certainly
24 true as a matter of logic. But in the phrase "portion,
25 split, or percentage," I think the more natural reading

1 of "percentage" is something less than 100 percent. In
2 other words, you're apportioning or you're splitting the
3 fee with somebody else.

4 MR. RUSSELL: Well, I think --

5 CHIEF JUSTICE ROBERTS: You could have --
6 "portion" I suppose could still mean a full portion;
7 "split" probably not. But, I mean, the more natural
8 reading is surely a division.

9 MR. RUSSELL: Well, I think "portion" is the
10 word that best fits this situation. And Congress has
11 used the phrase "portion" in other state -- in other
12 statutes to prohibit, for example, a public official
13 from converting to personal use any portion of the funds
14 entrusted to him --

15 JUSTICE SCALIA: It could mean that, but it
16 need not mean that. It could mean either that or just
17 -- just part and not whole; and which of the two it
18 means is often decided by the other words with which
19 it's associated. I mean, if you have a phrase that
20 says, you know, "tacks, nails, and" -- what? "Tacks,
21 nails, and wooden pegs," it's clear that "nails" doesn't
22 mean toenails; it -- it means a fastener.

23 And so, also here, when it says "portion,
24 split, or percentage," it seems to me the natural
25 reading is that portion or percentage means not, as it

1 could mean, the whole, but rather just a portion.

2 MR. RUSSELL: Well, I would -- I would say
3 two things about that. One is that when you have a
4 statute that forbids somebody from taking any portion of
5 something, I think the ordinary understanding is that
6 prohibits them from taking the whole of the thing. The
7 embezzlement statutes are an example of that.

8 JUSTICE SCALIA: That's not what we have.
9 We have -- we have a statute that says you shall not
10 take any portion or split.

11 MR. RUSSELL: Right.

12 JUSTICE SCALIA: Okay?

13 MR. RUSSELL: And so, the canon, though, I
14 don't think, is a canon that says when you have related
15 words, you give them all the same meaning. They
16 certainly have something in common. They're all the
17 measure of something, but the canon doesn't say that you
18 read them to all mean the same measure of something,
19 which would run headlong, I think, into the canon
20 against construing statutes to have surplusage.

21 CHIEF JUSTICE ROBERTS: But the -- one
22 reason -- one objection to your idea that, well, this
23 covers partial, so it must cover 100 percent, is that
24 it's a very different issue if you're talking about
25 partial and 100 percent. If you're talking about

1 partial, you have a classic case of a -- a kickback.
2 But if you suddenly say 100 percent of an unearned fee,
3 that's a much more difficult question to decide.

4 In this case, for example, you get a whole
5 bunch of things from Quicken Loans, including the loan
6 and all this other stuff, and it's kind of hard to
7 single out, well, this part is unearned but this part is
8 earned; it's kind of a whole package. When you have a
9 portion or split, it's an entirely different issue.

10 MR. RUSSELL: Well, you still have to
11 decide, when you're talking about a kickback, whether
12 the person who received the kickback has done anything
13 to earn their portion of it. And so, I don't think you
14 avoid the question of what does it mean for a fee to be
15 unearned entirely.

16 CHIEF JUSTICE ROBERTS: Yes, but there --
17 it's a more -- it's a narrower issue when you're talking
18 about a portion. Let's say the kickback goes to the
19 appraiser. Maybe you can decide in that case whether
20 the loan company really had anything to do with the
21 appraisal at all.

22 When the alleged unearned fee goes to the
23 whole loan company, it's a little harder to say which
24 part was unearned and which parts might have been
25 earned.

1 MR. RUSSELL: But --

2 CHIEF JUSTICE ROBERTS: It's just -- it's
3 the way these loans work, right? I mean, it's the same
4 thing whether you pay 10 percent and no points or 9
5 percent and 3 points. You know, which one of those is
6 earned or unearned, it's kind of hard to sort it out.

7 MR. RUSSELL: It's certainly harder to sort
8 out with respect to loan discount fees. But the run of
9 the mine cases here involve things like appraisals,
10 courier services, flood certifications --

11 JUSTICE BREYER: Okay. How does that work?
12 The bank says to Mr. Smith we are going to charge you
13 \$100 for a courier service. And then they don't. So,
14 there it is on the bill. And Mr. Smith, really knowing
15 he didn't get the courier service, pays the \$100. All
16 right? Why isn't Mr. Smith guilty, on your
17 interpretation?

18 I mean, on your interpretation, every
19 innocent consumer is guilty of a crime.

20 MR. RUSSELL: No. That -- that is not the
21 case --

22 JUSTICE BREYER: Why not?

23 MR. RUSSELL: -- and what protect consumers
24 is the last words of the -- of this provision, which
25 creates a safe harbor for people who give or accept

1 charges for services actually performed. And the
2 critical word here is "for." What a consumer is paying
3 "for" is what she has been charged "for."

4 JUSTICE BREYER: Yes.

5 MR. RUSSELL: If she has been charged for an
6 appraisal, what she is giving the charge for is for the
7 appraisal. If the appraisal wasn't performed, that
8 shows she didn't get what she paid for, but it doesn't
9 change what she was paying "for." Now --

10 JUSTICE BREYER: So, you -- I don't
11 understand that. It's my fault. But wouldn't -- it
12 says that if she doesn't get the appraisal, but she has
13 to pay for it, then why isn't she -- why hasn't -- why
14 doesn't she fall within the statute?

15 MR. RUSSELL: I think that there are two
16 ways you can construe what it means to pay a charge for.
17 One is what it is you actually got --

18 JUSTICE BREYER: What you got was nothing.

19 MR. RUSSELL: -- which was nothing. The
20 other is what you are actually charged for, which was
21 the appraisal.

22 JUSTICE BREYER: Yes.

23 MR. RUSSELL: And I think that latter
24 interpretation --

25 JUSTICE BREYER: Yes.

1 MR. RUSSELL: -- is the proper one. It's --
2 I think it's the most natural --

3 JUSTICE BREYER: Why hasn't the consumer
4 violated?

5 MR. RUSSELL: Because she didn't pay for
6 services other than -- she didn't pay for services other
7 than services actually performed. What she paid for --

8 JUSTICE BREYER: Then why is the bank
9 liable?

10 MR. RUSSELL: Because I think it's
11 different, depending on whether you're looking from the
12 perspective of accepting or receiving, what the charge
13 is for. So, for example, if you were to go to your
14 mechanic and you were charged for an oil change but you
15 didn't get one, it would be perfectly natural for you to
16 say I was charged for and I paid for an oil change.

17 JUSTICE BREYER: I see. So, this -- you're
18 saying when the bank writes down, "pay \$100 for the
19 courier service," the bank is charging for the courier
20 service.

21 MR. RUSSELL: Right.

22 JUSTICE BREYER: When the consumer pays for
23 the courier service which he sees there, the consumer is
24 not paying for the courier service. He is paying for
25 the nothing.

1 MR. RUSSELL: No, I think the consumer is
2 paying a charge for the -- for the courier service.

3 JUSTICE BREYER: All right. Then why
4 doesn't he fall within the -- within the statute?

5 MR. RUSSELL: Because it's not a violation
6 of the statute --

7 JUSTICE BREYER: Why?

8 MR. RUSSELL: -- to pay for a service
9 actually performed. And that's what she is paying for;
10 she's paying for an appraisal. She's not paying for
11 nothing.

12 JUSTICE GINSBURG: But they're -- but the
13 purchaser is the giver, and the statute reads, "No
14 person shall give and no person shall accept." The
15 acceptor is the loan company. The person who is giving
16 would be the consumer, the customer.

17 MR. RUSSELL: Correct.

18 JUSTICE GINSBURG: But -- so, the person who
19 gives is -- is not answerable under your reading of this
20 (b)?

21 MR. RUSSELL: Correct, because what she is
22 giving the charge for is what she has been charged for.
23 She was charged for an appraisal. She's giving the
24 charge for an appraisal, and that doesn't violate the
25 statute.

1 JUSTICE SCALIA: Give me an example of where
2 the language "give" would have an effect.

3 MR. RUSSELL: I think in --

4 JUSTICE SCALIA: Have you deprived it of all
5 effect?

6 MR. RUSSELL: No. In a traditional kickback
7 situation, where Quicken, for example, kicked back some
8 of the fee to a real estate agent for nothing, for the
9 referral of the business, which isn't for a service
10 actually performed within the meaning of the statute,
11 that would violate the provision.

12 JUSTICE GINSBURG: But then we have Quicken
13 as the giver and the person who receives the referral or
14 kickback as the receiver.

15 MR. RUSSELL: That's correct. This
16 provision does double duty. It is designed and written
17 broadly to encompass both traditional kickback
18 situations and unearned fee provisions.

19 JUSTICE GINSBURG: Mr. Russell, there's one
20 puzzling aspect of -- of your interpretation. It would
21 be a rather large thing for Congress to say we're going
22 to cover overcharges, as I believe HUD says is --
23 counts; and yet, in the -- in the purposes of the Act on
24 page 1 of the appendix, it says nothing about
25 overcharges, nothing about payment for a service not

1 received in the -- in the four -- "it is the purpose of
2 the Act to," and then there are four things listed, and
3 none of those say to stop charges for services that
4 weren't performed.

5 MR. RUSSELL: That's true. First, just to
6 clarify, we don't -- we're not arguing that it covers
7 overcharges in the sense of excessive charges.

8 JUSTICE GINSBURG: But that is -- that is
9 HUD's interpretation?

10 MR. RUSSELL: That is one of HUD's
11 interpretations, although it's an interpretation about
12 what it means for something to be unearned, not having
13 anything to do with whether split fees are covered or
14 not.

15 But to answer your more specific question,
16 we know that that enumeration is not comprehensive.
17 There are other things in the statute that are not
18 included. And the general purpose of the statute --

19 JUSTICE SCALIA: But nothing as big as this,
20 if you accept HUD's interpretation of this, which is
21 essentially the issuance of a -- of a price schedule by
22 HUD, and anything above these prices is an overcharge
23 and hence falls under -- under this provision. That's
24 immense.

25 MR. RUSSELL: It would be immense, but this

1 Court doesn't have to accept that view in order to
2 accept HUD's point of view.

3 JUSTICE SCALIA: No, but if we don't, then
4 we reject deference to HUD, which you want us to -- to
5 apply.

6 MR. RUSSELL: But as --

7 JUSTICE SCALIA: We can't at one time -- at
8 one and the same time, give deference to HUD and yet
9 disagree with what HUD says.

10 MR. RUSSELL: Certainly you can, and, in
11 fact, Your Honor did in Smith v. City of Jackson, where
12 you held that a provision of a regulation recognizing
13 disparate impact was entitled to deference, but a
14 provision saying what you had to prove to show a
15 disparate impact violation wasn't. And here
16 similarly -- I mean, particularly the overcharge part of
17 the interpretation is not even in the regulations. It's
18 in the policy statement. It's a subsequent --

19 JUSTICE ALITO: But do you think this is
20 just a labeling statute? Quicken could charge whatever
21 it wanted, bottom line, but if it breaks it down into
22 categories and it doesn't do something that's actually
23 attributable to one of those categories, then there's a
24 violation?

25 MR. RUSSELL: I think Congress -- yes. I

1 mean, it is -- labels are important, because Congress
2 didn't say you simply have to disclose the bottom line;
3 it said you have to give an itemized list. And
4 requiring that those identified line items actually
5 represent services that were actually rendered is a
6 completely reasonable supplement to the disclosure
7 requirement.

8 If I could reserve the remainder of my time.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Russell.

11 Ms. O'Connell.

12 ORAL ARGUMENT OF ANN O'CONNELL

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE, SUPPORTING PETITIONERS

15 MS. O'CONNELL: Mr. Chief Justice and may it
16 please the Court:

17 The plain terms of section 2607(b) prohibit
18 two separate actions, giving an unearned fee and
19 accepting one. Sometimes the statute will be violated
20 when an unearned fee is collected from the consumer and
21 then shared between two service providers. But the
22 statute is also violated when a service provider
23 collects an unearned fee directly from the consumer and
24 retains the entire fee for itself.

25 JUSTICE BREYER: The consumer doesn't

1 violate it in those circumstances because?

2 MS. O'CONNELL: It's -- we agree with the
3 Petitioners' interpretation of this --

4 JUSTICE BREYER: Well, can you tell me where
5 in the briefs? I have to read this about six times to
6 get this one in my head.

7 MS. O'CONNELL: I don't--

8 JUSTICE BREYER: Where in the briefs does it
9 explain to me why in your situation the bank would be
10 violating it, but the consumer wouldn't, since it says
11 "no person shall give" as well as "no person shall
12 receive"?

13 MS. O'CONNELL: Justice Breyer, I don't
14 think this is in the briefs. It's --

15 JUSTICE BREYER: Well, my goodness. If it
16 isn't in the briefs, it -- maybe I'm off on a track
17 here, but it seems to me a pretty obvious question.

18 MS. O'CONNELL: Well, it is --

19 JUSTICE BREYER: I mean, we have a statute
20 that looks like a kickback statute, and the reason it
21 looks like a kickback statute is it refers both to the
22 person giving and to the persons receiving, and it seems
23 to make them equally liable.

24 Now, you want to apply it to a situation
25 where I don't think you want to hold consumers liable.

1 And so, I think you have to explain to me why this
2 statute doesn't --

3 MS. O'CONNELL: I think --

4 JUSTICE BREYER: -- on your reading of it.

5 MS. O'CONNELL: The explanation is
6 encompassed in HUD's policy statement. Footnote 6 of
7 the policy statement, which is in the appendix to the
8 Petitioners' brief at 33a, says that HUD would be
9 unlikely to bring an enforcement action against
10 consumers for the payment of unearned fees.

11 JUSTICE BREYER: Oh, you mean it's all
12 prosecutorial discretion? In other words, if you happen
13 to be a consumer you just have to rely on the goodwill
14 of the prosecutor; is that the idea?

15 MS. O'CONNELL: Justice Breyer, I think it's
16 more than just prosecutorial discretion. What HUD is
17 explaining --

18 JUSTICE BREYER: What more?

19 MS. O'CONNELL: What HUD is explaining is
20 that the reason why it would not prosecute a consumer is
21 because the consumer does not make the payment for --
22 does not pay a fee for the payment of unearned fees. A
23 consumer --

24 JUSTICE KENNEDY: Have we said in some of
25 our cases, oh, don't worry, this is within the

1 discretion of the prosecutor, close enough for
2 government work?

3 MS. O'CONNELL: No, no. Justice Kennedy, I
4 don't -- I don't think that this is just prosecutorial
5 discretion. This is HUD's interpretation of the statute
6 laid out in a policy statement saying it doesn't think
7 consumers violate the statute because they're --

8 JUSTICE KENNEDY: Does HUD have expertise in
9 interpreting criminal statutes?

10 MS. O'CONNELL: HUD is -- has an expertise
11 in -- in determining what is earned and unearned and
12 what the practices are in the real estate industry for
13 charging consumers fees that haven't been earned by the
14 service providers. What HUD is saying in the policy --

15 JUSTICE SCALIA: Well, but I assume that
16 HUD's interpretation of a criminal statute like ours
17 must give the defendant the benefit of the doubt so that
18 if there's any ambiguity -- I mean, that's our standard
19 rule. If there's a genuine ambiguity, you -- you find
20 for the interpretation that favors the defendant. And
21 this here -- I think this is at the very least
22 ambiguous. And you are telling me -- well, I guess
23 you're right. I guess HUD is favoring what would be the
24 defendant in this case.

25 MS. O'CONNELL: If -- yes, it -- it's saying

1 that it doesn't think that a consumer violates the
2 statute because the consumer doesn't pay the fee other
3 than for services actually performed.

4 JUSTICE BREYER: But can you -- I don't want
5 to take all your time on this because to me the more
6 important problem was the problem of the difference
7 between a kickback statute, which we could understand as
8 well within HUD's expertise and normal and of course
9 very good reason for doing it. But a price control
10 statute, where we have the Federal agency deciding
11 whether the prices are accurate for each service that is
12 rendered or whether some percentage or all of it
13 represents service for nothing -- that's a rather big
14 novelty in American life. That is, we have it, but
15 they are usually Federal agencies that have a system
16 set up for determining proper prices and so forth.

17 So, it's hard for me to believe that sort of
18 inadvertently Congress brought in the second under the
19 guise of the first without a big fuss being raised and a
20 big debate and so forth.

21 MS. O'CONNELL: Justice Breyer, I think the
22 important -- important point here is that this is not an
23 overcharge case; this is an unearned fee case.
24 Overcharges are included in the 2001 policy statement,
25 but there is a basis in the statute to differentiate

1 between overcharges and unearned fees, and HUD has long
2 taken the position that undivided unearned fees, a fee
3 for which no service is performed, violates section
4 2607(b).

5 JUSTICE KENNEDY: Well, I'm not sure. It
6 seems to me that even under the Respondent's view of the
7 statute, you have to inquire into reasonableness to see
8 if the fee was earned.

9 MS. O'CONNELL: At some point, under
10 anybody's interpretation, there does have to be a
11 determination of whether something was earned. But
12 there is a statutory basis to distinguish between an
13 unearned fee and an overcharge in that the service has
14 to be -- the fee has to be other than for services
15 actually performed.

16 JUSTICE SCALIA: Wait a minute. If -- you
17 know, if -- if I charge you an exorbitant amount for
18 cutting down a tree, you know, 2,000, \$20,000, and then
19 I present my bill, you would say that I have not earned
20 it simply because it's exorbitant?

21 MS. O'CONNELL: There --

22 JUSTICE SCALIA: I don't think you have to
23 evaluate --

24 MS. O'CONNELL: No. Justice --

25 JUSTICE SCALIA: Under the Respondent's

1 interpretation, I don't think have you to evaluate the
2 reasonableness of the fee in order to decide whether it
3 was earned or not.

4 MS. O'CONNELL: Under the statute, if it's
5 for -- if the fee is for -- other than for services
6 actually performed, which -- we think the loan discount
7 fee in this case was a charge other than for a service
8 actually performed. There was no corresponding
9 reduction in the interest rate. That is an unearned fee
10 under -- under anybody's interpretation.

11 JUSTICE KAGAN: It looks to me as though you
12 have an additional statutory problem. You have two sets
13 of verbs in this statute. One is the "give and accept"
14 set of verbs, and then the other is the "charge made or
15 received." So, it seems to me that what the statute is
16 -- is thinking about is that first, that there is a charge
17 made or received, and that charge is, of course, the
18 charge that the consumer pays to the provider. And then
19 there's another transaction. And that transaction is
20 the "give or accept" transaction, and that transaction
21 occurs between two service providers. So, one set of
22 verbs refers to the consumer-provider relationship; the
23 other set of verbs refers to the provider-provider
24 relationship.

25 MS. O'CONNELL: Justice Kagan, we agree that

1 that -- that is one scenario covered by 2607(b). We
2 don't think it's the only scenario covered by the
3 statute. Under our interpretation and Petitioners'
4 interpretation, there doesn't have to be both a culpable
5 giver and acceptor. So, once the charge is received
6 from the consumer and accepted by the service provider,
7 that is also a violation of the statute.

8 It also does cover fees that are split
9 between two service providers, as you say, the giving
10 and accepting, but it doesn't have to involve two
11 service providers under the plain language of the
12 statute.

13 JUSTICE GINSBURG: But you -- you are now
14 splitting HUD's position. HUD's position says
15 overcharges are reached by the statute. You say not
16 overcharges, but only a fee when no service is
17 performed. So, why couldn't the customers have said
18 there is a fee for the service performed, that's the
19 reasonable fee; and the rest of it is a charge for a
20 service not performed?

21 I mean, can you really maintain that
22 distinction between an overcharge and a fee for services
23 that are not performed?

24 MS. O'CONNELL: Justice Ginsburg, in this
25 case, we don't think that the Court has to -- has to say

1 anything about overcharges and whether those are covered
2 by the statute. The fee in this case was a loan
3 discount fee, which is generally paid to procure a
4 reduction in the interest rate of the loan, and it
5 procured nothing for the Petitioners. It was a
6 completely unearned fee. It was other than for services
7 actually performed.

8 CHIEF JUSTICE ROBERTS: What does that mean?
9 In other words, the rate that was offered -- they said
10 you pay two points and you will get a rate of 8 percent. And
11 you're saying that even if they didn't pay the two
12 points, they would still get a rate of 8 percent?

13 MS. O'CONNELL: Right. Our understanding is
14 that when -- the Petitioners in this case got a quote
15 for their mortgage loan from Quicken over the phone at a
16 particular interest rate with no mention of points.
17 When it came time to pay the settlement charges, they
18 were charged a loan discount fee, charged points to
19 procure that particular interest rate. That -- that's
20 something that would have to be figured out on remand,
21 whether there actually should have been a -- a charge or
22 whether those points were included in the --

23 JUSTICE SCALIA: I don't know anybody who --
24 any knowledgeable person who applies for a loan, who
25 doesn't ask whether there are any points? I mean, it's

1 standard mortgage practice. And somebody who says I'm going
2 to get 8 percent? Yes. Eight percent with or without
3 points?

4 I mean, that -- I don't think that the mere
5 fact that the interest rate was 8 percent means that you
6 can't charge points and that any charging of points is
7 -- is a charge for a service not performed. The service
8 performed is giving you an 8 percent rate.

9 MR. O'CONNELL: Justice Scalia --

10 JUSTICE SCALIA: Now, if she didn't want the
11 points, she should have -- when it came to the closing,
12 say what are these points for? The 8 percent is what
13 you agreed to. And they would have said, well, that
14 8 percent is the -- is the rate we give when we charge 2
15 points.

16 MS. O'CONNELL: What -- what RESPA is
17 intended to do is to protect consumers, who often are
18 not sophisticated on what they're doing in securing a
19 residential mortgage loan and to make sure that they
20 understand what the charges are, and also to ensure that
21 they receive the charges -- the services for which they
22 pay at closing.

23 JUSTICE BREYER: Yes, but that's the
24 problem. The problem is, look, you are saying this is a
25 payment for a service that wasn't given. I think I

1 might say that this is just a lower interest -- a higher
2 interest rate than they -- than they expected.

3 Somebody might say you didn't get the
4 courier service at all. Others might say you got
5 service but not the gold-plated service, and the gold
6 plate was nothing. You see, that's what happens when
7 you get into a price control statute rather than a
8 kickback statute. And that is our concern here, I think
9 at least mine.

10 MS. O'CONNELL: Justice Breyer, this case
11 comes here under the assumption that this was an
12 unearned fee. If that's something the Court is
13 concerned about, it's something -- it could still decide
14 the question presented, and then the -- the lower courts
15 could figure that out on remand, whether this was earned
16 or not.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Ms. O'Connell.

19 Mr. Hefferon.

20 ORAL ARGUMENT OF THOMAS M. HEFFERON

21 ON BEHALF OF THE RESPONDENT

22 MR. HEFFERON: Mr. Chief Justice, and may it
23 please the Court:

24 In passing RESPA in 1974, Congress was
25 stepping into the middle of a primarily local market

1 controlled by State law. The statute shows that, in
2 doing so, Congress tread carefully. It did primarily
3 two things in the area of settlement charges.

4 First, its major reform was to standardize
5 and increase disclosure of charges, including requiring
6 a written estimate of charges to be given to people
7 weeks before the closing. That, in fact, was done here.

8 Second, as RESPA's finding and purposes
9 section tells us, Congress found that some consumers
10 needed particular protection from a particular market
11 failure. And I'm quoting from section 2601 in the first
12 page of the blue brief. Quote: "unnecessarily high
13 settlement charges caused by certain abusive practices
14 that have developed in some areas of the country."

15 Congress identified those as kickbacks and
16 referral fees. But in 1974, Congress went no farther.
17 It rejected proposals for direct price regulation which
18 had been proposed in both House and Senate. Congress
19 did recognize more legislation might be necessary and
20 that price controls might be advisable. And so, it sent
21 HUD out to do a study and report back.

22 JUSTICE KAGAN: Mr. Hefferon, if you are
23 right about subsection (b) and its meaning, what does it
24 do that subsection (a) does not do?

25 MR. HEFFERON: It -- it does two things.

1 First of all, with respect to the transactions that
2 relate to charges actually paid at the closing, it
3 eliminates the need to prove an agreement. All it --
4 all it says is that there will be a violation if you
5 follow the money and the money ends up in the hands --

6 JUSTICE KAGAN: Well, if that's the case, I
7 mean, why would Congress have done something that says
8 (a) pursuant to an agreement, (b) not pursuant to an
9 agreement? Why wouldn't it just have one provision that
10 didn't make any reference to an agreement?

11 MR. HEFFERON: Because (a) covers an entire
12 universe of things which appear, in many instances, away
13 from the closing table. For example, an agreement
14 between an attorney and a developer that the attorney
15 says I will do all the title work on the raw land for
16 this development if you later on send me the closings
17 when you build on the land and sell the particular
18 parcels.

19 If there was no agreement requirement,
20 agreement for referral, if that did not appear in (a),
21 then any relationship between two people in the
22 settlement service business would be presumptively a
23 kickback. And so, you had to have that.

24 JUSTICE SCALIA: Yes, well, (a) -- the
25 so-called kickback in (a) is not for services not

1 actually performed. The referral -- the referral is
2 certainly a service performed to the lender. There's --
3 there's nothing -- what should I say -- unethical about
4 getting a fee for a referral. It's -- it's called a
5 finder's fee.

6 So, you know, under (a) a finder's fee is --
7 is made unlawful, right?

8 MR. HEFFERON: That's correct. Congress has
9 decided that that is not something that should be
10 compensable as part of real estate business.

11 JUSTICE SCALIA: And under (b), something
12 quite different, and that is giving money to somebody
13 who performs no service at all is made unlawful. And
14 for that, you don't need an agreement, right?

15 MR. HEFFERON: That's correct. You don't
16 need to prove one. I think all parties here --

17 JUSTICE SOTOMAYOR: Counsel, under your
18 reading, as I understand it, the words "portion, split,
19 or percentage" means an amount less than the whole?

20 MR. HEFFERON: That's correct.

21 JUSTICE SOTOMAYOR: So, what happens if a
22 service provider gives 100 percent to the other side, as
23 opposed to a -- an amount less than the whole?

24 MR. HEFFERON: We don't believe that it is
25 covered by section 8(b). In most -- in section 2607(b).

1 In most instances, it would probably be provable as a
2 kickback under 2607(a) since, in normal circumstance,
3 one doesn't give all of one's fee away unless there's
4 something else going on, typically in this instance a
5 referral.

6 JUSTICE SOTOMAYOR: But that -- does that
7 make much sense that if you give one meaning -- if you
8 stay consistent with your meaning, what you're saying is
9 a situation where the service provider gives away
10 everything, 100 percent, they're just not liable under
11 (b)?

12 MR. HEFFERON: That --

13 JUSTICE SOTOMAYOR: If they give away 1
14 percent, they -- if they keep 1 percent, they're liable.

15 MR. HEFFERON: That's correct. Again,
16 Congress was trying to take a measured step here because
17 it was for the first time stepping into this local
18 market. Congress left State law remedies alone. And in
19 fact, the preemption provision --

20 JUSTICE SOTOMAYOR: Is there -- Judge
21 Higginbotham, in his dissent, said there is a big
22 difference between unearned fees and overcharge fees.
23 He said unearned fees, in their simplest form, is no
24 service whatsoever. Overcharges are some service but an
25 excessive value.

1 What's wrong with that definition? Why is
2 that definition unworkable in terms of limiting and
3 defining this statute?

4 MR. HEFFERON: If the Court would find that
5 "portion, split, or percentage" covers 100 percent, then
6 we would agree with Judge Higginbotham that it would --
7 that a -- liability would not go any further than a
8 situation where the person performed no services
9 whatsoever for a fee.

10 JUSTICE SCALIA: Is this 100 percent
11 thing -- is this a real problem that Congress was
12 addressing? Do you know of any 100 percent kickbacks or
13 100 percent payments to somebody else for services not
14 performed as opposed to just keeping part and giving the
15 rest?

16 MR. HEFFERON: In fact --

17 JUSTICE SCALIA: Isn't that enough reason
18 for its not being addressed, that it's not a real
19 problem?

20 MR. HEFFERON: And, Justice Scalia, there's
21 no indication that we are aware of in the legislative
22 history that such a thing was happening. What
23 Congress --

24 JUSTICE SOTOMAYOR: You think not? How
25 about with subsidiaries? Wasn't it common practice --

1 isn't it common practice that subsidiaries are often
2 receiving parts of the payments because then they
3 become -- they come out of the gross income of the major
4 parent?

5 MR. HEFFERON: It's -- it is a -- it is a
6 common arrangement if those subsidiaries are rendering
7 services in connection with the real estate settlement
8 service.

9 JUSTICE SOTOMAYOR: So, why isn't it a
10 potential common practice that they're getting
11 100 percent of something they didn't do?

12 MR. HEFFERON: Again, there's no
13 indication --

14 JUSTICE SOTOMAYOR: If they're rendering --
15 if they're already rendering services?

16 MR. HEFFERON: There's no indication in the
17 legislative history that that type of conduct was going
18 on, and Congress was specifically identifying kickbacks
19 and referral fees, which it referred to, for example, as
20 rebates and commissions, unearned commissions. And the
21 type of conduct which Congress meant to address was set
22 forth in this statute and in the legislative history.
23 And it, of course, deputized HUD to do a study to see if
24 more needed to be done. It recognized that full
25 payments may implicate the issue of rate setting and

1 that perhaps that's something that should be done, but
2 it wasn't going to be done at this point.

3 JUSTICE GINSBURG: Then why is the statute
4 labeled, titled, "Prohibition Against Kickbacks" --
5 that's one thing -- "and Unearned Fees"? What -- how do
6 you -- what does "unearned fees" refer to in the title
7 of 2607?

8 MR. HEFFERON: Well, Congress made the
9 decision at the time, as Justice Scalia pointed out,
10 that -- that a fee for a referral is -- is not properly
11 earned. And the -- the definition for the entire
12 section, the title, is "Kickbacks and Unearned Fees."
13 That refers to the entire section, (a) and (b). All
14 agree that 2607(b) frequently is -- is implicated if
15 there is a kickback. So, it can't be that the first
16 word applies only to (a) and the second word only to
17 (b).

18 CHIEF JUSTICE ROBERTS: So, you think there
19 could be an earned kickback.

20 MR. HEFFERON: There could be -- there could
21 be an earned kickback if Congress was willing to accept
22 the principle that it's okay to earn money for a
23 referral. That -- Congress rejected it, rejected the
24 principle that it's okay to get a -- to pay a kickback.

25 CHIEF JUSTICE ROBERTS: If it's okay to get

1 money for a referral, what type of kickback is not okay?

2 MR. HEFFERON: Well, it's -- let me be
3 clear. Congress made the policy decision it is not okay
4 to pay a kickback or any money in order to get a pure
5 referral and, therefore, said that in section (a) and
6 section (b) it is not proper to do that.

7 JUSTICE SCALIA: It made the decision that a
8 finder's fee in this area, although in all other areas
9 is perfectly okay, but a finder's fee in this area is a
10 kickback.

11 MR. HEFFERON: That's correct.

12 JUSTICE SOTOMAYOR: Counsel, if your reading
13 of the language is not plain, if there is two ways to
14 read this statute, give me your best reason for why the
15 policy statement should not be given deference.

16 I know you said because it didn't go through
17 notice and -- through notice; but outside of that, why
18 isn't this a HUD interpretation that the statute tells
19 us HUD can do, an interpretation of the statute? We can
20 argue about whether it's an interpretation of regulation
21 X or not, but why wouldn't it be entitled to deference?

22 MR. HEFFERON: It certainly is an
23 interpretation of the statute. We agree with that. And
24 HUD is given the authority -- now the bureau, previously
25 HUD, is given authority to interpret the statute.

1 In this instance, there's not a -- the
2 policy statement should not be due special deference for
3 several reasons. First of all, it's incomplete. It
4 purports to be an interpretation of this statute, and it
5 only touches very briefly and very generally on the
6 language. All the words that we have all spent a lot of
7 time working on in this case -- HUD says very little
8 about that. And it is -- also it doesn't --

9 JUSTICE SOTOMAYOR: Well, the Seventh
10 Circuit had said a lot different, and HUD came back --
11 and invited HUD to do something, and HUD came back and
12 said you read it that way; we think this is a better
13 reading.

14 What more do we need from an agency?

15 MR. HEFFERON: Because it -- it did not
16 treat the subject with the kind of depth that you would
17 expect or that this Court would want in terms of --

18 JUSTICE KAGAN: Well, Mr. Hefferon, I don't
19 think that that's true, that -- we defer to agencies,
20 not because we think that agencies do statutory
21 interpretation in exactly the way courts do. We
22 actually defer to agencies because we think they provide
23 something different, not because they're the best parser
24 of statutory language, but because when they see
25 ambiguity, they're able to import policy judgments into

1 that ambiguity. And that seems to me exactly what the
2 agency did here.

3 MR. HEFFERON: What the agency did on that
4 point is it simply said that if one construes it the way
5 they would like to construe it, it would address the
6 concern that Congress had for unnecessarily high
7 settlement charges. It provided no empirical or
8 experiential explanation for why that was the case.
9 Didn't say that this type of practice was going on;
10 didn't say that the interpretation was going to address
11 it. Furthermore, it didn't deal with the fact that its
12 interpretation also was going to sweep in price control
13 and what effect that would be.

14 In other words, the agency did not -- did
15 not do the types of things that would cause this Court
16 to defer to it.

17 JUSTICE SOTOMAYOR: In essence --

18 JUSTICE SCALIA: When an agency is
19 construing a criminal statute, a statute providing for
20 criminal penalties, do you think the agency is
21 constrained to apply the rule of lenity and to assume
22 that if there is ambiguity, it should be interpreted in
23 favor of the defendant?

24 MR. HEFFERON: Yes, Your Honor, because
25 the -- this is a criminal statute, and it is

1 particularly difficult, it seems -- it seems to us, to
2 give the policy statement deference because in order to
3 get to the policy statement, you have to assume the
4 statute's ambiguous and then assume the regulation's
5 ambiguous, and then you get to the -- the policy
6 statement. It would be appropriate for this Court to
7 impress upon the agency to be quite clear and to be
8 quite solicitous of defendants' rights to make sure that
9 it doesn't interpret this statute broader than what --

10 JUSTICE BREYER: Well, in 1992, they promulgated
11 the regulation, which is the strongest argument I think
12 on the other side. It's a strong argument. Have you --
13 has anybody looked at that notice-and-comment
14 proceeding? Have you looked at it?

15 MR. HEFFERON: We absolutely have, Your
16 Honor.

17 JUSTICE BREYER: All right. If you have, do
18 they go into this point, a point about -- the point
19 being this is a kickback statute? It isn't an
20 overcharge price regulation statute. Therefore,
21 promulgating a regulation that makes it a crime, a
22 Federal crime, to overcharge, which is what the
23 regulation says, is outside the scope of the statute.

24 Now, did someone make that argument? If so,
25 I'd like to be able to read it, and I'd like to be able

1 to see what the agency said in response.

2 MR. HEFFERON: Justice Breyer, the
3 regulatory history around this section, which is in
4 regulation X, is actually quite interesting and quite
5 favorable to -- to the reading the Fifth Circuit gave to
6 the statute. The regulation does appear in 15a and 16a
7 of the blue brief.

8 When it was proposed, there was no
9 discussion whatsoever that suggested that HUD was going
10 to actually legislate or regulate about the statute. It
11 merely -- at the time it was proposed, the regulation
12 was going to be to recite section 2607(b), and that's
13 it. It referred to the section as being a fee-splitting
14 section.

15 When the final rule was issued, there were
16 three additional sentences added in this part of the
17 regulation. There was no explanation for those three
18 sentences, with the exception of HUD's general
19 comment that it made other changes in this part of this
20 regulation in order to address what services --

21 JUSTICE BREYER: So, you would say -- is
22 it --

23 JUSTICE SOTOMAYOR: Counsel, I'm sorry. May
24 I just --

25 MR. HEFFERON: Sure.

1 JUSTICE SOTOMAYOR: -- correct you on that?
2 Didn't HUD in that preamble say explicitly, "The
3 Secretary, charged by statute with interpreting RESPA,
4 interprets 18(b) to mean that two persons are not
5 required"? It says that explicitly.

6 MR. HEFFERON: It says that in the policy
7 statement. That's correct.

8 JUSTICE SOTOMAYOR: Not in the policy
9 statement; in the preamble to regulation X.

10 MR. HEFFERON: In the --

11 JUSTICE SOTOMAYOR: In -- in 1996. I
12 thought that was the final rulemaking you were talking
13 about, because it didn't do rulemaking with respect to
14 the policy statement.

15 MR. HEFFERON: That's correct. The 1992
16 regulation is entitled "No split of charges other than
17 for actual services." And so, we read the regulation
18 and believe HUD at the time read the regulation as,
19 again, merely repeating the idea that this was -- this
20 section was a limited section consistent with
21 Congress's --

22 JUSTICE BREYER: Is this a fair statement in
23 your view -- and we'll hear theirs on rebuttal -- that in
24 respect to the 1992 regulation, there is a sentence
25 which says, "A charge by a person for which ... nominal

1 services are performed ... is an unearned fee and
2 violates this section"? All right? I've ellipsed part.

3 All right. Now, it says that. And that
4 later on is taken as being: This statute is a -- to
5 that extent, a price regulation statute.

6 Is it fair to say that notice of such a
7 regulation was not given?

8 MR. HEFFERON: Absolutely correct,
9 Justice Breyer. Notice was not given that that was
10 going to be put into the regulation. And as this Court
11 noted in Long Island Care at Home --

12 JUSTICE BREYER: Was comment received in
13 respect to that?

14 MR. HEFFERON: I don't know whether -- I
15 don't know comment was received or not. There was no
16 indication in the final rule when it discussed comments
17 that that issue was commented upon.

18 CHIEF JUSTICE ROBERTS: What -- you were you
19 about to tell us what we said in Long Island Home.

20 MR. HEFFERON: In Long Island Care at Home,
21 the Court merely repeated in particular statements made
22 in Chevron and Mead that, among other things, a
23 regulation cannot get deference unless it -- if it is
24 procedurally defective. And in this instance -- and it
25 talked about the fact that a circumstance sometimes

1 arises when a notice of proposed rule doesn't give the
2 public a notice that there's going to be something
3 happening; so, there's no -- there's no comments given
4 on a particular subject.

5 And, in this instance, that's precisely what
6 occurred, which is one reason why regulation X should
7 not get special deference from this Court.

8 JUSTICE SOTOMAYOR: But I'm not sure.
9 Congress didn't say that HUD could only give
10 interpretations through rules. It said it could give
11 rules, pass rules and regulations, and give
12 interpretations. So, what's the procedural defect in it
13 just giving an interpretation?

14 MR. HEFFERON: Well, there's not a
15 procedural defect. The issue is really a question of
16 how much deference to give the agency when it
17 gives the interpretation.

18 JUSTICE SOTOMAYOR: We go back to whether
19 the -- whether the policy -- whether the statute is
20 ambiguous or not.

21 MR. HEFFERON: Correct, as well as if it is,
22 whether one gives Chevron deference.

23 JUSTICE SOTOMAYOR: And what I'm trying to
24 figure out is what's the deficiency in the policy
25 statement that's independent of the ambiguity you rely

1 upon.

2 MR. HEFFERON: What it is, is it is
3 incomplete; it doesn't give a -- an effective statutory
4 analysis. It doesn't really give any effective policy
5 analysis. It is also inaccurate in that it attempts to
6 recount that this is a -- a reading which is of long
7 standing, when we believe -- and we cite in the -- in
8 the red brief, we believe it's not.

9 JUSTICE SOTOMAYOR: Well, it says it's
10 longstanding for it.

11 MR. HEFFERON: It attempts to explain why it
12 is a finding -- a ruling of long standing, and we point
13 out examples in the red brief where it isn't a finding of
14 -- an interpretation of long standing.

15 CHIEF JUSTICE ROBERTS: Which -- putting
16 aside the notice-and-comment point, which I think is at
17 least ambiguous, which of our cases stands for the
18 proposition that whether or not we give Chevron
19 deference depends on the thoroughness with which the
20 agency addressed an issue, rather than simply an
21 announcement of its interpretation?

22 MR. HEFFERON: I believe that that was -- I
23 believe that that was a factor that the Court looked at
24 in Long Island Care at Home. But the -- the question
25 for the Court in this instance is, should it give this

1 policy statement deference? If it doesn't qualify for
2 Chevron deference, then the question is, does it have
3 the power to persuade? Part of the power to persuade is
4 its thoroughness; as Skidmore itself says, the detail in
5 which it addresses things, how it addresses arguments on
6 the other side, and what it says about those arguments.

7 JUSTICE SCALIA: But you concede that if we
8 give it Chevron deference, you lose?

9 MR. HEFFERON: On the policy statement?

10 JUSTICE SCALIA: No, on -- the case. If we
11 give either the policy statement or the rule Chevron
12 deference, you lose. Is that right?

13 MR. HEFFERON: If the Court also then finds
14 that it's deserving of Chevron deference, that's
15 correct.

16 JUSTICE SCALIA: Ah. You want to talk to
17 that?

18 MR. HEFFERON: Oh, sure.

19 (Laughter.)

20 JUSTICE SCALIA: We don't give deference to
21 interpretations that are beyond the limits of what the
22 language will bear, do we?

23 MR. HEFFERON: That -- that's absolutely
24 correct. And it -- it would be quite an odd result for
25 this Court to find that the policy statement effected

1 some kind of price control direct rate regulation regime
2 when that was specifically rejected by Congress in 1974.

3 JUSTICE SOTOMAYOR: Counsel, I'm a little
4 confused. Under your interpretation or theirs, the
5 court gets involved in determining whether fees,
6 services were rendered. I mean, it's not as if your
7 interpretation is going to keep the court out of that
8 business. To be able to find a kickback, the court has
9 to determine whether services were rendered or not. So,
10 what's the difference in that inquiry when it involves a
11 kickback and when it involves a -- a single provider?

12 In a kickback situation, the court has to
13 decide whether there was actually a service rendered
14 that entitled the person to a percentage or not,
15 correct?

16 MR. HEFFERON: That's correct.

17 JUSTICE SOTOMAYOR: So, what's the
18 difference between deciding that question and deciding
19 that the -- the one individual provided a service?

20 MR. HEFFERON: We agree that in each
21 instance, the court would have to make a factual
22 determination. But it comes back to what Congress
23 intended in 1974. It specifically identified that it
24 was attempting to address certain abusive practices that
25 had arisen in some areas.

1 JUSTICE SOTOMAYOR: And it listed, as
2 Justice Ginsburg said, unearned fees. Why would it
3 matter to Congress? Give me a reason that it would
4 matter to Congress whether the unearned fee was by one
5 person in a dual relationship or a single person alone?
6 The issue was unearned fees, rendering -- charging for a
7 service you didn't render. That's what the whole
8 kickback idea was about, correct?

9 MR. HEFFERON: That's with respect to
10 settlement service providers.

11 JUSTICE SCALIA: Could you complete your
12 earlier answer? I was just waiting for your point, and
13 it never came.

14 MR. HEFFERON: On the question of whether or
15 not to provide Chevron -- actually provide deference, if
16 Chevron was applicable? If Chevron's applicable to the
17 policy statement, the policy statement does not deserve
18 Chevron deference because it is an irrational reading of
19 the statute. The statute does not cover the kinds of
20 direct regulation that the policy statement suggests
21 that it covers.

22 JUSTICE KAGAN: Mr. Hefferon, you might be
23 right that we never get to Chevron deference here
24 because the statute is plain on its face, and there's no
25 ambiguity for the -- the agency to think or do anything

1 about. But let's just assume that there is ambiguity on
2 the statute, and the question is whether to provide this
3 interpretation with Chevron deference.

4 So, then, what's your argument for why there
5 should be no Chevron deference to this interpretation,
6 given that the statute under which this interpretation
7 was promulgated refers identically to regulations and
8 interpretations as something that HUD gets to do?

9 MR. HEFFERON: Well, the statute does give
10 HUD interpretive authority, but in this instance, what
11 it is doing -- in fact, it's not quite clear what words
12 it is interpreting in a way, trying -- trying to
13 interpret the words and any vague aspects of the
14 words -- is not a gap-filling situation that we're
15 talking about.

16 Congress reasonably in this statute, as well
17 as in the Truth in Lending Act, provided that the agency
18 would have interpretive authority. A lot of what this
19 agency was going to be doing with respect to this
20 statute is filling a lot of gaps. It's going to create
21 the special information booklet. It's going to create
22 these forms that I've referred to.

23 JUSTICE SCALIA: Doesn't any agency have
24 interpretive authority regarding the statute it's
25 implementing?

1 MR. HEFFERON: That's correct --

2 JUSTICE SCALIA: Is there agency that
3 doesn't?

4 MR. HEFFERON: Well, certainly, most
5 agencies would think --

6 JUSTICE SCALIA: Does it have to be
7 specifically conferred?

8 MR. HEFFERON: I don't believe it has to be
9 specifically conferred.

10 JUSTICE SCALIA: Is it at all increased when
11 it's specifically conferred?

12 MR. HEFFERON: I don't believe the Court's
13 precedents suggest that it's increased if Congress has
14 gone the next step to actually say you have the
15 authority to interpret the statute. The question is,
16 for purposes of -- of deference, is what is the
17 question? The question that HUD sometimes -- if HUD is
18 deciding what form should go on the form, then that's
19 interstitial lawmaking, and that's certainly something
20 that might get more deference than if the question is
21 interpreting the legal effect of these words that appear
22 in 2607(b). It is not -- it's not a definition; they're
23 not purporting to apply a definition; they're not
24 filling a gap.

25 And so, this is -- this is not where you

1 would look towards a Chevron deference. But Congress is
2 not expecting that -- that HUD would -- after it has
3 decided not to allow direct regulation of charges, that
4 HUD would nonetheless try to do it through the back door
5 through the interpretative --

6 JUSTICE BREYER: All right.

7 JUSTICE KAGAN: Now that's just a way of saying
8 that there's no ambiguity here. But I was suggesting
9 that if there is ambiguity here, I -- at least I have
10 not found a reason not to give HUD deference in this
11 situation. I mean, you say they didn't do a very good
12 job. But we don't usually grade agencies like that, and
13 say, well, you didn't do a very good job; so, you're not
14 entitled to Chevron deference.

15 MR. HEFFERON: The nature of the question
16 that HUD's addressing is interpreting the legal --
17 basically giving a legal interpretation of the statute.
18 It doesn't really purport to give a policy
19 interpretation of the statute because it simply refers
20 to -- it is a passing reference.

21 JUSTICE SCALIA: We give deference to legal
22 interpretations all the time.

23 MR. HEFFERON: But it is a -- it is -- the
24 question of what the Congress intended, whether --
25 whether they intended HUD to be giving the

1 interpretation or filling a gap, or whether it was
2 simply giving guidance. It --

3 JUSTICE SCALIA: I have no idea. What --
4 I'm supposed to psychoanalyze Congress in every Chevron
5 case?

6 MR. HEFFERON: HUD issued the policy
7 statement as a guidance document.

8 JUSTICE BREYER: That's -- no, no. That's a
9 good question, and your problem is different people feel
10 differently about the answer. So, the -- which is why
11 from my perspective --- and perhaps you're only
12 answering a question for me and no one else has it --
13 but I would be pretty interested to know whether when
14 you looked at the legislative history of this, what you
15 discovered was a lot of complaints about consumers
16 paying for things they didn't get, period. Which favors
17 HUD's interpretation.

18 Or whether you see a whole long list of
19 complaints about consumers having to pay referral fees,
20 where that's just one person taking advantage of another
21 person's business. I would -- I think it would be
22 relevant. And then if you've looked at all this, which
23 you could tell me you haven't -- I will try to -- but
24 what do you find?

25 MR. HEFFERON: Your Honor, you actually

1 don't find either. What you find is complaints about
2 providers doing things between each other and a
3 recognition that, ultimately, the consumers perhaps
4 unknowingly are being harmed by that. The Senate Report
5 and House Report both described that in great detail.
6 We're talking about rebates, commissions, unearned
7 commissions, and kickbacks and referral fees.

8 That's what Congress identified in 2601 as
9 the "certain abusive practices" that had arisen in some
10 areas of the country. This was not meant to be a
11 panacea. State law remedies stayed in place. And, in
12 fact, if you look at most of the court of appeals cases
13 that give rise to these -- this circuit split, they all
14 also bring a claim under State law, whether it's fraud
15 or contract or unjust enrichment.

16 That only drives the point home that it's
17 not irrational for Congress to have decided, when it was
18 taking a step into this area for the first time, to
19 actually legislate an important area, but not go all the
20 way, and instead leave other remedies in place. And
21 that's what the proper reading of this statute should
22 be. That's the reading the Fifth Circuit gave it as
23 well.

24 JUSTICE GINSBURG: Did you give a complete
25 answer to the question what does (b) cover that (a) does

1 not? So, one suggestion that's made is, well, you
2 didn't -- if all this statute has to do -- do with is
3 kickbacks, then all you need is (a), and there's no
4 necessity for (b). You said one thing is contract,
5 proving a contract, and not -- is there anything else?

6 MR. HEFFERON: Thank you, Justice Ginsburg.
7 Actually, I didn't give a complete answer now that I
8 recall. It does cover -- the best example is the
9 classic reason why the -- this section was put in, in
10 the first place, why it was proposed; and that would be
11 an unearned commission. Title insurance companies at
12 the time would enter into commission agreements with
13 agents where the agent would get 10 percent of the title
14 premium; in exchange, the agent would do the title work.

15 In a situation -- if the title agent in fact
16 didn't do the title work, it would be receiving an
17 unearned fee, that is, part of the title insurance
18 commission, for no work. And that, however, would not
19 normally be covered under (a) because the agreement, the
20 underlying agreement to give the commission was not to
21 refer business; it was actually to do some of the title
22 work.

23 So, that situation would be covered, but
24 most situations, as I think all parties agree, this
25 statute is -- is typically a kickback. It just simply

1 removes the agreement requirement.

2 JUSTICE SCALIA: And under -- under (b),
3 there doesn't have to be an agreement to pay -- under
4 (b) there doesn't have to be an agreement to pay the
5 title company for no work. It's just if it's a -- if
6 it's a refinancing and the title company did the same
7 title search, you know, 2 years ago, it says, heck, I'm
8 not going to do it again, but it still gets the 10
9 percent, right?

10 MR. HEFFERON: That's correct.

11 JUSTICE SCALIA: Even though there's no
12 agreement to pay it for no work.

13 MR. HEFFERON: That's correct.

14 So, in sum, the elements of the Fifth
15 Circuit's interpretation are all supportive of our view,
16 that is, that the language, the structure, the context,
17 and the history of this statute all show that it is
18 important, but it's limited; and it does not address
19 direct charges made by lenders. And the Fifth Circuit
20 had it right.

21 JUSTICE SOTOMAYOR: I'm sorry. Could you go
22 back to Justice Scalia's question? If a -- if a bank
23 has an appraisal fee from the past and decides I don't
24 need a new one, but still charges you for an appraisal
25 fee, would that violate the statute?

1 MR. HEFFERON: If the -- I think the
2 question was in the context of the title agent doing the
3 title work. If an appraiser was charging -- was
4 charging the consumer directly and not doing the work,
5 it would not violate the statute, again, because the
6 statute requires two providers.

7 JUSTICE SOTOMAYOR: Or if the bank charged
8 you for a title search that it did?

9 MR. HEFFERON: If -- if the bank arranged --

10 JUSTICE SOTOMAYOR: If it had one already?

11 MR. HEFFERON: If the bank arranged for a
12 title searcher to do title work, and then the bank
13 charged the consumer, and then it split the charge with
14 the title searcher --

15 JUSTICE SOTOMAYOR: No, no. So, going back
16 to Justice Scalia's question, if the provider decides
17 I'm going to use what I had before, I'm not going to
18 redo the work, but still charges you a second time,
19 they're not liable under your reading of the statute?

20 MR. HEFFERON: Not under 2607(b) and perhaps
21 under --

22 JUSTICE SCALIA: They'd be liable under
23 State law, I assume --

24 MR. HEFFERON: State law. That's --

25 JUSTICE SCALIA: -- for fraud, wouldn't

1 they.

2 MR. HEFFERON: I would assume so. That's
3 correct.

4 JUSTICE SCALIA: Yes.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. HEFFERON: If there are no other
7 questions, thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Russell, you
9 have 5 minutes.

10 REBUTTAL ARGUMENT OF KEVIN K. RUSSELL

11 ON BEHALF OF THE PETITIONERS

12 MR. RUSSELL: Thank you.

13 Justice Breyer, you had asked why Congress
14 would engage in a statute that gets at overcharges and
15 has a rate regulation kind of thing, which is very
16 unusual, and I agree it's unusual. That's a reason to
17 read this statute not to do that, to only get at truly
18 unearned fees, which are the equivalent of fraudulent
19 fees, which the law does forbid pervasively. In this
20 case, Congress --

21 JUSTICE BREYER: Once you say that, you're
22 -- you're outside the reg. I mean, when you read the
23 reg and the policy statement, it's pretty clear what
24 they are thinking of.

25 MR. RUSSELL: No, to be --

1 JUSTICE BREYER: And the policy statement is
2 even clearer. What they are thinking of is overcharges,
3 period.

4 MR. RUSSELL: No, I don't think that's
5 correct.

6 JUSTICE BREYER: No?

7 MR. RUSSELL: I think that there was a
8 two-step analysis. The first step is they decided that
9 split fees are not the only thing that the statute gets
10 at. And then -- but this -- an unsplit fee still has to
11 be unearned, and they had a separate interpretation of
12 what it means for a fee to be unearned.

13 JUSTICE GINSBURG: Where do you get --

14 MR. RUSSELL: At any rate --

15 JUSTICE GINSBURG: Where is that in the
16 policy statement? The difference between unearned
17 and --

18 MR. RUSSELL: It's towards the end where
19 they enumerate the different kinds of unearned fees.

20 JUSTICE BREYER: It's right here. It's on
21 -- it's on 53,057. And what they're explaining is that,
22 and they're talking about a third situation, and they
23 say one settlement service provider charges a fee to a
24 consumer where no work is done, or the fee exceeds the
25 reasonable value of the services performed by that

1 provider.

2 MR. RUSSELL: That's correct. They are --

3 JUSTICE BREYER: And so, if it exceeds the
4 reasonable value of the services performed by that
5 provider, you have to say what is the reasonable value
6 of the services performed by that provider. And that
7 involves the agency in the job of deciding what's a fair
8 or just price for this particular service.

9 MR. RUSSELL: I'm not -- I'm not disagreeing
10 with you about that. They list four different -- or
11 three or four different kinds of charges that could be
12 unearned. You don't have to agree with them with
13 respect to each of those things, about --

14 JUSTICE BREYER: No, but what I'm doing
15 there, you see, is now I'm trying to make sense out of
16 an agency interpretation which is other than what it
17 says, where what they're trying to do is to change the
18 nature of the statute from a kickback statute into a
19 statute that protects consumers across the board from
20 paying for things they don't get.

21 MR. RUSSELL: Well, I would --

22 JUSTICE BREYER: Now, that's where I'm sort
23 of interested in what the legislative history said, et
24 cetera, et cetera. It's much more complicated than I
25 thought coming in. I have to look at a lot of things.

1 MR. RUSSELL: Sure. What Congress said its
2 purpose was, was to get at abusive practices that
3 unnecessarily increase the costs of settlement. What --
4 the legislative history was focused on kickbacks, but
5 there were examples in the HUD/VA report, at page 16 of
6 that report, and in the Washington Post articles about
7 markups that are a form of undivided, unearned fee.

8 Congress knew -- subsequent to the passage
9 of this statute, HUD has frequently found and reported
10 to Congress incidents of unearned fees, including those
11 involving loan discount fees. And the States -- 21
12 States have filed a brief in this case telling you that
13 there is a pervasive problem with settlement closings
14 included padded charges for things that were never
15 performed.

16 With respect to the agency's interpretation,
17 I would point you particularly to this 1996 rulemaking,
18 where the agency withdrew an exemption for certain
19 payments between consumers and providers for the use of
20 a particular kind of computer service. That exemption
21 would have been unnecessary had HUD thought, as Quicken
22 does, that the statute only regulates transactions
23 between providers.

24 And in withdrawing that exemption, HUD
25 explained in quite a lot of detail that it rejected

1 specifically that -- the split fee requirement. And so,
2 I don't think there's any question that they've grappled
3 with this question and that they've explained why they
4 think that split fees aren't covered.

5 The question ultimately is whether that's a
6 reasonable conclusion in light of the language of this
7 statute --

8 JUSTICE BREYER: And then part of that is --
9 you might want to say something about the other part. I
10 mean, the purpose of this kind of APA/Chevron stuff is
11 to prevent agencies, seeing the supreme importance of
12 their own mission, taking a statute, running with it and
13 in particular transforming into a criminal law something
14 that really wasn't much there.

15 Now, procedure is important in that. And
16 that's why I'm very interested in whether -- whether
17 they gave notice to the public: Dear public, we are
18 thinking that this is far more than a kickback statute.

19 MR. RUSSELL: They gave --

20 JUSTICE BREYER: We would like to hear what
21 you think about that.

22 MR. RUSSELL: They gave the public more
23 notice than the Court found sufficient in Long Island
24 Care at Home, which is they -- they told the public this
25 provision is at issue; we're going to issue an

1 interpretation about it. And they ultimately did. In
2 Long Island Care, they did the opposite of what they had
3 proposed to do, and this Court said that was enough. In
4 this case, and even in 1996, they received comments with
5 respect to the case law that said that only splits are
6 required, and they said we disagree.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel,
8 counsel.

9 The case is submitted.

10 (Whereupon, at 11:12 a.m., the case in the
11 above-entitled matter was submitted.)

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