No. 10-1042

IN THE

Supreme Court of the United States

TAMMY FORET FREEMAN, ET AL.,
Petitioners,

v.

QUICKEN LOANS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

LAURENE K. JANIK
RALPH W. HOLMEN
NATIONAL ASSOCIATION OF REALTORS®
430 North Michigan Ave.
Chicago, Illinois 60611
(312) 329-8375

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
MARC A. WALLENSTEIN
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

Counsel for National Association of REALTORS®

January 10, 2012

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INTEREST OF *AMICUS CURIAE*[1]

This case raises an issue of fundamental importance to *Amicus* the National Association of REALTORS® ("NAR")[2] and its members. It concerns whether Congress, in the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§ 2601-2617, authorized government regulators and lay juries to review the reasonableness of charges for real estate settlement services.

Congress passed RESPA out of concern that "certain abusive practices" that had developed "in some areas of the country" were leading to "unnecessarily high" prices for services rendered in connection with the settlement process for residential real estate transactions. 12 U.S.C. § 2601(a).[3] In the years preceding RESPA's enactment, Congress considered, but did not pass, bills that would have authorized direct federal regulation of charges for settlement services. Instead, Congress sought to promote competition for settlement services by requiring "more effective

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *Amicus* also represents that all parties have consented to the filing of this brief. Counsel for petitioners and respondent have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

[2] REALTOR® is a federal registered collective membership mark used by members of NAR to indicate their membership status.

[3] "Settlement services," for purposes of RESPA, encompass "any service provided in connection with a real estate settlement," including "services rendered by a real estate agent or broker." 12 U.S.C. § 2602(3).

advance disclosure to home buyers and sellers of settlement costs" and prohibiting those "abusive practices" – i.e., "kickbacks or referral fees" – that were thought to lead to "unnecessarily high settlement charges." *Id.* § 2601(a), (b)(1)-(2).

Despite Congress's rejection of proposed bills to authorize regulation of charges for settlement services, petitioners (supported by the government) ask this Court to interpret RESPA § 8(b) to achieve the very result Congress rejected. As explained further below, the court of appeals correctly found the interpretation of § 8(b) advanced by petitioners and the Department of Housing and Urban Development ("HUD") to be unpersuasive because it cannot be reconciled with the text or history of that provision.

Furthermore, adopting petitioners' and HUD's position that RESPA regulates charges paid by consumers for settlement services would upset the settled expectations of settlement-service providers, including NAR's members, formed over decades since RESPA's enactment. Those concerns are not hypothetical: interpreting RESPA § 8(b) to apply to charges received from consumers, several lower courts have held that real estate brokerages violated that provision by charging a total commission package that included a traditional percentage of the sale price and a fixed amount paid by the buyers. Even where there is undisputed evidence that the buyers received both advance disclosure of the compensation package and substantial services from the brokerages, those courts have held that the fixed component of the commission violates § 8(b), absent proof (satisfactory to the judge) of a sufficient "connection" to "new" services provided by the brokerage. Applying RESPA in that manner not only transforms the statute into a rate-regulation scheme, but also functionally prevents real estate brokerages from modifying their compensation arrangements in response to rising costs and increased competition. The Fifth Circuit's interpretation of RESPA, by contrast, avoids those practical problems by limiting § 8(b) to its intended application: prohibiting abusive fee-sharing among providers of settlement services.

NAR is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,400 local Associations of REALTORS®, and more than 1 million REALTOR® and REALTOR-ASSOCIATE® members.

NAR represents the interests of real estate professionals and real property owners in important matters before the legislatures, courts, and executives of the federal and state governments. The issues presented in those matters include fair lending practices, equal opportunity in housing, real estate licensing, neighborhood revitalization, housing affordability, and cultural diversity. NAR has previously participated as *amicus curiae* in numerous cases before this Court, including, *e.g.*, *Sackett v. EPA*, No. 10-1062 (argued Jan. 9, 2012); *First American Financial Corp.*

v. Edwards, No. 10-708 (argued Nov. 28, 2011); *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009); *Glenmont Hills Associates Privacy World at Glenmont Metro Centre v. Montgomery County*, 553 U.S. 1102 (2008); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *Lincoln Property Co. v. Roche*, 546 U.S. 81 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Yee v. City of Escondido*, 503 U.S. 519 (1992).

SUMMARY OF ARGUMENT

RESPA § 8(b) provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed." 12 U.S.C. § 2607(b). The Fifth Circuit held that § 8(b) does not regulate charges paid by consumers for settlement services. Rather, the court properly interpreted that language to prohibit a provider of settlement services from giving part of a charge received from a consumer to another person "other than for services actually performed." Petitioners (and the government) argue that a plaintiff can state a claim against a settlement-service provider under § 8(b) by alleging that the provider did not perform *sufficient* services in exchange for some "portion, split, or percentage" of the charge paid by the consumer to that provider. That reading of § 8(b) transforms the provision from a restriction on abusive fee-sharing by settlement-service providers into a vehicle to regulate directly charges for settlement services. RESPA's text and history, as well as the consequences of petitioners' and the government's interpretation, demonstrate that the court of appeals properly rejected petitioners' position.

A. Three features of § 8(b)'s text make clear that it does not regulate charges paid by consumers for settlement services.

First, the statute describes two different exchanges – a payment of a charge by a consumer to a settlement-service provider, and a division of that charge by the provider and another person. The "charge" paid by the consumer is "made or received" by the provider. 12 U.S.C. § 2607(b). Then, the provider "give[s]," and another person "accept[s]," a "portion, split, or percentage" of that "charge." *Id.* Section 8(b) prohibits only the latter exchange (and only when the part of the charge is given and accepted "other than for services actually performed"). The statute does not prohibit the "ma[king]" or "receiv[ing]" of the charge by the provider of settlement services.

Second, in common usage, the words "give" and "accept" entail an exchange between two persons. To say one "accepts" something ordinarily means that another has given that thing to the person. Section 8(b)'s language comports with that ordinary usage: it makes both the settlement-service provider that "give[s]" the unearned part of the charge and the provider that "accept[s]" that part liable for civil and criminal penalties. *Id.*; *see id.* § 2607(d)(1)-(2). Under petitioners' and HUD's interpretation, however, the consumer "give[s]" the part of the charge and a provider "accept[s]" it. That reading makes the consumer – the alleged victim of the offense – a violator of the statute and (at least theoretically) subject to severe civil and criminal sanctions. Petitioners and HUD provide no basis for concluding that Congress intended such an absurd circumstance.

Third, § 8(b) applies only to the giving and accepting of a "portion, split, or percentage" of a charge for a settlement service. *Id.* § 2607(b). The ordinary meaning of each of those words refers to a part of something, not the whole. That fact reinforces the conclusion that § 8(b) was intended to apply when settlement-service providers share a charge, not when a consumer pays a charge to a provider. Although petitioners and the government identify isolated, unrelated contexts in which the words "portion" and "percentage" could be taken to refer to the whole of something, those unusual usages do not suggest that "portion" or "percentage" carry anything other than their ordinary meanings in § 8(b) – particularly given that they appear alongside the word "split," which all agree refers to less than a whole.

B. RESPA's legislative history confirms the conclusion that § 8(b) applies only to fee-sharing by settlement-service providers. The drafting history of that provision shows that it originated as a prohibition on attorneys accepting commissions from title insurance companies. The provision was revised to apply not only to those who give such commissions but also to those who accept them. It was also broadened to cover all providers of settlement services, not just attorneys and title insurers. But the history contains no suggestion that those changes were intended to make the provision applicable to prices charged by settlement-service providers to consumers. On the contrary, the Senate committee report explained that § 8(b) "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 6 (1974) (emphasis added); *accord* H.R. Rep. No. 93-1177, at 7 (1974).

C. The court of appeals' interpretation of § 8(b) is also confirmed by the fact that Congress considered and rejected legislation that would have regulated charges paid by consumers. In the years preceding RESPA's enactment, Congress considered a number of different bills designed to address the perception that charges for some settlement services were "unnecessarily high" in certain areas of the country. 12 U.S.C. § 2601(a). One approach, championed by certain legislators, would have authorized HUD to regulate directly the prices charged for settlement services by setting maximum rates – or "caps" – for those services. But Congress rejected that approach and instead enacted legislation that sought to address the costs of settlement services by regulating "certain abusive practices that ha[d] developed in some areas of the country" – specifically, "kickbacks or referral fees." *Id.* § 2601(a), (b)(2). Therefore, petitioners' and the government's reading of § 8(b) – which makes that provision applicable to charges paid by consumers to settlement-service providers – violates the venerable principle that "Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotation marks omitted).

Petitioners – but not the government – protest that their position does not make RESPA a price-control statute because, here, the allegation is that the provider rendered *no* services in return for the fee at issue. In their view, such a claim is permissible so long as it does not ask a court to determine whether a particular charge was reasonable in relation to the services performed. But, on petitioners' construction of the statute, nothing restricts plaintiffs from bringing claims alleging that a particular charge is unreasonable; nor would HUD be prohibited from regulating the reasonableness of those charges. Put differently, a claim that no services were provided in return for a charge necessarily entails judicial inquiry into the reasonableness of that charge – a role that Congress did not intend for courts to play. Indeed, HUD has elsewhere acknowledged that interpreting § 8(b) to reach charges paid by consumers to providers of settlement services means that "[a] single service provider . . . may be liable under Section 8(b) when it charges a fee that exceeds the reasonable value of goods, facilities, or services provided." Real Estate Settlement Procedures Act Statement of Policy 2001-1, 66 Fed. Reg. 53,052, 53,059 (Oct. 18, 2001).

D. Petitioners' and the government's interpretation of the statute also would create significant practical problems for providers of settlement services, including NAR's members. Although providers have long been entitled to rely on Congress's considered decision in RESPA not to regulate directly charges for settlement services, petitioners' and the government's position would subject providers to onerous new litigation and regulatory burdens. In the place of Congress's preferred check on charges for settlement services – namely, market forces (supplemented by disclosure requirements and prohibitions on kickbacks and referral fees) – petitioners and the government would substitute review of those charges by judges, juries, and government regulators.

The adverse practical consequences of petitioners' and the government's approach are already being felt by the industry. In recent years, multiple courts have held that real estate brokerages violated § 8(b) by charging a commission that included as one component a fixed amount paid by the buyer. For example, even in the face of undisputed evidence that a brokerage provided substantial services to the buyers, and that those buyers received advance disclosure of the brokerage's compensation arrangement, one court has held that the brokerage violated § 8(b) – making it potentially liable to a large consumer class for treble damages and attorneys' fees – because the court found no "specific" service tied to the fixed component. The court of appeals' interpretation of § 8(b) avoids such results, by respecting Congress's decision not to regulate directly charges to consumers for settlement services.[4]

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[4] As explained below, employing "traditional tools of statutory construction" (*Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)) reveals that Congress did not intend RESPA § 8(b) to regulate charges paid by consumers to providers of settlement services. There is accordingly no basis to defer to any contrary interpretation of HUD. *See General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (explaining that "deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent" and listing "the text, structure, purpose, and history" as sources of congressional intent); *see also Chevron*, 467 U.S. at 862-63 (considering legislative history before agency interpretation). In any event, as respondent correctly explains, HUD's interpretations lack the force of law and therefore are not entitled to deference. Those interpretations also are unpersuasive. *See* Resp. Br. 43-59.

ARGUMENT

RESPA § 8(b) APPLIES ONLY WHEN TWO OR MORE PERSONS DIVIDE A CHARGE PAID BY A CONSUMER

A. The Text Of RESPA § 8(b) Covers Sharing A Part Of A Charge, Not Paying The Whole Of One

1. The interpretation of RESPA "begin[s], as in any case of statutory interpretation, with the language of the statute." *E.g.*, *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1107 (2011). RESPA § 8(b) provides in pertinent part that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed." 12 U.S.C. § 2607(b). That "statutory language describes a situation in which *A* charges *B* (the borrower) a fee of some sort[,] collects it, and then either splits it with *C* or gives *C* a portion or percentage . . . of it." *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002) (Posner, J.). Three main reasons confirm that interpretation.

First, § 8(b) prohibits "giv[ing]" and "accept[ing]" a "portion, split, or percentage" of a "charge made or received for the rendering of a real estate settlement service." 12 U.S.C. § 2607(b). Those words describe two distinct exchanges: First, a "charge" is "made or received" from the consumer by a person who has rendered a settlement service. *Id.* Second, the provider that received the charge from the consumer "give[s]," and another person "accept[s]," a "portion, split, or percentage" of that "charge." *Id.* If, as petitioners contend, the statute applied to payments by consumers to settlement-service providers, there would have been no reason for Congress to use different sets of verbs to describe the consumer-provider transaction ("made or received"), on the one hand, and the fee-sharing transaction ("give and . . . accept"), on the other hand.

Second, by its plain terms, § 8(b) requires at least two persons to commit a violation – one to "give" and another to "accept" a portion, split, or percentage of a charge for settlement services. In common usage, one can be said to "give" something only if another accepts it; likewise, to say that one "accepts" something means that it has been given to that person by another.[5] Thus, for a person to violate § 8(b) by accepting a portion, split, or percentage of a charge, there must be another person who also violates the statute by giving the first person the portion, split, or percentage. As the court of appeals explained, "the provision requires two parties each committing an act: one party gives a 'portion, split, or percentage,' and another party receives a 'portion, split, or percentage.'" Pet. App. 7a.

Although petitioners and the government do not dispute that it takes two to make a violation of § 8(b), they argue that, in cases (such as this one) in which the settlement-service provider did not divide the charge with another person, the consumer is the person who "give[s]" a portion, split, or percentage

[5] *See Webster's New Int'l Dictionary* 1060 (2d ed. 1952) ("*Webster's Second*") (defining "give" as "[t]o deliver or transfer (to another something that is taken by him)"); *id.* at 14 (defining "accept" as "[t]o receive (a thing offered to or thrust upon one) with a consenting mind"); *Webster's Third New Int'l Dictionary* 959 (2002) ("*Webster's Third*") (defining "give" as "to confer the ownership of without receiving a return" or "to put into the possession of another for his use"); *id.* at 10 (defining "accept" as "to receive with consent (something given or offered)").

of the charge. *See* Pet. Br. 21; Gov't Br. 14. But adopting that interpretation would have the absurd consequence of making the alleged victim of the offense a violator of the statute. *See Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 265 (4th Cir. 2002) ("It would be irrational to conclude that Congress intended consumers to be potentially liable under RESPA for paying unearned fees."); *see also Krzalic*, 314 F.3d at 879. By contrast, the court of appeals' reading of the text – i.e., that it regulates the sharing of charges among providers of settlement services, not the reasonableness of charges paid by consumers – avoids that absurdity. *See*, *e.g.*, *United States v. Granderson*, 511 U.S. 39, 56 (1994) (Court adopts interpretation that "avoids attributing to the legislature either 'an unjust or an absurd conclusion'") (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510-11 (1989); *id.* at 527 (Scalia, J., concurring in the judgment).

Petitioners concede that "[i]t would make no sense to construe the statute to render a consumer liable to herself under a statute expressly enacted for the protection of consumers." Pet. Br. 21 n.16. But that is exactly what their interpretation of the statute requires. RESPA § 8(d) provides that "[a]ny person or persons who violate" § 8(b) "shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. § 2607(d)(2). Thus, under petitioners' and the government's interpretation of the statute, petitioners are liable to themselves for treble damages because they both "g[a]ve" the fee at issue to respondent (and thus violated § 8(b)) and were "charged for the settlement service involved in the violation" (and thus are entitled to seek treble damages under § 8(d)(2)).[6]

Petitioners maintain that consumers are unlikely to be held liable for damages under § 8(d)(2) "'because a consumer will always intend to pay the fee for services that are actually performed.'" Pet. Br. 21 n.16 (quoting *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 982 (11th Cir. 2003)); *see also* 66 Fed. Reg. at 53,059 n.6. But even if petitioners are correct that consumers are unlikely to face damages judgments under § 8(d)(2) – or criminal liability under § 8(d)(1)[7] – that would not change the fact that their interpretation makes the victim a violator of the statute in many cases. Indeed, according to petitioners, the paradigmatic violation of § 8(b) involves a consumer "giv[ing]" an "unearned fee[]" to a settlement-service provider. Pet. Br. 24; *accord* Gov't Br. 16-17. Petitioners identify no other statute under which a victim is considered a violator in the usual case; nor do they offer any reason to conclude that Congress would have intended such a "perverse"

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[6] The government asserts that § 8(d) supports the conclusion that a single service provider can violate § 8(b) when it accepts a charge from a consumer because that provision establishes penalties for "[a]ny *person* or persons" who violate § 8. 12 U.S.C. § 2607(d)(1), (2) (emphasis added). But the reference to any "person" indicates only that each violator of the statute is subject to joint and several liability for damages (or criminal sanctions). If the statute had said only that the "persons" who violate § 8 are liable for penalties, it could have been read to require a plaintiff to join both the giver and the acceptor of the part of the charge in an action under § 8(d).

[7] HUD has said only that it would be "unlikely" to initiate an enforcement action against a consumer under § 8(b). *See* 66 Fed. Reg. at 53,059 n.6.

result under RESPA. *Boulware*, 291 F.3d at 265. Reading § 8(b) to apply only when one settlement-service provider divides a charge with another provider – and not when a consumer pays a charge to a provider – makes sense of the statutory scheme and avoids attributing to Congress an illogical intent. *See id.* (concluding that "it is insufficient for HUD to proclaim that the statute will not be enforced against consumers" because the court will not "interpret § 8(b) so as to compel the absurd conclusion that Congress drafted it to apply to consumers in the first place").

Third, § 8(b)'s requirement that the violator have given or accepted a "portion, split, or percentage" of a charge for settlement services, 12 U.S.C. § 2607(b), reinforces the conclusion that Congress intended to regulate fee-sharing. The ordinary meaning of each of those terms refers to less than the whole of something.[8] Section 8(b) therefore applies to circumstances in which a provider of settlement services gives a part of a charge to another person, even though that person performed no services in return for its share. The provision does not apply when a

[8] *See Webster's Second* at 1924 (defining "portion" as "[a]n allotted part; a share; a parcel; a division in a distribution[;] . . . [a] part of a whole"); *Webster's Third* at 1768 (defining "portion" as "an individual's part or share of something"); *Webster's Second* at 2432 (defining "split" as a "[s]hare, as in a division of booty"); *Webster's Third* at 2202 (defining "split" as "a share (as of booty, winnings, profits) claimed or promised"); *Webster's Second* at 1815 (defining "percentage" as "[a] certain rate per cent; the allowance, duty, rate or interest, discount, or commission, on a hundred; a part or proportion of a whole expressed as so much or many per hundred"); *Webster's Third* at 1675 (defining "percentage" as "a part of a whole expressed in hundredths[;] . . . a share of winnings or profits : COMMISSION, CUT"); *see also* Pet. App. 9a; *Boulware*, 291 F.3d at 265.

consumer pays the whole of a charge to a settlement-service provider, because the provider has not "accept[ed]" a "portion, split, or percentage" of that charge.

The fact that there may be other contexts in which "percentage" could include 100 percent, or a prohibition on embezzling "any portion" of a fund could include the whole, *see* Pet. Br. 17-18; Gov't Br. 18, does not suggest that those terms have anything other than their ordinary meanings in RESPA § 8(b). In fact, the placement of those words together with the term "split" – which all agree cannot refer to a whole – reinforces the conclusion that Congress intended to proscribe the sharing of a part, not the payment of a whole. *See* Pet. App. 9a-10a; *Chevron*, 467 U.S. at 861 ("the words associated with [a term] may indicate that the true meaning of the series is to convey a common idea"); *see also*, *e.g.*, *McNeill v. United States*, 131 S. Ct. 2218, 2221 (2011) ("[I]n all statutory construction cases, we begin with 'the language itself *[and] the specific context in which that language is used*.'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (emphasis added; second alteration in original).[9]

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[9] Petitioners' reliance on the use of "any" before the phrase "portion, split, or percentage" in § 8(b), Pet. Br. 18-19, is misplaced because the pertinent question is whether or not the whole of a charge can be considered a "portion, split, or percentage" of a charge. If, as the court of appeals held, those words refer only to a part of a charge, then the fact that Congress prohibited giving or accepting "any" part of a charge provides no support for petitioners' interpretation. *Cf. Small v. United States*, 544 U.S. 385, 388 (2005) ("[E]ven though the word 'any' demands a broad interpretation, we must look beyond that word itself.") (collecting cases; citation omitted).

Nor does reading "portion, split, or percentage" to refer to a part, rather than the whole, of a charge render the words "portion" and "percentage" "entirely without effect," as petitioners contend, Pet. Br. 20. As the Seventh Circuit explained, "portion" or "percentage" refers to a share "other than 50 percent – the situation that the statutory term 'split' most naturally describes." *Krzalic*, 314 F.3d at 879. Thus, the phrase "portion, split, or percentage of any charge" demonstrates Congress's intent broadly to capture all arrangements in which one settlement-service provider divides a charge with another person; it does not indicate that Congress sought to prohibit the payment of the charge itself.

2. Petitioners concede that, under the court of appeals' interpretation, § 8(a) and § 8(b) "perform[] some independent function" and that their reading "leaves some overlap" between those two provisions. Pet. Br. 24. They nevertheless argue that § 8(b) must be construed to apply to payments of charges by consumers, lest it be rendered "largely surplusage" in light of the prohibition on kickbacks in § 8(a). *Id.* That contention has no merit.

Section 8(a) prohibits giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service . . . shall be referred to any person." 12 U.S.C. § 2607(a). That provision is both broader and narrower than § 8(b). It broadly prohibits the transfer of any "thing of value," *id.*, which RESPA expansively defines to "include[] any payment, advance, funds, loan, service, or other consideration," *id.* § 2602(2). Section 8(b), by contrast, prohibits only the exchange of part of a "charge" for settlement services, and it requires a showing that the part of the charge was given and accepted "other than for services actually performed." *Id.* § 2607(b).

Section 8(a) is also narrower than § 8(b), however, because it requires proof of an "agreement or understanding" that settlement-service business "shall be referred" in exchange for the kickback. *Id.* § 2607(a). Subsection (b) contains no such requirement and instead prohibits any division of a charge where the recipient performs no services in return for the part of the charge it accepts.

Thus, in § 8(a), Congress broadly prohibited referral arrangements in which one settlement-service provider pays any form of kickback (any "thing of value") in return for an "agreement or understanding" that settlement-service business will be referred to it. Section 8(b) performs the distinct function of barring settlement-service providers from dividing charges paid by consumers, even where no agreement or understanding regarding the referral of business can be proved. To avoid criminalizing "[r]easonable payments in return for services actually performed or goods actually furnished," which Congress did not "intend[] to be prohibited," S. Rep. No. 93-866, at 6; *accord* H.R. Rep. No. 93-1177, at 7, § 8(b) includes the additional express requirement, not found in § 8(a), that the plaintiff prove that the payment of a part of the charge was not "for services actually performed," 12 U.S.C. § 2607(b). The two subsections thus perform complementary functions in pursuit of Congress's purpose of "eliminat[ing] . . . kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2).

B. RESPA's Legislative History Confirms That § 8(b) Does Not Reach Undivided Charges

RESPA's legislative history "makes clear" that Congress did not intend to empower courts to review the reasonableness of undivided charges paid by consumers to settlement-service providers. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 n.12 (2010). Section 8(b) originated as a prohibition on title insurance companies paying portions of premiums to attorneys representing parties in real estate transactions. During the legislative process, the provision was broadened to cover other types of settlement services, but the legislative record leaves no doubt that the provision's sole purpose was to regulate fee-sharing among settlement-service providers. Congress sought to bolster the explicit prohibition on kickbacks in § 8(a) by also barring settlement-service providers from sharing parts of charges received from consumers with other providers where the providing accepting the payment performs no services in return – recognizing that providers often made such payments in the hope of obtaining referrals of future business (even in the absence of an actual agreement or understanding to that effect).

In February 1972, Representative Patman introduced a bill that contained both a provision banning kickbacks (similar to what is now § 8(a)) and a provision prohibiting attorneys "who perform[] any legal services which are incident to or a part of any real estate settlement" from "receiv[ing] any commission in connection with the issuance of title insurance for any real property which is a part of such settlement." H.R. 13337, 92d Cong. § 103(a) (1972). Representative Patman's proposal was incorporated into a larger housing-related bill under consideration by the House Banking Committee. *See* Staff of H. Comm. on Banking & Currency, 92d Cong., Housing and Urban Development Act of 1972, at 56 (Comm. Print 1972) (§ 907). During the committee proceedings, Representative Stephens proposed a substitute bill that included a modified version of Representative Patman's proposal. *See* 118 Cong. Rec. 28,117 (Aug. 14, 1972) (statement of Rep. Stephens). The committee adopted Representative Stephens's substitute and reported a bill containing the following provision under the heading "Prohibition Against Unearned Fees":

> Any person who gives and any person who receives any portion, split, or percentage of any or all charges for title insurance in connection with any real estate settlement involving a federally-related mortgage loan, other than for services actually performed in the issuance of such title insurance, shall be jointly and severally liable to the person or persons charged for the portion, split, or percentage in an amount equal to three times the portion, split, or percentage.

H.R. 16704, 92d Cong. § 907 (1972). Representative Stephens explained that, whereas Representative Patman's proposal was "directed only to 'attorneys,' and cover[ed] only the receipt of [unearned] fees," his substitute "expand[ed] th[e] prohibition to embrace all persons, irrespective of whether they are attorneys or not and irrespective of whether they are on the giving or receiving end of the transaction." 118 Cong. Rec. 28,118 (Aug. 14, 1972). Thus, Representative Stephens's substitute prohibited both the giving and the accepting of an unearned title insurance commission. There is no indication, however, that the substitute provision was intended to regulate the amount of title insurance premiums paid by consumers.

In 1973, within weeks of each other, members of both the House and the Senate introduced legislation containing language substantively identical to what is now RESPA § 8(b). *See* S. 2228, 93d Cong. § 105(b) (1973); H.R. 9989, 93d Cong. § 106(b) (1973). Representative Stephens, the lead sponsor of the House bill, explained that "the provision prohibiting unearned fees of last year's bill has been expanded to cover all persons who render settlement services." *Real Estate Settlement Costs: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking & Currency*, 93d Cong. 49 (1973) (statement of Rep. Stephens). While the Senate bill was under consideration by the Senate Banking Committee, Senator Brock, the sponsor of that legislation, introduced another bill containing certain additional provisions not found in S. 2228, but preserving the prohibition on fee-sharing without change. *See* S. 3164, 93d Cong. § 7(b) (1974). He described that provision as "prohibit[ing] any fee-splitting among persons who render settlement services unless the fee is paid in return for services actually rendered." 120 Cong. Rec. 6,586 (Mar. 13, 1974); *accord id.* at 23,551 (July 16, 1974) (statement of Sen. Brock).

The committee reports on the Senate and House bills confirmed that the purpose of the provision was to prohibit fee-sharing among settlement-service providers where the recipient of the share provided no services in return for its portion of the charge. The Senate Banking Committee's report described the provisions now known as RESPA § 8(a) and § 8(b) as follows:

> Section [8] is intended to prohibit all kickback or referral fee arrangements whereby any payment is made or "thing of value" furnished for the referral of real estate settlement business. *The section also prohibits* ***a person or company that renders a settlement service*** *from giving or rebating any portion of the charge to any other person except in return for services actually performed.* Reasonable payments in return for services actually performed or goods actually furnished are not intended to be prohibited.

S. Rep. No. 93-866, at 6 (emphases added); *accord* H.R. Rep. No. 93-1177, at 7. The report thus made clear that the provision targets payments by "a person or company that renders a settlement service" – not payments by consumers to providers.

The Senate report described in detail the arrangements that RESPA § 8 was designed to prohibit. It stated that the legislation targeted "the payment of referral fees, kickbacks, rebates and unearned commissions" paid by providers of settlement services "as inducements to those persons who are in a position to refer settlement business." S. Rep. No. 93-866, at 6; *accord* H.R. Rep. No. 93-1177, at 7. The report provided examples of prohibited arrangements, all of which involved payments by one settlement-service provider to another. It explained that "a title insurance company may give 10% or more of the title insurance premium to an attorney who may perform no services for the title insurance company other than placing a telephone call to the company or filling out a simple application." S. Rep. No. 93-866, at 6; *accord* H.R. Rep. No. 93-1177, at 7. Or "a 'commission' may be paid by a title insurance company to a corporation that is wholly-owned by one or more savings and loan associations, even though that corporation performs no substantial services on behalf of the title insurance company." S. Rep. No. 93-866, at 6; *accord* H.R. Rep. No. 93-1177, at 7. In both of those examples, one settlement-service provider shares part of a charge received from a consumer with another provider that performed no services in return for the payment. Nothing in either committee report suggested that the provision that became § 8(b) was intended to regulate charges paid by consumers.[10]

During debate on the House floor, Representative Blackburn, a co-sponsor of the House bill, was asked whether the language now in § 8(b) would permit an action against a settlement-service provider if the provider's charges were not reasonably related to the value of the services rendered. *See* 120 Cong. Rec. 28,263 (Aug. 14, 1974). Although Representative Blackburn indicated uncertainty, he replied that he "hope[d] that would not be the case." *Id.* Less than a week later, Representative Blackburn supplemented his response, making clear that the text of § 8(b) "would not authorize" a "civil suit brought by a homebuyer who believed that the charge made to him by" a provider of settlement services "was in excess of the reasonable value of the services rendered." *Id.* at 29,442 (Aug. 20, 1974). He explained that, "[w]hen [§ 8(b)] says that no person shall give a portion of

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[10] In seeking to find support in RESPA's legislative history for interpreting § 8(b) to regulate charges paid by consumers, the government points to references to "unearned fees." Gov't Br. 22-23. But those statements refer to "unearned fees" paid by one settlement-service provider to another – not allegedly "unearned fees" paid by consumers to settlement-service providers. *See* S. Rep. No. 93-866, at 6; H.R. Rep. No. 93-1177, at 7.

the fee to anyone else except for services actually performed, it is clear that the word 'person' does not refer to the homebuyer or seller himself who is purchasing a settlement service." *Id.* Otherwise, he continued, "the homebuyer or seller might be liable for the criminal and civil penalties provided in subsection (d)." *Id.* Representative Blackburn thus concluded that § 8(b) "was intended to deal only with fee-splitting arrangements among participants in the settlement process, whereby an attorney, title company, lender or other person who provides a settlement service might give a portion, split or percentage of the fee he receives to someone else even though the person who gets the portion, split or percentage has not done any legitimate work." *Id.*[11]

The legislative record thus confirms overwhelmingly that Congress's intention in enacting § 8(b) was to regulate fee-sharing among settlement-service providers, not charges paid by consumers.

C. Petitioners' Interpretation Would Make RESPA A Price-Control Statute, An Approach Congress Considered And Rejected

Petitioners' interpretation of RESPA § 8(b) is incorrect for the additional reason that it would empower not only lay juries but also HUD to regulate charges paid for settlement services. The legislative

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[11] Although those remarks were published in the Congressional Record after the House passed its version of RESPA, the House and Senate bills subsequently went to a conference committee to resolve differences among them. When the House voted to approve the resulting conference bill in December 1974, *see* 120 Cong. Rec. 39,129 (Dec. 11, 1974), its members had the benefit of Representative Blackburn's explanation that the language of § 8(b) applies only to fee-sharing among providers of settlement services.

record is clear that Congress considered and rejected proposals to enact a price-control scheme for settlement services.

In the years preceding RESPA's enactment, Congress considered numerous proposals that would have authorized HUD to set maximum charges for settlement services. *See*, *e.g.*, S. 3248, 92d Cong. § 712(a) (1972) (directing HUD to "publish standards governing the amounts of closing costs allowable to be paid by buyers and sellers"); S. 2288, 93d Cong. § 4(a)(1) (1973) (directing 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" and providing that those "maximum amounts . . . shall be designed to reflect the reasonable charges for necessary services . . . and to assure that settlement costs do not exceed such reasonable charges"); H.R. 11183, 93d Cong. § 4(a)(1) (1973) (same); H.R. 12066, 93d Cong. § 4(a)(1) (1973) (same); *see also* S. 2775, 92d Cong. § 5 (1971) (authorizing HUD to "establish standards for determining effective premium rates" for title insurance). In 1972, one of those proposals – S. 3248 – passed the Senate, but not the House.

Those proposals provoked substantial debate in Congress. Ultimately, both chambers rejected those rate-regulation proposals in favor of legislation that regulated particular "abusive" practices by settlement-service providers – namely, kickbacks and fee-sharing. As the Senate committee report on RESPA explained:

> [T]here are two basic approaches that can be taken in solving the problems of settlement costs. One approach is to regulate closing costs directly, that is to provide for legal maxima on the charges

> which may be imposed for services incident to real estate settlements. This approach is the one take in S. 2288. The second approach is to regulate the underlying business relationships and procedures of which the costs are a function. This is the approach employed in S. 3164 adopted by the Committee.

S. Rep. No. 93-866, at 3; *accord* H.R. Rep. No. 93-1177, at 4. Thus, as multiple courts of appeals have recognized, "Congress considered and explicitly rejected a system of price control for fees"; instead, it "directed § 8 against a particular kind of abuse that it believed interfered with the operation of free markets – the splitting and kicking back of fees to parties who did nothing in return for the portions they received." *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985) (Easterbrook, J.); *accord Boulware*, 291 F.3d at 268.

As this Court consistently has observed, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS*, 480 U.S. at 442-43 (internal quotation marks omitted); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001). But that is exactly the result of petitioners' construction of § 8(b). Under petitioners' interpretation, a private plaintiff or regulator can bring an action under § 8(d) alleging that a settlement-service provider "accept[ed]" from a consumer "a 'portion, split, or percentage' of a settlement service charge . . . 'other than for services actually performed.'" Pet. Br. 16-17. Thus, petitioners' interpretation would permit judicial review (and HUD regulation) of whether charges paid by consumers bear a sufficient connection (in the court's or regulator's eyes) to settlement services performed by the provider.

Although petitioners observe that the allegation in this case is that the *entire* charge was other than for services actually performed, *see id.* at 28, nothing in their reading of the statute would prevent a claim that *part* of the charge was "unearned." Indeed, in the HUD policy statement on which petitioners rely, the agency candidly acknowledges that interpreting § 8(b) to reach charges paid by consumers to providers of settlement services means that "[a] single service provider . . . may be liable under Section 8(b) when it charges a fee that exceeds the reasonable value of goods, facilities, or services provided." 66 Fed. Reg. at 53,059. Petitioners and the government thus seek to achieve through administrative and judicial "interpretation" a result that Congress rejected during the legislative process.

Petitioners argue that § 8(b) should be interpreted to regulate charges paid by consumers to settlement-service providers because Congress found in RESPA that "reforms" are necessary to protect consumers "from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a); *see* Pet. Br. 25-27. But "[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means – and there is often a considerable legislative battle over what those means ought to be." *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). Here, there is no dispute that RESPA was intended to limit "unnecessarily high settlement charges." Congress sought to achieve that goal, however, not by "regulat[ing] closing costs directly" (as petitioners' approach would do), but by "regulat[ing] the underlying business relationships and procedures of which the costs are a function" – i.e., "kickbacks" and "unearned fees" paid by one provider to another. S. Rep. No. 93-866, at 3; *accord* H.R. Rep. No. 93-1177, at 4. Petitioners cannot rely on vague notions of legislative purpose to resurrect a statutory means – regulation of the reasonableness of charges for settlement services – that Congress rejected. *See also Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs[,] . . . and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").[12]

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[12] Moreover, the government's hyperbolic claim that, if § 8(b) is not interpreted to regulate charges paid by consumers, then "the kinds and amounts of unearned fees that a lender (or other settlement service provider) could charge a consumer would be limited only by the lender's creativity," Gov't Br. 20, ignores the role that state statutory and common law plays in prohibiting fraudulent practices by settlement-service providers. In addition, the concerns raised in the States' *amicus* brief (Br. 9, 16-19) regarding inadequate disclosure of charges are not only misplaced (because this case is about whether charges can be made at all, not whether they must be disclosed) but also unfounded (because they rely on studies that pre-date recent amendments to HUD's disclosure regulations, *see* Final Rule, Real Estate Settlement Procedures Act (RESPA): Rule To Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 68,204 (Nov. 17, 2008)).

D. Petitioners' Interpretation Would Upset The Settled Expectations Of Providers Of Settlement Services And Create Significant Practical Problems For The Settlement-Service Industry

Providers of settlement services, including NAR's members, have been entitled for decades to rely on Congress's decision to reject versions of RESPA that would have authorized direct federal regulation of charges for settlement services. Adopting petitioners' view that § 8(b) applies to charges paid by consumers to settlement-service providers would, however, upset the settled understanding that RESPA is not a price-control statute by authorizing plaintiffs (both public and private) to bring actions alleging that charges paid by consumers are "unearned" (in whole or in part). The result would be to substitute administrative and judicial regulation for Congress's preferred approach, which was to rely on market forces – bolstered by improved disclosure and prohibitions on abusive practices – to constrain charges for settlement services.

In addition, authorizing suits such as petitioners' leads to harsh and irrational consequences for providers of settlement services. Indeed, such consequences are already being felt. Relying in part on the assertion in HUD's 2001 policy statement that § 8(b) regulates charges paid by consumers, *see* 66 Fed. Reg. at 53,058-59, private plaintiffs have in recent years pursued class actions against settlement-service providers, alleging that those providers violated § 8(b) by receiving compensation without performing sufficient services in return. In a number of cases, courts have allowed such claims to proceed not only to discovery but also to trial.

In one recent decision, for example, a court held that "[a] rational jury could find that" the defendant mortgage lender violated § 8(b) by receiving compensation that (according to the plaintiff) "was not in fact charged 'for' services," but was instead an (apparently unlawful) "overhead charge," or an amount that was otherwise insufficiently "[]connected to compensable settlement services." *Cohen v. J.P. Morgan Chase & Co.*, 608 F. Supp. 2d 330, 340 (E.D.N.Y. 2009).[13] To avoid a trial involving the claims of tens of thousands of consumers – in which it would have had to prove that the particular amount in question bore a judicially sufficient "[]connect[ion]" to "compensable settlement services" – the lender was compelled to agree to a substantial class-action settlement.

NAR's members have faced similar claims. In response to increased competition and rising costs, real estate brokerages have in recent years experimented with innovative compensation structures, including commissions that have a fixed component. Thus, for example, a brokerage may charge a commission that includes a fixed amount, usually on the order of a few hundred dollars, in addition to the traditional percentage of the sale price of the property. That fixed amount is generally disclosed and agreed to by the client or customer, along with the rest of the commission.

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[13] *Cohen* was decided on remand from a decision in which the Second Circuit held, in conflict with the Fourth and Seventh Circuits' decisions in *Boulware* and *Krzalic*, that the plaintiff had stated a valid claim under § 8(b) by alleging that the lender "collected an undivided unearned fee." *Cohen v. J.P. Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007); *see id.* at 115 n.3 (noting the circuit conflict).

Private plaintiffs nevertheless have sued real estate brokerages under RESPA, claiming that the fixed component of their real estate commissions was "other than for services actually performed" and therefore violated § 8(b). Those plaintiffs have sought to recover treble damages and attorneys' fees under § 8(d) on behalf of large consumer classes. Following the approach in *Cohen*, multiple courts have allowed such claims to proceed, threatening brokerages with ruinous class-action liability. *See Augenstein v. Coldwell Banker Real Estate LLC*, No. 2:10-cv-191, 2011 WL 3837096 (S.D. Ohio Aug. 30, 2011) (granting summary judgment for plaintiffs); *Noall v. Howard Hanna Co.*, 750 F. Supp. 2d 833 (N.D. Ohio 2010) (denying defendants' motion to dismiss); *Busby v. JRHBW Realty, Inc.*, 642 F. Supp. 2d 1283, 1294 (N.D. Ala. 2009) (relying on *Cohen* in holding as a matter of law that the brokerage's fixed component was "not settlement-related and/or provide[d] little or no benefit" to the customer and therefore violated § 8(b)).

In *Augenstein*, for example, the brokerage charged a "total commission package" consisting of 3% of the sale price (paid by the sellers of the property) and a fixed amount of $199 (paid by the buyers). 2011 WL 3837096, at *1. That arrangement was disclosed to the buyers in advance, and the record showed that the brokerage had "provided a number of services to" the buyers, including "represent[ing] [them] as buyers' brokers"; "show[ing] them properties and provid[ing] them with information"; "prepar[ing] and present[ing] offers and counteroffers"; and "assist-[ing] with negotiating the Purchase Agreement." *Id.* at *4.

The buyers nevertheless sued the brokerage under RESPA and argued that the brokerage violated § 8(b) when it "accept[ed]" the $199 amount. They alleged that the $199 was "a fee for which no services [were] rendered; and/or . . . a duplicative fee for services already rendered as part of the [3%] total sales/broker's commission." *Id.* at *1. The plaintiffs sought to represent "a nationwide class of similarly situated borrowers" who paid a similar fixed amount to the brokerage. *Id.* at *2.

The district court agreed with the plaintiffs' position and held that the brokerage had violated RESPA § 8(b).[14] Although the court paid lip service to the principle that "RESPA is not a price control statute," it rejected the brokerage's position that the $199 amount was properly considered "part of the total commission." *Id.* at *3. Instead, it held that a provider of settlement services must prove "a direct connection between" any money it collects and "a specific settlement service." *Id.* Despite the (apparently undisputed) evidence that the defendant brokerage performed extensive services in return for its commission package (and that the compensation arrangement was disclosed to the plaintiffs in advance), the court held that the $199 fixed portion of the commission was an unlawful "unearned" fee because it was not "connect[ed] . . . to any specific service." *Id.* at *4. The court emphasized testimony that customers received no "new services" when the brokerage began including the fixed portion. *Id.* at *1. And it reasoned that, "[w]hile [the defendant] can certainly change its fee structure in order to

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[14] Although the district court granted the plaintiffs' motion for summary judgment on liability, further proceedings are pending on their motion for class certification.

increase its profit, it must do so in a manner that is consistent with RESPA." *Id.* at *4.

The *Augenstein* court did not explain how the brokerage could have "change[d] its fee structure . . . consistent with" the court's interpretation of RESPA. *Id.* But the import of the court's reading of the statute is that *any* "new" component of a commission package must bear a sufficient "connection" to the provision of a "new" service for the customer. That construction of RESPA places severe restrictions on the ability of real estate brokerages to adjust their pricing arrangements in response to competition and rising costs.[15]

* * *

There is no basis to think that, in rejecting rate regulation and adopting legislation designed to address abusive kickbacks and referral fees, Congress could have contemplated, let alone intended, the statute to be used to preclude a provider of settlement services from changing its pricing structure or raising its prices. Such results find no support in RESPA's text, and they functionally reverse Congress's considered decision to reject proposed bills that would have made RESPA a rate-regulation statute. The Fifth Circuit's interpretation of § 8(b) avoids the problems presented by decisions such as those discussed above by limiting § 8(b) to its intended role – regulating abusive fee-sharing among providers of settlement services.

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[15] Even an increase in the percentage rate of a traditional sales commission could be attacked under the interpretation adopted in *Augenstein*, on the ground that the brokerage performed no "new services" in return for the higher commission.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

LAURENE K. JANIK
RALPH W. HOLMEN
NATIONAL ASSOCIATION OF REALTORS®
430 North Michigan Ave.
Chicago, Illinois 60611
(312) 329-8375

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
MARC A. WALLENSTEIN
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

Counsel for National Association of REALTORS®

January 10, 2012