No. 13-684

IN THE
Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
Petitioners,
v.

COUNTRYWIDE HOME LOANS, INC.,
SUBSIDIARY OF BANK OF AMERICA, N.A.,
D/B/A AMERICA'S WHOLESALE LENDER, *et al.*,
Respondents.

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

BRIEF FOR RESPONDENTS

NOAH A. LEVINE
ALAN E. SCHOENFELD
JASON D. HIRSCH
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
New York, NY 10007

ANDREW B. MESSITE
REED SMITH LLP
599 Lexington Avenue
New York, NY 10022

SETH P. WAXMAN
Counsel of Record
LOUIS R. COHEN
ALBINAS J. PRIZGINTAS
CHRISTOPHER D. DODGE*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

AARON D. VAN OORT
FAEGRE BAKER DANIELS LLP
2200 Well Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

QUESTION PRESENTED

When a borrower sends notice of his intention to rescind and the lender disputes the borrower's right to rescind, must the borrower bring any suit for rescission before the right of rescission expires under the three-year statute of repose?

CORPORATE DISCLOSURE STATEMENT

BAC Home Loans Servicing, LP is now known as Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, L.P. Bank of America, N.A. is wholly owned by Bank of America Corporation. Bank of America Corporation has no parent corporation, and no publicly held company owns 10% or more of Bank of America Corporation's stock.

Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender, is a wholly owned subsidiary of Countrywide Financial Corporation, which in turn is a wholly owned subsidiary of Bank of America Corporation. Bank of America Corporation has no parent corporation, and no publicly held company owns 10% or more of Bank of America Corporation's stock.

Mortgage Electronic Registration Systems, Inc. is a wholly owned subsidiary of MERSCORP Holdings, Inc. MERSCORP Holdings, Inc. is a privately held company with two entities, Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac), holding more than a 10% interest. No other corporation owns 10% or more of MERSCORP Holdings, Inc.

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INTRODUCTION

The Truth in Lending Act permits certain borrowers to rescind their mortgage loans within three days of the loan closing, or to do so at a later date if the lender violated TILA by failing to deliver required disclosures. Recognizing that rescission is a grave remedy, Congress enacted an uncompromising statute of repose under which the right of rescission expires three years after the closing of the loan, cutting off any rescission remedy.

TILA and its implementing regulation require borrowers seeking rescission to notify their lenders of their intention to rescind by sending written notice. In some cases, the lender may acknowledge the borrower's right to rescind, and the parties will mutually carry out the multi-step rescission process that Congress outlined in the statute. In other cases, however, the lender will dispute the borrower's right to rescind, denying the borrower's assertion that the lender in fact violated TILA. Under petitioners' reading of the statute, the lender's objection is of no importance because the mere sending of notice unilaterally effectuates the rescission. Congress took a different view, however, recognizing that litigation would be required and a court would need to adjudicate the borrower's contested right to rescind and "award" any "rescission" to which the borrower may be entitled. 15 U.S.C. § 1635(g); *see id.* § 1640(a)(3). And Congress emphatically declared that the right of rescission, the necessary foundation for any suit for rescission, expires after three years. *Id.* § 1635(f).

The question presented here is of consequence only in a narrow, though frequently reprised, set of circumstances: where the borrower sends notice of his intention to rescind within three years of the loan closing, the lender disputes the borrower's right to rescind, and the borrower files suit after the three years have run. In these cases, the borrower's lawsuit is time-barred by TILA's statute of repose, notwithstanding any notice of his intention to rescind sent to the lender within three years of the loan closing. Petitioners' view that merely sending notice is sufficient in a contested case to effectuate rescission is inconsistent with the statutory text, Congress's intent, and the common law of rescission.

What is more, petitioners' reading of TILA would thwart Congress's purpose in enacting the repose provision. Petitioners ask this Court to assume, implausibly, that the same Congress that enacted an absolute statute of repose in order to address concerns about clouds on title was indifferent to the effects of unresolved, contested rescission claims. It is also implausible to say, as petitioners do, that Congress intended clouds on title occasioned by notices of intention to rescind to be resolved through declaratory judgment actions filed by lenders. That claim finds no support in TILA, which recognizes that the borrower will sue for an "award" of "rescission." 15 U.S.C. § 1635(g).

Petitioners signed a written acknowledgement at their loan closing, attesting to their receipt of all the disclosures required by TILA. Three years to the day later, facing foreclosure, they sent notice of their intention to rescind on the ground that they allegedly did not receive the required number of copies of disclosures—thus claiming as a matter of statutory right the return of all the interest and fees they paid in connection with a sizeable loan they used to pay off outstanding consumer debt. And predictably, having defaulted, they provided no indication that they could tender the loan principal. In view of petitioners' signed acknowledgement of receipt of the disclosures in question, respondents disputed petitioners' right to rescind. Petitioners then brought a lawsuit for rescission, more than four years after the loan closing. Under TILA's statute of repose, any right to rescind had already definitively expired—three years after the loan closing. Petitioners' lawsuit is barred, and the judgment of the court of appeals should be affirmed.

STATEMENT

A. TILA

Congress enacted the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, in 1968 to promote the "informed use of credit" by requiring "meaningful disclosure of credit terms," *id.* § 1601(a). Specifically, Congress sought to address the dangers of "blind economic activity"—credit transactions in which consumers were "ignorant of the nature of their credit obligations and of the costs of deferring payment." *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 363, 364 (1973). TILA accordingly requires lenders to provide "clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights." *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998).

TILA is often described by courts as a "'hypertechnical'" statute, *Marr* v. *Bank of Am., N.A.*, 662 F.3d 963, 964 (7th Cir. 2011), whose provisions must be "absolutely complied with and strictly enforced," *Mars* v. *Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983). Congress's amendments over time have nonetheless "made manifest that although it had designed TILA to protect consumers, it had not intended that lenders would be made to face overwhelming liability for relatively minor violations." *McKenna* v. *First Horizon Home Loan Corp.*, 475 F.3d 418, 424 (1st Cir. 2007); *see also American Mortg. Network, Inc.* v. *Shelton*, 486 F.3d 815, 819 n.4 (4th Cir. 2007) (clarifying that its comment in *Mars* "was not to imply … that the Act's requirements should not be reasonably construed and equitably applied"); *Smith* v. *Highland Bank*, 108 F.3d 1325, 1327 n.4 (11th Cir. 1997) ("Congress would

not have us adopt a hypertechnical reading of any part of TILA.").

As relevant to this case, the statute and its implementing regulation require that, subject to exceptions not applicable here, a lender shall provide to "each consumer whose ownership interest is or will be subject to [a] security interest," 12 C.F.R. § 1026.23(a)(1), two copies of a notice of the right to rescind (also referred to as the notice of right to cancel), *id.* § 1026.23(b)(1), and a TILA disclosure statement outlining specified material terms, 15 U.S.C. § 1602(v).[1] These disclosures must be made "clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R. § 1026.17(a)(1).

At a mortgage closing, lenders conventionally provide borrowers with the required disclosures and ask them to sign an acknowledgement of receipt, a practice Congress recognized when TILA was first enacted. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, § 125(c), 82 Stat. 146, 153 (1968) (discussing "written acknowledgement of receipt of any disclosures"). The Consumer Financial Protection Bureau has prescribed the form of the required TILA disclosures and authorizes lenders to "include an acknowledgement of receipt" among them. 12 C.F.R. § 1026.17(a)(1). TILA provides that this acknowledgement establishes "a rebuttable presumption of delivery" of the acknowledged disclosures. 15 U.S.C. § 1635(c).

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[1] The right to rescind does not extend to purchase-money mortgages or mortgages securing any dwelling other than the borrower's principal residence. 15 U.S.C. §§ 1635(a), (e), 1602(x).

B. Rescission Under TILA

1. Congress created the right of rescission to address fraudulent practices by home improvement contractors, about which Congress heard extensive testimony leading up to TILA's enactment. *See Unfair Practices in the Home Improvement Industry and Amendments to the FTC Act: Hearing Before the S. Comm. on Commerce*, 90th Cong. 2 (1968). Specifically, Congress learned about "home improvement racketeers who trick homeowners, particularly the poor, into signing contracts at exorbitant rates, which turn out to be liens on the family residences." 114 Cong. Rec. H4114, H4118 (May 22, 1968) (statement of Rep. Sullivan). As the Second Circuit explained, "[t]he typical home improvement contract is procured, usually under pressure conditions, by a prime contractor … who frequently possesses little or no capital of its own; the actual work is often done by various subcontractors." *N. C. Freed Co.* v. *Board of Governors of Fed. Reserve Sys.*, 473 F.2d 1210, 1215 (2d Cir. 1973). "One of the problems mentioned during those hearings was where the homeowner paid the contractor, then discovered the subcontractor recorded a lien on the home, and had to pay twice." *Rudisell* v. *Fifth Third Bank*, 622 F.2d 243, 250-251 (6th Cir. 1980).

To remedy this problem, and to provide homeowners some recourse against contractors who fail to disclose the consequences of a loan secured by real property, Congress enacted the provision now codified at 15 U.S.C. § 1635(a), giving homeowners the right to rescind their mortgage loans under certain conditions. *See Gardner & N. Roofing & Siding Corp.* v. *Board of Governors of Fed. Reserve Sys.*, 464 F.2d 838, 841 (D.C. Cir. 1972) ("The specific purpose of section 125(a), 15 U.S.C. § 1635(a), was to protect homeowners from the

unscrupulous business tactics of certain home improvement contractors." (discussing legislative history)). Rescission is "the most draconian remedy available" to borrowers under TILA. 141 Cong. Rec. S14,566, S14,567 (Sept. 28, 1995) (statement of Sen. D'Amato). "When a loan is rescinded, the borrower is released from the obligation under the mortgage" and is "entitled to reimbursement of all finance charges, as well as other charges." *Id.*

2. Rescission was an established contractual remedy at common law, long before TILA was enacted. The doctrine "provided for restoration of the status quo by requiring the buyer to return what he received from the seller." *Pinter* v. *Dahl*, 486 U.S. 622, 641 n.18 (1988). Important for present purposes, common-law rescission could be had at law or in equity; each entails critically different procedures and consequences for the rescinding party, the non-rescinding party, and the courts.

"[R]escission at law occurs when the plaintiff has a right to unilaterally avoid a contract. The rescission itself is effected when the plaintiff gives notice to the defendant that the transaction has been avoided and tenders to the defendant the benefits received by the plaintiff under the contract." *Griggs* v. *E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 445-446 (4th Cir. 2004). There are two recognized preconditions to "unilateral" rescission at law. First, the plaintiff must "hav[e] grounds justifying rescission." *Acton* v. *J.B. Deliran*, 737 P.2d 996, 999 n.5 (Utah 1987); *see Lillis* v. *Steinbach*, 99 P. 22, 24 (Wash. 1909) ("notices … did not rescind the contract, because the appellant … had no right to rescind"); *see also* 3 Black, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments* § 569, at 1403 (2d ed. 1929) ("notice of rescission is not

effectual for any purpose unless given at a time when the party has a clear right to rescind"). Second, the borrower must, when giving notice of his election of rescission, simultaneously "tender[] to the defendant the benefits received … under the contract." *Griggs*, 385 F.3d at 445-446; *see also* 17 Am. Jur. 2d *Contracts* § 512, at 995 (1964) ("One cannot have the benefits of rescission without assuming its burdens."). Once a party both gives notice of rescission and tenders, the contract is void, and the rescinding party may bring an action seeking restitution of the consideration he provided to his counterparty. *See, e.g.*, *Omlid* v. *Sweeney*, 484 N.W.2d 486, 490 (N.D. 1992); *Brown* v. *Techdata Corp.*, 234 S.E.2d 787, 791 (Ga. 1977) (per curiam); *Bollenback* v. *Continental Cas. Co.*, 414 P.2d 802, 804-806 (Or. 1966) (en banc); *see also* 1 Dobbs, *Law of Remedies* § 4.8, at 673-674 (2d ed. 1993).

In contrast, equitable rescission—also known as judicial rescission—is not effected unilaterally by the rescinding party but rather requires adjudication of that party's right to rescind.

> In equity, … the rescission is effected by the decree of the equity court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief. In other words, a court of equity grants rescission or cancellation, and its decree wipes out the instrument, and renders it as though it does not exist.

Haumont v. *Security State Bank*, 374 N.W.2d 2, 7 (Neb. 1985) (internal quotation marks omitted); *see Cruickshank* v. *Griswold*, 104 A.2d 551, 552 (R.I. 1954). An action for rescission in equity is required, for example, "'[w]here the attempt to rescind has been

ineffectual.'" *Omlid*, 484 N.W.2d at 490 n.3 (quoting Koford, Comment, *Rescission at Law and in Equity*, 36 Cal. L. Rev. 606, 607 (1948)).

While a consumer's tender is required in both rescission at law and in equity, there is an important distinction between the two: Under rescission "in equity, a person suing to rescind a contract, as a rule, is not required to restore the consideration at the very outset of the litigation." *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 426 (1998). That is because, in equity, the "action does not proceed as *upon* a rescission, but proceeds *for* a rescission." *Gould* v. *Cayuga County Nat'l Bank*, 86 N.Y. 75, 83 (1881) (emphasis added).

3. TILA codified a statutory right to rescind certain mortgage loans, furnishing borrowers with a new basis for rescinding and prescribing the steps necessary by both parties to accomplish that rescission. Subject to exceptions not relevant here, *see supra* n.1, when a borrower secures a loan with his principal dwelling, section 1635(a) provides that he

> shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section … , whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so.

15 U.S.C. § 1635(a).

Thus, if the borrower gives notice within three days after consummation, his right to rescind is "unconditional." *Thompson* v. *Irwin Home Equity Corp.*, 300 F.3d 88, 89 (1st Cir. 2002). It can be invoked "for

any reason or for no reason"—the borrower need not allege any violation of TILA. *McKenna*, 475 F.3d at 421. Outside the initial three-day period, however, the borrower's right to rescind depends upon whether the lender violated TILA. Borrowers "only have a right to rescind after the three day period has passed if the right to rescind was not disclosed or if other material disclosures were not made as required." *Rudisell*, 622 F.2d at 251.

Section 1635(a) requires a borrower to "notify[]" the lender "of his intention to" rescind. Section 1635(b) then prescribes the steps both parties must carry out to return to the *status quo ante—i.e.*, to accomplish rescission. Specifically, within 20 calendar days after receipt of notice, the lender must return any money or property given in connection with the transaction and take all necessary or appropriate action to reflect the termination of the security interest. 15 U.S.C. § 1635(b); 12 C.F.R. § 1026.23(d)(2). When the lender has performed its obligations, the borrower must tender the money or property to the lender or, if that is impracticable or inequitable, must tender the property's reasonable value. 15 U.S.C. § 1635(b); 12 C.F.R. § 1026.23(d)(3). "[U]pon such a rescission," the borrower "is not liable for any finance or other charge, and any security interest given by the obligor … becomes void." 15 U.S.C. § 1635(b); *see* 12 C.F.R. § 1026.23(d)(1). These procedures "apply except when otherwise ordered by a court." 15 U.S.C. § 1635(b); *see* 12 C.F.R. § 1026.23(d)(4).

The process outlined in section 1635(b) plays out differently, depending upon when the borrower seeks rescission. Within three business days after closing, the process is simple and "straightforward": The borrower's right to rescind is incontestable and "loan funds

typically have not been disbursed yet." 75 Fed. Reg. 58,539, 58,547 (Sept. 24, 2010); *see also* 12 C.F.R. § 1026.23(c) ("no money shall be disbursed other than in escrow" and "no services shall be performed" until lender "is reasonably satisfied that the consumer has not rescinded").

Outside that three-day period, however, the rescission "process is problematic," given that funds have already been disbursed (and may have been spent by the borrower), security interests have been perfected, and, most important, the claimed right itself can be contested. *See, e.g.*, 75 Fed. Reg. at 58,547. When a borrower asserts a right to rescind in this context, the lender may agree that it violated TILA and rescind the loan. In those cases, the borrower and lender follow the statutory process for unwinding the mortgage described above. *Cf. Keiran* v. *Home Capital, Inc.*, 720 F.3d 721, 728 n.4 (8th Cir. 2013), *petition for cert. filed*, No. 13-705 (U.S. Dec. 9, 2013).

As in this case, however, the lender may dispute the borrower's right to rescind because, for example, the lender maintains that it did not violate TILA's notice and disclosure requirements. In that event, the rescissionary steps set forth in section 1635(b) will not take place, and the borrower's right to rescind must be established by judicial resolution. *See, e.g.*, *Yamamoto* v. *Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003) ("[i]n a contested case," borrower "'rescinds' the transaction" only when "the right to rescind is determined in the borrower's favor"). TILA therefore recognizes the availability of an "action in which it is determined that a creditor has violated" section 1635 by making inadequate disclosures at the loan closing, 15 U.S.C. § 1635(g), and "in which a person is determined to have a right of rescission under section 1635," *id.*

§ 1640(a)(3); *see id.* § 1640(c) (recognizing "action brought under … section 1635"). In that action brought under section 1635, it is the court that "award[s]" "rescission." *Id.* § 1635(g); *see id.* § 1640(a)(3); *see also id.* § 1640(g) (recognizing "remedy permitted by section 1635"). TILA establishes a "rebuttable presumption" to govern in that litigation—that a borrower who signed an acknowledgement of receipt of disclosures did in fact receive the required forms. *Id.* § 1635(c). TILA also authorizes the court to alter the procedures set forth in section 1635(b).

4. TILA originally placed no time limit on a borrower's ability to seek a rescission. *See* Pub. L. No. 90-321, § 125, 82 Stat. at 152-153. That omission proved problematic.

As the Board of Governors of the Federal Reserve System and the National Commission on Consumer Finance emphasized to Congress, the uncertainty surrounding unexpired rescission rights placed clouds on titles and the enforceability of loans. Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1972* (Jan. 3, 1973), *reprinted in* 119 Cong. Rec. S2803, S2813 (Feb. 20, 1973) (without "any limit on the length of time that the right continues where the creditor has failed to notify the customer of his right," "the titles to many residential real estate properties may become clouded by uncertainty regarding unexpired rights of rescission"); Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1971*, at 19 (Jan. 3, 1972) (same); National Commission on Consumer Finance, *Consumer Credit in the United States* 189-190 (1972) ("*Consumer Credit*") ("The FRB pointed out in two previous reports that the rescission period runs indefinitely unless required

disclosures have been made and notice of rescission provided. This clouds the titles to many residential properties and injures consumers in the long run."). The Federal Reserve Board and the National Commission therefore recommended to Congress that it enact a three-year "outside limit on the time the right of rescission may run." 119 Cong. Rec. at S2815; *see Consumer Credit* 190 (Congress should amend TILA to "limit the time the right of rescission may run where the creditor has failed to give proper disclosures").

Congress amended the Act in 1974 to respond to these concerns and put an end to any uncertainty. In an amendment titled, "Time limit for right of rescission," Congress categorically stated that a borrower's right of rescission "shall expire" three years after consummation of the loan transaction. Pub. L. No. 93-495, § 405, 88 Stat. 1500, 1517 (1974), *as amended*, Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 612(a)(6), 94 Stat. 132, 176; 15 U.S.C. § 1635(f).[2]

5. TILA originally delegated responsibility for implementing and promulgating rules regarding the Act to the Federal Reserve Board. Pub. L. No. 90-321, § 105, 88 Stat. at 148. The following year the Board promulgated Regulation Z, TILA's implementing regulation. 12 C.F.R. pt. 226.

The Board administered TILA for the next 40-plus years, until the Dodd-Frank Wall Street Reform and Consumer Protection Act transferred authority to the

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[2] This three-year limit, as enacted in 1974, applied in all circumstances. In 1980, Congress added one narrow exception (not applicable here), extending the repose period when an agency "institutes a proceeding" to enforce the provisions of section 1635. Pub. L. No. 96-221, § 612(a)(6), 94 Stat. at 176.

Consumer Financial Protection Bureau on July 21, 2011. *See* Pub. L. No. 111-243, § 1061(b)(1), (d), 124 Stat. 1376, 2036, 2039 (2010) (codified at 12 U.S.C. § 5581(b)(1), (d)); 75 Fed. Reg. 57,252, 57,252 (Sept. 20, 2010). In December 2011, the Bureau republished the Board's Regulation Z as 12 C.F.R. §§ 1026 *et seq*. *See generally* 76 Fed. Reg. 79,768 (Dec. 22, 2011). That regulation requires that, "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication." 12 C.F.R. § 1026.23(a)(2).

Both the Board and the Bureau have acknowledged that "courts are frequently called upon to resolve rescission claims." 75 Fed. Reg. at 58,629; *see* 12 C.F.R. pt. 1026, Supp. I, cmt. § 1026.23—Right of Rescission ¶ 23(d)(4) ("Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind[.]"). Regulation Z, however, does not address what a borrower must do to obtain resolution of a contested assertion of rescission, and by when the borrower must do it.

C. Petitioners' Facts

In recent years, the mine run of TILA rescission cases has arisen from the following fact pattern: Borrowers—often in default on their mortgages and facing foreclosure—inform their lenders of their intent to rescind because, years into the mortgage, the borrowers assert that they were not provided the required number of copies of the disclosures prescribed by TILA. In these cases, the borrowers signed an acknowledgement at the loan closing, attesting to their receipt of all required copies of all required disclosures. They do not claim any substantive defect in the disclosures, nor do

they claim that the lender failed to provide the disclosures at all; they claim only that they did not receive duplicates of the required forms. These are the facts of the three petitions for certiorari pending before this Court, raising the same legal question presented here, and they are the facts of petitioners' case.

On February 23, 2007, petitioners refinanced the mortgage on their primary residence by executing a promissory note for $611,000 with respondent Countrywide Home Loans, Inc. Pet. App. 5a. At the loan closing, each petitioner signed disclosures acknowledging full lender compliance with the pertinent TILA requirements—*i.e.*, the petitioners' "'receipt of two copies of NOTICE OF RIGHT TO CANCEL and one copy of the Federal Truth in Lending Disclosure Statement.'" *Id.*; *see also id.* 7a n.3. Petitioners used the proceeds of the loan to "'pa[y] off multiple consumer debts.'" *Id.* 5a (alteration in original).

On February 23, 2010, three years to the day after the loan closing, petitioners notified respondents of their intention to rescind the loan, asserting that while Countrywide had provided the required disclosures at closing, Countrywide had allegedly failed to provide the required number of copies of the disclosures. Pet. 6; Pet. Br. 8. At the time, petitioners were "in default" (Arg. Recording 13:37-40 (8th Cir. Dec. 11, 2012)), and, according to them, facing foreclosure (JA25 (alleging that, absent court intervention, "wrongful forced sale foreclosure" will result); *see also* JA21 (original complaint, alleging that "Defendants have proceeded to … unlawfully initiate and continue a foreclosure proceeding by posting a sale")). Petitioners made no mention in their notice of an offer or ability to tender the loan proceeds. *See* Pet. Br. Add. 9-10.

Within 20 days, respondent BAC Home Loans Servicing, LP replied to petitioners' notice and denied that they had a right to rescind. Pet. App. 5a. On February 24, 2011—four years and one day after the loan closed—petitioners filed their "Complaint for Rescission, Damages & Jury Trial." JA12. Petitioners filed the operative "Amended Complaint for Rescission, Damages & Jury Trial" on July 22, 2011. JA24. In their prayer for relief, petitioners sought "[r]escission of [the] transaction," actual and statutory damages, and declaratory relief. JA35-36.

Respondents moved for judgment on the pleadings on the ground that petitioners' suit was barred by TILA's three-year statute of repose. The district court granted respondents' motion, holding that "a suit for rescission filed more than three years after consummation of an eligible transaction is barred by TILA's statute of repose." Pet. App. 9a. The court did not address the contested factual question whether petitioners received the requisite number of copies, but noted that their "assertion that they did not receive the required number of disclosures is undermined by documents submitted by Defendants demonstrating that Plaintiffs signed the disclosure documents acknowledging receipt by each Plaintiff of sufficient copies." *Id.* 7a n.3.

The court of appeals affirmed. Relying on its earlier decision in *Keiran*, 720 F.3d 721, the court concluded that "a party seeking to rescind a loan transaction must file suit within three years of consummating the loan." Pet. App. 2a. The Eighth Circuit denied rehearing en banc. *Id.* 10a.

SUMMARY OF ARGUMENT

I. A. Section 1635(a) gives certain borrowers the "right to rescind" their mortgage loans and requires that they "notify[]" their lender of their "intention to do so." That provision, however, says nothing about what a borrower must do to effectuate a rescission of his loan. Congress provided that direction in section 1635(b) and (g), where it created two rescissionary procedures for a borrower to pursue, depending on whether his right to rescind is in fact in dispute. In neither case does the borrower's notice of "intention to" rescind effectuate a rescission.

Where a borrower's right to rescind is uncontested, section 1635(b) prescribes a series of steps for the mutual accomplishment of rescission, including the lender terminating the security interest and the borrower tendering the loan principal. In contrast, where, as here, more than three days have elapsed since the loan closing and the lender denies it failed to provide the required disclosures, the Act prescribes a different procedure for a borrower seeking rescission: He must go to court and sue for an "award" of "rescission." 15 U.S.C. § 1635(g); *see id.* § 1640(a)(3). Thus, in this contested case, where petitioners' *right* to rescind is in dispute and the parties accordingly have not restored each other to the *status quo ante* through the statutory procedures in section 1635(b), petitioners were required to sue for any rescission.

This interpretation of TILA is reinforced by the common law, which created two alternative ways of accomplishing rescission. Under the common law, rescission can be effectuated unilaterally (at law) only upon a valid notice accompanied by tender, thereby ensuring restoration of the status quo by the rescinding party.

By contrast, the intervention of a court is necessary (in equity) to award rescission where a party's right to rescind is contested. Petitioners and the United States insist that TILA is meant to mirror common-law rescission at law, but that is clearly wrong. First, Congress separated notice from the obligation of tender, both of which are necessary under the common law to accomplish a unilateral rescission. Second, by underscoring the need for judicial intervention to "award" "rescission" in the case of a dispute, Congress enacted a regime that more closely resembles rescission in equity, whereby rescission must be decreed by a court.

B. TILA originally placed no time limit on a borrower's ability to seek a rescission. In response to concerns from federal regulators that unexpired rescission rights placed clouds on title and the enforceability of loans, Congress enacted a three-year statute of repose. In an amendment titled "Time limit for right of rescission," Congress categorically stated that a borrower's right of rescission "shall expire" three years after the consummation of the loan transaction. Pub. L. No. 93-495, § 405, 88 Stat. 1500, 1517 (1974).

As the Court unanimously confirmed in *Beach* v. *Ocwen Federal Bank*, 523 U.S. 410, 416 (1998), that provision, codified at 15 U.S.C. § 1635(f), "'operates … to extinguish the right which is the foundation for the claim'"—*i.e.*, rescission. It therefore necessarily "limits … the time for bringing a suit, by governing the life of the underlying right." *Id.* at 417. Because petitioners filed their lawsuit seeking rescission after section 1635(f)'s three-year limit, their rescission claim is time-barred.

II. Petitioners' interpretation would frustrate Congress's objectives in enacting TILA's statute of repose.

On petitioners' view, as long as a borrower sends a notice of intention to rescind within the three-year period, the borrower has an indefinite number of additional years to bring suit to obtain an "award" of "rescission." Any limit on the time for filing suit—an issue, petitioners oddly say, the Court need not even address—should be drawn from state statutes of limitations or from 15 U.S.C. § 1640, even though section 1635(f) already imposes a three-year statute of repose. But section 1640 applies to claims for damages, not rescission. And it is highly implausible that Congress, after creating an extraordinary remedy and then enacting an uncompromising three-year limitation on the underlying right, meant to leave the time for actually seeking an award of that remedy subject to a patchwork of 50 States' laws as interpreted by various courts.

As petitioners see it, Congress's solution to the problem of clouds on title was not to extinguish the borrower's right of rescission three years after closing, but instead to require the borrower only to notify the lender within those three years, and take no further action if his notice is rejected, placing the burden on the lender to sue for a declaratory judgment. That would proliferate avoidable and unnecessary litigation. It is a no-lose proposition for a borrower to send a lender written notice of his intention to rescind—an act outside the requirements of the Federal Rules of Civil Procedure—even where, as here, he has previously acknowledged receiving his disclosures. Lenders would thus be required to initiate countless declaratory judgment actions against frivolous notices of borrowers' intention to rescind or suffer the very clouds on title Congress sought to eliminate. But there is no indication Congress contemplated anything like that.

Rather, under the scheme set forth in section 1635, it is the borrower—the one who claims a violation of TILA and seeks an "award" of "rescission" based on that claim—who brings suit.

III. TILA's text should be the end of the matter. But in any event, no deference is due the CFPB's litigation views. First, the CFPB's regulation concededly provides no clarity on the relevant statutory interpretation issue here: What must a borrower do to obtain resolution of a contested assertion of rescission, and by when must the borrower do it? Second, the CFPB's view on that issue, set forth in its amicus briefs, finds no footing in TILA's text, disregards Congress's intent, and has no basis in any special agency expertise.

ARGUMENT

I. PETITIONERS' RESCISSION CLAIM IS TIME-BARRED

Petitioners' argument starts from the "fundamental premise" that they fully accomplished rescission in this contested case at the time they sent their notice of intention to rescind—the only act they took within the three-year repose period relative to their asserted right to rescind—even if the notice were itself not valid because it was predicated on an alleged TILA violation that respondents contend did not occur. Pet. Br. 32 n.4. In other words: Despite signing acknowledgements that each received the required number of copies of disclosures that they later claimed, in the face of impending foreclosure, never to have received, petitioners—merely by sending notice—reduced respondents from secured to unsecured creditors and, without any tender or other indication that they could or would restore the status quo, became entitled to the return of all interest

and fees they had paid and to relief from any duty to make loan payments in the future.

That position is flawed. Under TILA's text, supported by the common law, rescission in a contested case is not effectuated automatically upon a borrower's unilateral notice. The statute says that petitioners' right to rescind depends on a TILA violation. It also says that where the right to rescind is denied (because the TILA violation is denied), petitioners may assert their claim in court for an "award" of "rescission." And it says that they have three years to do so. Since petitioners sued for rescission after the three-year limit, their rescission claim is time-barred.

A. In A Contested Case, A Borrower Can Obtain Rescission Only By Bringing Suit

1. When a borrower's alleged right to rescind depends on the existence of a fact the lender denies, rescission does not occur upon notice but rather requires that a court award that remedy

a. The statutory "'right which is the foundation'" for the remedy of rescission is set forth in 15 U.S.C. § 1635. *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998). Section 1635(a) provides that a borrower "shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section … , whichever is later." Under this provision, a borrower has no right to rescind beyond the three days following consummation unless the lender violated TILA by failing to deliver the required disclosures.

Under section 1635(a), a borrower seeking to rescind his mortgage must "notify[]" the lender "of his intention to do so." That notice of "intention to" rescind is not the same as "rescission" in cases where the borrower's right to rescind is in dispute. To the contrary, where the lender disputes the borrower's claim of a TILA violation, only a court may "award" "rescission." 15 U.S.C. § 1635(g); *see id.* § 1640(a)(3).

Petitioners assert (Br. 32 n.4) that section 1635(a) "begins with the fundamental premise that rescission is accomplished by notifying the creditor." That is wrong and has rightly been rejected by a majority of the courts of appeals to have addressed it.[3] "By the plain language of" section 1635(a), a borrower's notice "does not actually rescind the transaction but merely communicates the obligor's '*intention* to [rescind the transaction].'" *Hartman* v. *Smith*, 734 F.3d 752, 760 n.2 (8th Cir. 2013) (quoting 15 U.S.C. § 1635(a)) (emphasis and alterations in original).

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[3] *See, e.g.*, *McOmie-Gray* v. *Bank of Am. Home Loans*, 667 F.3d 1325, 1327 (9th Cir. 2012) ("Rescission is not automatic upon a borrower's mere notice[.]"); *American Mortg. Network, Inc.* v. *Shelton*, 486 F.3d 815, 821 (4th Cir. 2007) ("This Court adopts the majority view of reviewing courts that unilateral notification of cancellation does not automatically void the loan contract."); *Yamamoto* v. *Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003) (automatic rescission "makes no sense when … the lender contests the ground upon which the borrower rescinds"); *Large* v. *Conseco Fin. Servicing Corp.*, 292 F.3d 49, 54 (1st Cir. 2002) (in a contested case, "mere assertion of the right of rescission" does not have "the automatic effect of voiding the contract"); *see also* Rohner & Miller, *Truth in Lending* 319 (Harrell ed., 2007 Supp.) ("[C]onsiderable case law indicates that the creditor, upon receiving a notice of rescission, is not required to immediately cancel its security interest and effectively become an unsecured creditor before it has an opportunity to be heard before a court.").

b. Section 1635(a) says nothing about how and when rescission is effectuated. Congress answered those questions in section 1635(b) and (g), where it created two rescissionary procedures for the borrower to pursue, depending on whether his right to rescind is disputed.

Where a borrower's right to rescind is uncontested, section 1635(b) sets forth the steps necessary to effectuate rescission. That provision makes clear that "rescission is a process involving two parties, each with their own obligations." *Iroanyah* v. *Bank of Am.*, 753 F.3d 686, 691 (7th Cir. 2014); *accord*, *e.g.*, *Yamamoto* v. *Bank of N.Y.*, 329 F.3d 1167, 1173 (9th Cir. 2003) ("rescission under § 1635(b) is an on-going process consisting of a number of steps"). A borrower's "exercise[]" of "his right to rescind" initiates this process, but rescission is achieved only when the transaction has been unwound and both parties have been restored to the *status quo ante*, under the steps prescribed in section 1635(b). *See*, *e.g.*, *Iroanyah*, 753 F.3d at 692 (where tender by the borrower "is impossible," "rescission, by *any* definition, has not taken place").[4]

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[4] The text of section 1635(b) distinguishes the "exercise[]" of the right to rescind from "rescission." *See In re Ramirez*, 329 B.R. 727, 735 (D. Kan. 2005) ("The plain language of the statute indicates that exercising the right to rescind is a discrete event; and rescission is a separate discrete event."); *see also Gilbert* v. *Residential Funding LLC*, 678 F.3d 271, 277 (4th Cir. 2012) ("We must not conflate the issue of whether a borrower has exercised her right to rescind with the issue of whether the rescission has, in fact, been completed and the contract voided."). The text provides that "[w]hen an obligor *exercises his right to rescind* … , he is not liable for any finance or other charge," and it continues that, "any security interest given by the obligor … becomes void *upon such a rescission*." 15 U.S.C. § 1635(b) (emphasis added); *see Beach*, 523 U.S. at 412 (security interest "'becomes void' upon

Where, as here, the existence of a borrower's right to rescind is contested, and thus the rescissionary steps set forth in section 1635(b) will not take place, TILA prescribes a different procedure: A borrower seeking rescission in a contested case must proceed to court and invoke the alleged right to rescind by suing for an award of rescission. Petitioners and the United States acknowledge that "[v]arious TILA provisions contemplate that a court may become involved in a rescission-related dispute" (U.S. Br. 8; *see* Pet. Br. 23), but they contend that a "court's task in such a suit is to decide whether the obligor *has already rescinded* the transaction by means of a notice" (U.S. Br. 8 (emphasis added)). That is wrong.

In section 1635(g)—a provision the CFPB considers "certainly not helpful" to its position (Arg. Recording 13:35-38, *Sherzer* v. *Homestar Mortg. Servs.*, No. 11-4254 (3d Cir. Sept. 19, 2012)), and a provision petitioners fail even to cite—Congress recognized the availability of an "action in which it is determined that a creditor has violated" section 1635. That, of course, is *the* precondition of any right to rescind more than three days beyond the loan closing. Congress also expressly provided in section 1635(g) that, in the action permitted thereunder, a court may "*award*" "rescission" as a remedy. 15 U.S.C. § 1635(g) (emphasis added); *see also*

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rescission"). Under petitioners' view, the statutory phrase "upon such a rescission," a phrase they ignore, would be superfluous. And mere notice itself—even if contested—would void the lender's security interest. But if Congress intended to equate exercise of the right to rescind with rescission itself, it would not have used different terms for the same event. *See, e.g.*, *Bailey* v. *United States*, 516 U.S. 137, 146 (1995) (assuming that when Congress "used two terms … it intended each term to have a particular, nonsuperfluous meaning").

Parker v. *Potter*, 232 F. App'x 861, 865 (11th Cir. 2007) (per curiam) ("An action for rescission under § 1635 is a distinct cause of action[.]"); *Eby* v. *Reb Realty, Inc.*, 495 F.2d 646, 652 (9th Cir. 1974) (section 1635 provides a "form[] of relief" that a court may "grant"). Section 1640 likewise recognizes this action as one "in which a person *is determined to have a right of rescission under section 1635*." 15 U.S.C. § 1640(a)(3) (emphasis added); *see id.* § 1640(c) (recognizing "action brought under … section 1635"); *id.* § 1640(g) (referencing "remedy permitted by section 1635").

Congress also legislated a rule to govern in that action. Section 1635(c) provides for a "rebuttable presumption" that a borrower who signs an acknowledgment of receipt in fact received the required disclosures. The only purpose of that presumption is to have effect in litigation, imposing on the party against whom it is directed—here, the borrower—"the burden of producing evidence to rebut the presumption." Fed. R. Evid. 301. And the presumption further strongly implies that when there has been an acknowledgement, a borrower's notice that asserts the contrary is not presumed to be valid.

Far from petitioners' claim that rescission is effectuated unilaterally and automatically upon notice, then, TILA requires that a borrower in a contested case sue for rescission. "If a lender disputes a borrower's purported right to rescind, the designated decision maker … must decide whether the conditions for rescission have been met." *Large* v. *Conseco Fin. Servicing Corp.*, 292 F.3d 49, 55 (1st Cir. 2002). What "'rescinds' the transaction" is a court decision, if "the right to rescind is determined in the borrower's favor." *Yamamoto*, 329 F.3d at 1172. Unless and until that decision is made, a borrower has "only advanced a claim seeking

rescission." *Large*, 292 F.3d at 55. In sum, when the lender contests a borrower's right to rescind, that borrower must bring an "action in which [he] is determined to have a right of rescission under section 1635," 15 U.S.C. § 1640(a)(3), and in which the court may "award" "rescission," *id.* § 1635(g).

c. Petitioners cite (Br. 30) snippets of legislative history for the proposition that Congress "intended to create a simple, non-judicial rescission remedy … without requiring burdensome litigation." Quoting Representative Sullivan in 1968, petitioners state: "'[w]hen the debtor gives notice of intention to rescind, that voids the mortgage absolutely and unconditionally regardless of whether either the debtor or the creditor does any of the things that [Section 1635] requires be done.'" *Id.* (alterations in original).

The context of Representative Sullivan's statement makes clear that she was referring to notice provided during the unconditional rescission period—before a lender "disburses funds."[5] To the extent petitioners rely on it to support the proposition that a contested notice "absolutely and unconditionally" voids a mortgage, not even their amici appear to agree. *See* New York et al. Br. 15 n.11 (consumer must assert a "*legitimate* right to rescind" (emphasis added)); *see also* 3 Black, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments* § 569, at 1403 (2d

[5] 114 Cong. Rec. H4114, H4118 (May 22, 1968); *see also id.* (explaining that "[i]n this connection, … a lender who disburses funds … would ordinarily be taking a risk if he did so before the contract and all the required information had been in the hands of the debtor for three full business days," and noting that the right to rescind may be waived in "an emergency situation where the debtor really needs to have the money or performance right away").

ed. 1929) ("notice of rescission is not effectual for any purpose unless given at a time when the party has a clear right to rescind"). In any event, that extreme view—which would effectuate rescission even in the absence of tender by the consumer—is in conflict with the text of section 1635, which of course is "Congress's 'authoritative statement.'" *Chamber of Commerce of U.S.* v. *Whiting*, 131 S. Ct. 1968, 1980 (2011).

Petitioners also rely on a failed amendment from 1977 that would have permitted parties to "'bring an action to determine the right to rescind.'" Pet. Br. 26; *see id.* 29. This Court has repeatedly recognized that "'[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1173 n.16 (2014); *see*, *e.g.*, *Lockhart* v. *United States*, 546 U.S. 142, 147 (2005). In any event, three years later, Congress enacted amendments to TILA that largely accomplished what petitioners say Congress failed to enact in 1977. The 1980 amendments expressly recognize an action in which a court is asked to determine whether a borrower has a right of rescission, and in which the court may "award" "rescission." Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 612(a)(6), 94 Stat. 132, 176 ("[i]n any action in which *it is determined that a creditor has violated this section*" (emphasis added)); *see also id.* § 615(a)(2), 94 Stat. at 180 ("in any action in which a person is *determined to have a right of rescission under section 125*" (emphasis added)). And Congress did so amidst comments from the Federal Reserve Board that "there has been frequent resort to the courts to determine a consumer's right to rescind, and the various consequences of rescission." *Simplify and Reform the Truth in Lending Act: Hearing on S. 1312, S. 1501,*

and S. 1653 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Hous., & Urban Affairs, 95th Cong. 56 (1977) (statement of Philip C. Jackson, Jr., Governor, Board of Governors of the Federal Reserve System). Far from showing that Congress intended to allow for unilateral and automatic rescission upon notice, the legislative history shows that Congress contemplated borrowers would need to sue for a rescission award in contested cases and provided the means for doing so.

2. The common law supports respondents' interpretation of rescission under TILA

The common law of rescission reinforces TILA's text and drafting history. A party seeking to rescind at common law may, depending upon the circumstances, proceed at law or in equity. In enacting a statutory rescission remedy, Congress plainly did not adopt rescission at law, whereby rescission is unilaterally effectuated only upon notice *and* tender. Instead, by separating notice in time and sequence from tender, and underscoring the need for judicial intervention to "award" "rescission" in the case of a dispute, Congress enacted a statutory remedy that much more closely resembles rescission in equity—one that is not effectuated unilaterally and automatically upon notice, but rather must be decreed by a court.

Petitioners and the United States acknowledge that Congress departed from rescission at law in enacting section 1635. Pet. Br. 32 n.4 (acknowledging "departure from the common law"); U.S. Br. 16 n.4 (acknowledging "some modifications" to rescission at law). They further acknowledge that equity informs actions to accomplish rescission under TILA. Pet. Br. 23;

U.S. Br. 30 n.7.[6] But, failing to engage with the consequences of these acknowledgements, they insist that Congress adopted a regime whereby "a party effectuates a rescission simply by notifying the non-rescinding party." Pet. Br. 13; *see* U.S. Br. 16 n.4. That contention is simply wrong.

As discussed, *supra* pp. 7-8, under rescission at law, the rescinding party must tender the benefits received under the contract for the transaction to be considered rescinded. 1 Dobbs, *Law of Remedies* § 4.8, at 673 (2d ed. 1993); 3 Black § 616, at 1483-1484; *see, e.g.*, *Smeltzer* v. *White*, 92 U.S. 390, 395-396 (1876); *Savers Fed. Sav. & Loan Ass'n of Little Rock* v. *First Fed. Sav. & Loan Ass'n of Harrison*, 768 S.W.2d 536, 538 (Ark. 1989). Contrary to what petitioners claim (Br. 13), in a rescission at law a party does *not* in fact "effecuate[] a rescission simply by notifying the non-rescinding party." Rather, it is "*the tender itself* [that] effectuates the rescission," after which the plaintiff is entitled to sue for restitution. *Brown* v. *Techdata Corp.*, 234 S.E.2d 787, 791 (Ga. 1977) (per curiam) (emphasis added); *see Savers Fed. Sav. & Loan Ass'n of Little Rock*, 768 S.W.2d at 538 ("Rescission at law is accomplished when one party to a contract tenders … the benefits received under the contract."); *see also* 1 Dobbs § 4.8, at 673; 3 Black § 617, at 1485-1488. That sequence is grounded in principles

[6] Courts are in accord. It has long been established that rescission under TILA, "[a]lthough … statutorily granted," "remains an equitable doctrine subject to equitable considerations." *Brown* v. *National Permanent Fed. Sav. & Loan Ass'n*, 683 F.2d 444, 447 (D.C. Cir. 1982) (per curiam); *accord, e.g.*, *Lee* v. *Countrywide Home Loans, Inc.*, 692 F.3d 442, 451 n.2 (6th Cir. 2012) ("'rescission is an equitable remedy'"); *Hull* v. *Bowest Corp.*, 683 P.2d 1181, 1185 (Colo. 1984) (en banc) ("action to rescind under TILA is an equitable proceeding").

of fairness: Tender is required because "it would be unfair" to allow for unilaterally effective termination upon notice and "insist that the defendant give up what he got without any assurance of getting back what he gave." 1 Dobbs § 4.8, at 674; *see also* 17 Am. Jur. 2d *Contracts* § 512, at 995 (1964) ("One cannot have the benefits of rescission without assuming its burdens.").

"Rescission in equity is a very different matter." 1 Dobbs § 4.8, at 675. "[I]n equity, a person suing to rescind a contract, as a rule, is not required to restore the consideration at the very outset of the litigation." *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 426 (1998); *see* 1 Dobbs § 4.8, at 675. That is because, in equity, the "action does not proceed as *upon* a rescission, but proceeds *for* a rescission." *Gould* v. *Cayuga County Nat'l Bank*, 86 N.Y. 75, 83 (1881) (emphasis added). In other words, "it is not a suit based upon the rescission already accomplished by the plaintiff, but a suit to have the court decree a rescission." 1 Dobbs § 4.8, at 675.

The procedure for effectuating rescission under TILA differs markedly from the unilateral rescission-at-law regime and more closely resembles rescission in equity. First, in section 1635, by separating the notice of intention to rescind from the tender, Congress removed the traditional underpinnings of "unilateral" rescission: Absent a tender, the initial step taken by the borrower or buyer does not assure restoration of the status quo—the heart of rescission. Under section 1635(b), a borrower is not required to tender upon the sending of notice, but must ultimately do so as a prerequisite to accomplishing rescission. *See, e.g.*, *Iroanyah*, 753 F.3d at 692 (absent tender, "rescission … has not taken place"); *accord, e.g.*, *McKenna* v. *First Horizon Home Loan Corp.*, 475 F.3d 418, 422 (1st Cir. 2007)

("rescission entails the return of loan proceeds to the creditor"); *see also* 75 Fed. Reg. 58,539, 58,547 (Sept. 24, 2010) ("The Board does not believe that Congress intended for the creditor to lose its status as a secured creditor if the consumer does not return the loan balance.").

Second, when contested, there is no rescission until a court grants a borrower that remedy: TILA's text expressly speaks of a court "award[ing]" "rescission," 15 U.S.C. § 1635(g), in the action that Congress created for a court to "determine[]" whether a borrower "ha[s] a right of rescission under section 1635," *id.* § 1640(a)(3); *see also id.* § 1640(c), (g). An action for an "award" of "rescission" under TILA is not, as in the case of a rescission at law, a suit for restitution based on a rescission already accomplished. Rather, it is a suit *for rescission*, and thus more closely resembles a rescission in equity, "'effected by the decree of the … court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief." *Griggs* v. *E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 446 (4th Cir. 2004); *see also Phelps* v. *U.S. Life Credit Life Ins. Co.*, 984 S.W.2d 425, 427 (Ark. 1999) ("cancellation of an instrument" is "exclusively an equitable power"); 3 Black § 686, at 1635. Indeed, that is precisely what petitioners request as relief in their complaint here: "[r]escission of [the] transaction" (JA35), and cancellation of the security interest (JA33). *Compare* Pet. Br. 32 (in rescission at law, "'plaintiff effects the rescission, and the court gives a judgment for restitution'").

B. Section 1635(f) Establishes An Uncompromising Three-Year Limit On The Time For Bringing A Suit For Rescission

1. Responding to concerns from federal regulators and others about the clouds on titles resulting from indefinite rescission rights, *see supra* pp. 12-13, Congress amended TILA in 1974 to put a definitive end to a borrower's ability to seek rescission. In an amendment titled, "Time limit for right of rescission," Congress categorically stated that a borrower's right of rescission "shall expire" three years after the consummation of the loan transaction. Pub. L. No. 93-495, § 405, 88 Stat. 1500, 1517 (1974), *as amended*, Pub. L. No. 96-221, § 612(a)(6), 94 Stat. at 176. That provision, codified at 15 U.S.C. § 1635(f), sets forth an absolute time limit after which any right of rescission ceases to exist. *See, e.g.*, *Black's Law Dictionary* 519 (5d ed. 1979) ("[e]xpiration" means "[c]essation; termination from mere lapse of time"); *Webster's Third New International Dictionary* 801 (1971) ("expire" means "become void through the passage of time").

Section 1635(f), by its plain terms, is a statute of repose.[7] It operates as "'a cutoff'"—an "'absolute …

[7] The CFPB has repeatedly conceded the point. *See* Arg. Recording 10:31-33, *Keiran* v. *Home Capital, Inc.*, Nos. 11-3878, 12-1053 (8th Cir. Oct. 16, 2012) (acknowledging that section 1635(f) "is a statute of repose"); Arg. Recording 12:27-30, *Sherzer*, No. 11-4254 (3d Cir. Sept. 19, 2012) (same). And the courts of appeals, even those in the minority of the circuit split here, are in accord. *See Keiran* v. *Home Capital, Inc.*, 720 F.3d 721, 727-728 (8th Cir. 2013); *Rosenfield* v. *HSBC Bank, USA*, 681 F.3d 1172, 1182-1183 (10th Cir. 2012); *McOmie-Gray* v. *Bank of Am. Home Loans*, 667 F.3d 1325, 1326 (9th Cir. 2012); *Sampson* v. *Washington Mut. Bank*, 453 F. App'x 863, 865 n.3 (11th Cir. 2011); *In re Community Bank of N. Va.*, 622 F.3d 275, 301 n.18 (3d Cir. 2010); *Jones* v. *Sax-*

bar' on a defendant's temporal liability." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014) (alteration in original); *see id.* ("Statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'"). Under a statute of repose, if an "'action is not brought within the specified period, the plaintiff literally has *no* cause of action.'" *Id.* at 2187 (quoting *Hargett* v. *Holland*, 447 S.E.2d 784, 787 (N.C. 1994)). Given Congress's concern with clouds on title, that was precisely the intended effect of section 1635(f). *See Beach*, 523 U.S. at 418-419 ("Since a statutory right of rescission could cloud a bank's title on foreclosure, Congress may well have chosen to circumscribe that risk[.]").[8]

As this Court unanimously confirmed in *Beach*, in enacting section 1635(f) Congress emphatically declared that the right of rescission shall not "'be enforceable in any event after the prescribed'" three-year period. 523 U.S. at 416; *see also Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946) ("If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter."). Section 1635(f) "'operates … to extinguish the right which is the foundation

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on Mortg., Inc., 537 F.3d 320, 327 (4th Cir. 1998); *Ramadan* v. *Chase Manhattan Corp.*, 156 F.3d 499, 505 (3d Cir. 1998).

[8] *Cf. Hanger* v. *Abbott*, 73 U.S. (6 Wall.) 532, 538 (1868) ("statutes of repose … proceed … upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period, and they take away all solid ground of complaint"); *Lewis* v. *Marshall*, 30 U.S. (5 Pet.) 470, 477 (1831) ("The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate.").

for the claim,'" *Beach*, 523 U.S. at 416—"thereby cutting off any rescission remedy," New York et al. Br. 11.

Section 1635(f) necessarily "limits … the time for bringing a suit, by governing the life of the underlying right." *Beach*, 523 U.S. at 417. Congress provided for an action "in which a person is determined to have a *right of rescission* under section 1635." 15 U.S.C. § 1640(a)(3) (emphasis added); *see id.* § 1635(g). Congress also limited the time for bringing that action, providing plainly that the "obligor's *right of rescission* shall expire three years after the date of" closing. *Id.* § 1635(f) (emphasis added). Because petitioners filed their lawsuit for rescission after the end of this three-year repose period, their rescission claim is time-barred. "Done is done." *Jones* v. *Thomas*, 491 U.S. 376, 392 (1989) (Scalia, J., dissenting).

2. Ignoring the operative text of section 1635(f) and avoiding entirely the intended consequences of a statute of repose, petitioners rely on the subtitle of that provision that appears in the U.S. Code to argue that section 1635(f) limits only the time for sending notice of intention to rescind. Pet. Br. i; *see id.* 40. But that subtitle, "Time limit for exercise of right," is only a codifier's editorial revision and thus irrelevant. Congress never approved the subtitle; nor has Congress enacted Title 15 of the U.S. Code as positive law. *Cf. United States Nat'l Bank of Or.* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 n.3 (1993) ("When Congress has enacted a title of the Code as positive law … , the text of the Code provides 'legal evidence of the laws.'"); *see also United States* v. *Dunham Concrete Prods., Inc.*, 475 F.2d 1241, 1244 n.1 (5th Cir. 1973) ("Congress has not enacted Title 15 of the United States Code into positive law, so the Statutes at Large take precedence over the codification."). This codifier's revision there-

fore "should be given no weight." *United States* v. *Welden*, 377 U.S. 95, 98 n.4 (1964).

That is particularly the case because, as noted, *supra* p. 13, Congress *did* provide a title for the amendment that gave rise to section 1635(f)—"Time limit for right of rescission"—a title that, unlike the editorial revision, is entirely consistent with the operative text.[9] Like the enactment's title, section 1635(f) says nothing about "exercising" a right of rescission—indeed, the word "exercise" appears nowhere in the text. The statute is directed to the right itself, and that right expires after three years. *See also Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("subchapter heading cannot substitute for the operative text of the statute").

The Solicitor General's explanation (U.S. Br. 25) for why section 1635(f) operates only to "place[] an outer limit … on … the Section 1635(a) notification procedure," is similarly unpersuasive. Tellingly, as support for this assertion, the government cites *not* section 1635(f) but rather section 1635(b). *Id.* 21. The government also references two cases addressing statutes of repose that "set a deadline for performing some action other than initiation of a lawsuit." *Id.* 25-26 (citing *Balam-Chuc* v. *Mukasey*, 547 F.3d 1044, 1049 (9th Cir. 2008); *Iacono* v. *OPM*, 974 F.2d 1326, 1328 (Fed. Cir. 1992)). The statutes at issue in those two cases are readily distinguishable. Both expressly identify (1) a

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[9] The regulation promulgated by the Federal Reserve Board shortly after the enactment of section 1635(f) is also inconsistent with petitioners' position (and the editorial revision), making no reference at all to the "exercise" of the right of rescission. *See* 40 Fed. Reg. 30,085, 30,086 (July 17, 1975) (adding 12 C.F.R. § 226.9(h), "*Time limit for unexpired right of rescission*").

deadline *and* (2) the specific action that a party must take by that deadline. *See* 8 U.S.C. § 1255(i) (alien must "*file[]*" petition by April 30, 2001 (emphasis added)), *discussed in Balam-Chuc*, 547 F.3d at 1049; 5 U.S.C. § 8341 note (1988) (spouse must "'*file[]* an application … on or before May 7, 1989'" (emphasis added)), *discussed in Iacono*, 974 F.2d at 1327; *see also* N.Y. U.C.C. Law § 4-A-505 ("customer" must "*notif[y]* the bank of the customer's objection to the payment within one year" (emphasis added)), *discussed in Ma* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 88-89 (2d Cir. 2010). In contrast, section 1635(f) states, simply and categorically, that the right of rescission "shall expire" at the end of three years. Like petitioners, the government reads into the statute words that are not there.

II. PETITIONERS' INTERPRETATION WOULD THWART CONGRESS'S PURPOSE IN ENACTING THE REPOSE PROVISION

A. Petitioners acknowledge (Br. 39), almost as an afterthought, that "it is useful to understand" section 1635(f), but only insofar as they contend it does not govern the time for filing suit. What that time limit is, petitioners and their amici say (*id.*; New York et al. Br. 8 n.7), the Court need not figure out—even though it is *the question* that has divided the lower courts. If the Court is interested in that dispositive issue, petitioners advise (Br. 43-45), it should borrow from the one-year limitations period found in section 1640(e) or from state statutes of limitations.

Petitioners' suggestion would sow uncertainty where Congress intended repose. It is fanciful to suggest that, after creating an extraordinary remedy and then enacting an uncompromising limitation on the sub-

stantive right to that remedy, Congress meant to leave indeterminate the time for seeking an award of that remedy.

Section 1640 applies to claims for damages, not claims for rescission. The CFPB's tepid support in the lower courts for section 1640's limitations period applying here is telling. *See, e.g.*, CFPB Amicus Br. 26 n.6, *Sherzer*, No. 11-4254 (3d Cir. Apr. 13, 2012) (taking no position on the issue and noting only that there is "some support" for this proposition "in the legislative history"). And in *Beach*, 523 U.S. at 418, this Court recognized the "stark contrast" between the "1-year limitation provision on damages actions" in section 1640(e) and the "treatment of rescission" in the "uncompromising provision of § 1635(f)."

The alternative suggestion that Congress intended the uncertainty of a patchwork of 50 States' statutes of limitations, as interpreted by various courts, is also inconsistent with the statutory plan. Congress was fastidious about setting the precise timeframe for virtually every step in the rescissionary process. *E.g.*, 15 U.S.C. § 1635(a) ("obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction"); *id.* § 1635(b) (creditor shall act "[w]ithin 20 days after receipt of a notice of rescission"); *id.* (unless creditor takes possession "within 20 days after tender," ownership vests with borrower); *id.* § 1635(f) (if agency institutes formal proceeding, three-year repose period extended until "the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later"). But as petitioners would have it, that same Congress left the ultimate issue—the time for suing for an award

of rescission—open to the vagaries of state law.[10] To have a statute of repose in this context that speaks only to the timing for a notice of intention to rescind—leaving litigation of rescission claims wholly unaddressed—would "run counter to the commercial-certainty concerns of Congress … that led Congress to establish the fixed and limited repose period of § 1635(f) in the first place." *Rosenfield* v. *HSBC Bank, USA*, 681 F.3d 1172, 1187 (10th Cir. 2012).

B. Petitioners say (Br. 33) that requiring borrowers to file suit to accomplish rescission in contested cases would result in "thousands of needless lawsuits." Quite to the contrary, it is petitioners' interpretation that would proliferate unnecessary litigation. If a borrower need only notify his lender of his intention to rescind in order unilaterally to accomplish rescission, then the lender's claim to title becomes fraught with uncertainty: Once the borrower has put down a placeholder—such that, in petitioners' words, he has indefinitely "retained the right of rescission" (JA33)—will the borrower ever actually sue for an award of rescission? Unless the lender is willing to operate with a cloud on its title, in the form of some possible lawsuit at some distant point in the future—up to nine years after closing in Minnesota, on petitioners' view (Br. 44)—the lender's only option is to file a declaratory judgment suit, even if the borrower's notice is patently meritless.

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[10] As petitioners' amici note (New York et al. Br. 18), "[m]any state statutes provide no limitation on consumers' right to cancel so long as the seller fails to provide proper disclosures." Petitioners' interpretation therefore leads to the further potential complication of divining what statute of limitation, if any, applies in States that provide no limitation for their state TILA analog.

Petitioners and their amici say that mere notice of intention to rescind is sufficient to "eliminate[] any commercial uncertainty to the same extent as a lawsuit." Pet. Br. 33; *see* U.S. Br. 28; New York et al. Br. 10. That is plainly wrong. Unilaterally asserting a contested right increases, rather than reduces, commercial uncertainty. "Sending written notice … presents far fewer burdens" than filing a lawsuit. New York et al. Br. 22. Indeed, sending a written notice—a costless act to the borrower that falls outside the requirements of the Federal Rules of Civil Procedure (including requirements for formal service and Rule 11's prohibition on frivolous filings)—presents no burdens whatsoever. It is a no-lose proposition for a borrower to send a lender a notice of intention to rescind, even if the borrower has previously expressly acknowledged receiving his disclosures, as petitioners did here. And it is a particularly attractive option for homeowners who are in default or facing foreclosure, as it would provide, as they see it, immediate relief from their duties under the mortgage.[11]

Under petitioners' interpretation, then, lenders—holding in one hand an acknowledgement of receipt of disclosures (with the rebuttable presumption it carries) and in the other hand a notice of intention to rescind premised on exactly the opposite proposition—will have no choice but to sue or else face an extended cloud on title. But as TILA shows, Congress did not intend for the *lender* to sue for a declaratory judgment

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[11] This has not escaped the attention of the foreclosure bar. For example, the Foreclosure Defense Resource Center advertises that "TILA [r]escission" "may be your most potent weapon to combat foreclosure!" Foreclosure Defense Resource Center, *TILA Rescission*, http://www.foreclosuredefenseresourcecenter.com/foreclosure-defense-strategies/truth-in-lending-rescission/ (last visited Sept. 16, 2014).

or suffer a cloud on its title when it is the *borrower* who is claiming a "violat[ion]" of section 1635 and seeking an "award" of "rescission." 15 U.S.C. § 1635(g); *see id.* § 1640(a)(3); *see also Keiran* v. *Home Capital, Inc.*, 720 F.3d 721, 728 (8th Cir. 2013) (rejecting argument that "the bank, rather than the obligor, should be required to file suit to essentially prevent rescission"), *petition for cert. filed*, No. 13-705 (U.S. Dec. 9, 2013). A suit for rescission must be brought by the party seeking that remedy—the borrower.

Requiring a borrower to file suit ensures that no litigation will commence unless the borrower—the one claiming the violation of TILA—is properly confident of his assertion about the lender's violation and is prepared to prove it in court. *Cf. Crawford-El* v. *Britton*, 523 U.S. 574, 600 (1998) ("Rule 11 … authorizes sanctions for the filing of papers that are frivolous [or] lacking in factual support[.]"). Requiring the commencement of litigation does not, as petitioners' amici claim (New York et al. Br. 13-14), "simply move[] the dispute over TILA rescission into court." Rather, it works to ensure discipline such that fewer cases reach the courts and, when they do, that there is a non-frivolous basis for invoking courts' jurisdiction to adjudicate meritorious claims.

C. Finally, petitioners' interpretation is also inequitable and thus inconsistent "with the general goal and application of a rescission remedy." *Rosenfield*, 681 F.3d at 1185. Rescission under TILA is an equitable remedy, *see supra* pp. 28-29 & n.6, and "the primary justification of rescission" is that of "'remedial economy,' not … the compensatory goal of a damages award," *Rosenfield*, 681 F.3d at 1184. "Consequently, it is not an appropriate remedy in circumstances where its application would lead to prohibitively difficult (or

impossible) enforcement." *Id.*; *see Keiran*, 720 F.3d at 727-728.

Under petitioners' approach, a borrower's notice within three years is all that is required to void a lender's security interest, instantly reducing the lender to an unsecured creditor. Yet a lawsuit to adjudicate the right to rescission *vel non* can come many years later. Unraveling a mortgage transaction three years after the fact is difficult enough; extending that period for an additional six years (petitioners' proposal (Br. 44) borrowing from Minnesota law) on the mere sending of notice indicating a borrower's intention to rescind would be, to say the least, "costly and difficult," given that "the underlying circumstances in no small number of cases are likely to have changed significantly," *Rosenfield*, 681 F.3d at 1185; *see Hartman*, 734 F.3d at 759-760.

III. The Remaining Arguments Of Petitioners And Their Amici Lack Merit

A. The Solicitor General contends that respondents' interpretation of section 1635(f) "creates a substantial danger that a borrower's cause of action for an alleged violation of Section 1635(b) may become time-barred before it accrues." U.S. Br. 24; *see also* Pet. Br. 45-46. As the government sees it, if a borrower gives notice to the creditor just before the three-year window expires, he will not know immediately whether the creditor will in fact unwind the transaction in accordance with the statute; and until the creditor's 20-day window for unwinding the transaction expires, the borrower will ordinarily have no sound basis for alleging that the creditor has violated section 1635(b).

This argument is unpersuasive. First, Congress has already addressed and rejected this concern by enacting a statute of repose. "The statute of repose limit is 'not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered.'" *CTS Corp.*, 134 S. Ct. at 2182.

Second, as the government acknowledges, the borrower could easily avoid this result by sending his notice more than 20 days before the three-year period expires. U.S. Br. 24. And, should there be any question near the end of the "already-generous three-year repose period," *Rosenfield*, 681 F.3d at 1187, about the lender's position, the borrower can simply file a protective suit, *cf. Saylor ex rel. Saylor* v. *Dyniewski*, 836 F.2d 341, 345 (7th Cir. 1988) ("'[e]lementary prudence' should have prompted plaintiffs' lawyer to file a protective suit" (alteration in original)), *superseded on other grounds by* 735 Ill. Comp. Stat. 5/2-209.

B. According to the Solicitor General, respondents "suggest" that "a favorable judicial ruling is an essential prerequisite to the borrower's actual exercise of his right of rescission," such that "even the borrower's filing of suit within three years of the transaction would not satisfy Section 1635(f)." U.S. Br. 24.

That is certainly not respondents' position; nor have they ever made that "suggest[ion]." Respondents' position is simple: It is the "*obligor's* right of rescission" that expires. 15 U.S.C. § 1635(f) (emphasis added). When rescission is contested, the obligor (*i.e.*, borrower) invoking that remedy must sue before his right of rescission expires under section 1635(f). That is an

unexceptional proposition that holds true for statutes of repose more generally.[12]

IV. No Deference Is Due The CFPB's Litigation Views

For the reasons set forth above, TILA forecloses petitioners' view that a borrower in a contested case need only notify his lender of his intention to rescind within the three-year statute of repose. "[T]hat is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Negusie* v. *Holder*, 555 U.S. 511, 542 (2009) (internal quotation marks omitted).

Even were the Act ambiguous, no deference would be due the CFPB.

First, Regulation Z provides no clarity on the relevant statutory interpretation issue here—as the Bureau conceded in the lower courts. CFPB Letter 2, *Sherzer*, No. 11-4254 (3d Cir. Sept. 17, 2012). The regulation says nothing about what a borrower must do to obtain resolution of a contested assertion of rescission, and by when the borrower must do it. *See id.*; *see also Keiran*, 720 F.3d at 728 ("while Regulation Z sets forth one of the things that an obligor must do to rescind the loan—give written notice to the bank—it does not set forth the entirety of things necessary to accomplish *rescission*" (emphasis added)).

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[12] The notion that a timely brought cause of action "must be dismissed" as a result of judicial inaction post-dating the expiration of the statute of repose is fanciful. Tellingly, while the United States raises the prospect (U.S. Br. 24-25), it cites nothing to suggest that this possibility has ever been countenanced—in any context.

In the lower courts the Bureau argued for deference on the basis of the "considered view" expressed in its amicus briefs. CFPB Letter 2. But those briefs simply vouch for the Bureau's regulation, and that regulation, at best, only parrots the statute. Consequently, the Court's decision in *Auer* v. *Robbins*, 519 U.S. 452 (1997), and "the standard of deference it accords to an agency are inapplicable here." *Gonzales* v. *Oregon*, 546 U.S. 243, 256 (2006); *see id.* at 257 ("An agency does not acquire special authority to interpret its own words, when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."); *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 882 (2011) ("no deference [is] warranted to an agency interpretation of what [are], in fact, Congress' words").

All that remains for the Bureau, accordingly, is a claim for deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *See* CFPB Letter 3. But the Bureau's view "lack[s] the persuasive force that is a necessary precondition to deference under *Skidmore*," *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2533 (2013), and ought to be rejected.

The CFPB fails to provide any explanation consistent with TILA's text for why rescission in a contested case is complete and instantaneously effective upon notice. To the contrary, the Bureau has conceded that section 1635(g) is "certainly not helpful" to its position. Arg. Recording 13:35-38, *Sherzer*, No. 11-4254 (3d Cir. Sept. 12, 2012). And the Bureau has never reconciled its position with the common law of rescission. Despite acknowledging that section 1635 "reflects 'a reordering of common law rules governing rescission'" (CFPB *Sherzer* Amicus Br. 16 n.3; *see* U.S. Br. 16 n.4), the Bureau never grapples with the consequences of

that reordering or with the significant factors pointing directly toward a scheme resembling the equitable model of rescission.

Finally, the Bureau has never purported to base its view on any special expertise that bears on the issue here. Indeed, the Bureau says nothing, based on any expertise in general or more specifically regarding how rescission disputes arise in the real world, about why its reading reasonably conforms to Congress's objectives in enacting the statute of repose set forth in section 1635(f). *See Gonzales*, 546 U.S. at 269 ("lack of expertise" tempers claim of deference); *see also City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring in part and concurring in judgment) ("agency interpretation, in light of the agency's special expertise" may have "'power to persuade'"). The CFPB's unpersuasive view, like that of petitioners, disregards important features of TILA's text and Congress's intent, vitiating the certainty of title Congress sought to ensure through the enactment of section 1635(f).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOAH A. LEVINE
ALAN E. SCHOENFELD
JASON D. HIRSCH
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
New York, NY 10007

ANDREW B. MESSITE
REED SMITH LLP
599 Lexington Avenue
New York, NY 10022

SETH P. WAXMAN
Counsel of Record
LOUIS R. COHEN
ALBINAS J. PRIZGINTAS
CHRISTOPHER D. DODGE*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

AARON D. VAN OORT
FAEGRE BAKER DANIELS LLP
2200 Well Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

**Admitted to practice only in New York. Supervised by members of the firm who are members of the District of Columbia Bar.*

SEPTEMBER 2014