No. 13-684

IN THE
Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
INDIVIDUALS,
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

REPLY BRIEF FOR PETITIONERS

LYNN E. BLAIS
MICHAEL F. STURLEY
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1350

MICHAEL J. KEOGH
KEOGH LAW OFFICE
P.O. Box 11297
St. Paul, Minnesota 55111
(612) 644-2861

ERIN GLENN BUSBY
411 Highland Street
Houston, Texas 77009
(713) 868-4233

DAVID C. FREDERICK
Counsel of Record
MATTHEW A. SELIGMAN
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)

October 16, 2014

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Section 1635(a) provides a "right to rescind" certain home mortgages "by notifying the creditor." 15 U.S.C. § 1635(a). The provision's plain meaning provides the mechanism for the borrower's exercise of the right of rescission. That mechanism is notification, not the filing of a lawsuit. The surrounding provisions support that straightforward reading of Section 1635(a)'s text. Section 1635(b) scripts a set of procedures to implement that rescission without litigation. Section 1635(f), which provides that the "right of rescission shall expire three years after . . . the transaction," *id.* § 1635(f), speaks only of the rescission right's duration and not of a deadline for filing a lawsuit to vindicate a timely exercised right. That interpretation preserves the efficient and effective mechanism Congress enacted to provide a simple remedy to protect homeowners while ensuring commercial certainty by requiring that the right be exercised within three years.

Respondents' countervailing interpretation adds words and concepts to the statute that Congress neither enacted nor intended. Respondents assert that Congress intended for borrowers to file suit to effectuate the rescission right within three years if – but only if – the creditor "disputes" the rescission. No words in Section 1635's text support that interpretation, which is directly contrary to the text's instruction that "notifying the creditor" is the means to exercise the right to rescind. That theory also imposes an atextual limitation on the applicability of Section 1635(b)'s procedures, which by their terms do not depend on whether the creditor "contests" the rescission. And it converts Section 1635(f), which "says nothing in terms of bringing an action," *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998), into an absolute bar on suits to enforce rescissions even

when the borrower timely has exercised the right to rescind through written notice.

The two agencies charged with administering this provision of the Act since its enactment – the Federal Reserve Bank and the Consumer Financial Protection Bureau – consistently have construed Section 1635(a) for more than four decades to provide that a borrower may rescind the transaction through written notice to the lender. That longstanding interpretation warrants deference.

ARGUMENT

I. A BORROWER EXERCISES THE RIGHT TO RESCIND UNDER SECTION 1635(a) BY NOTIFYING THE CREDITOR WITHIN THREE YEARS OF THE TRANSACTION

A. The Text And Structure Of Section 1635 Establish That A Borrower Rescinds By Notifying The Creditor

1. Section 1635(a) provides that the borrower "shall have the right to rescind . . . *by notifying* the creditor." 15 U.S.C. § 1635(a) (emphasis added). The statutory text thus refutes respondents' contention that it "says nothing about how and when rescission is effectuated." Br. 23. Respondents concede that a borrower "*must* 'notify[]' the lender," Br. 22 (emphasis added; alteration in original), but misconstrue Section 1635(a) by ignoring a word – "by" – essential to its meaning.

Congress used the word "by" to specify the means by which the borrower exercises "the right to rescind." The preposition "by" followed by the gerund form of a verb indicates the means or method by which a task is performed. *See* Rodney Huddleston & Geoffrey Pullum, *The Cambridge Grammar of the English Language* 673 (2002) ("Means . . . adjuncts

are characteristically realized by [preposition phrases] headed by *by*"). For example, in the sentence "Adam gets to work by walking down 16th Street," the phrase "by walking" indicates the means by which Adam commutes to work. Congress then simplified the method for rescinding through notice by requiring creditors to "provide . . . appropriate forms for the [borrower] to exercise [the] right to rescind." 15 U.S.C. § 1635(a).

Relevant dictionary definitions of the word "by" confirm that straightforward interpretation. "The pertinent dictionary definitions of 'by' are 'through the means or instrumentality of[;] . . . through the direct agency of[;] . . . through the medium of[;] . . . through the work or operation of." *Bayer AG v. Housey Pharms., Inc.*, 340 F.3d 1367, 1378 (Fed. Cir. 2003) (quoting *Webster's Third New International Dictionary* 307 (1968)) (alterations in original); *see Webster's New International Dictionary* 367 (2d ed. 1952) (defining "by" as "through the medium of; . . . through the means of"); *Black's Law Dictionary* 251 (4th ed. 1968) (defining "by" as "[t]hrough the means, act, agency or instrumentality of").

Adjoining provisions of the Act similarly use the word "by" followed by a gerund to indicate a means of achieving an end. *See*, *e.g.*, 15 U.S.C. § 1637(c)(2)(B)(iii) ("the consumer elects to accept the card or account *by using* the card") (emphasis added); *id.* § 1637(c)(3)(C)(i)(II) ("the applicant may contact the creditor . . . *by calling* a toll free telephone number or *by writing* to an address") (emphases added); *id.* § 1637a(b)(2)(B) ("The disclosures required . . . shall be conspicuously segregated . . . *by grouping* the disclosures separately . . . or *by providing* the disclosures on a separate form") (emphases added).

In accord with that plain meaning, Congress elsewhere used the phrase "by notifying" in identical fashion to establish the means by which a consumer may exercise a statutory right to cancel a contract. The Credit Repair Organizations Act of 1996 provides that "[a]ny consumer may cancel any contract with any credit repair organization . . . *by notifying* the credit repair organization of the consumer's intention to do so." 15 U.S.C. § 1679e(a) (emphasis added). Congress removed any doubt that the consumer need only send notice – and need not also file a lawsuit – to exercise that right by requiring those organizations to provide a form stating, "'[t]o cancel this contract, mail or deliver a signed, dated copy of this cancellation notice.'" *Id.* § 1679e(b). Congress's use of the phrase "by notifying" to denote the means of exercising a cancellation right in the 1996 Act merely mimicked the mechanism already established in Section 1635(a) nearly 30 years earlier.[1]

Section 1635(b) confirms that the phrase "by notifying the creditor" specifies the means for rescinding. That provision scripts a detailed series of steps to implement the rescission once notice is given, without mentioning (much less requiring) that the borrower file a lawsuit. *See* Pet. Br. 20-21. It provides that, "[w]hen [a borrower] *exercises* [the]

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[1] Congress has used the phrase "by notifying" to convey that meaning in dozens of other statutes. *See*, *e.g.*, 15 U.S.C. § 1693e(a) ("[a] consumer may stop payment of a preauthorized electronic fund transfer by notifying the financial institution orally or in writing"); 25 U.S.C. § 4026 ("any Indian tribe which has withdrawn trust funds may choose to return any or all of the trust funds such tribe has withdrawn by notifying the Secretary in writing"); 38 U.S.C. § 1562(g)(1) ("A person who is entitled to special pension . . . may elect not to receive special pension by notifying the Secretary of such election in writing.").

right to rescind under [Section 1635(a)], he is not liable for any finance or other charge" and "any security interest . . . becomes void upon *such a rescission*." 15 U.S.C. § 1635(b) (emphases added). The phrase "upon such a rescission" refers to the "exercise[] [of the] right to rescind." The creditor's obligation to return the borrower's downpayment is in turn expressly triggered by "receipt of a notice of rescission," not by the filing of a lawsuit. *Id.* The consumer therefore rescinds the mortgage when the right is "exercise[d] . . . under" Section 1635(a) by sending "a notice of rescission." *Id.*

2. Section 1635's text provides no support for respondents' proffered distinction in the method for exercising the right to rescind between "contested" and "uncontested" rescissions. *Cf.* Resp. Br. 24. Section 1635(a) establishes a single method for exercising the right through the phrase "by notifying the creditor" and is completely silent about whether the rescission subsequently is "contested." *See* Pet. Br. 19. The textual mechanism for effectuating the rescission right simply does not "create[] two rescissionary procedures for the borrower to pursue, depending on whether his right to rescind is disputed." Resp. Br. 23; *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769 (2014) ("'To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one.'") (quoting *Clark v. Martinez*, 543 U.S. 371, 378 (2005)) (alteration in original).

Nor does Section 1635(b) support respondents' position. Respondents err (at 24) in speculating that, "[w]here, as here, the existence of a borrower's right to rescind is contested, . . . the rescissionary steps set forth in section 1635(b) will not take place." Section

1635(b) contains no such limitation. Congress would not carefully craft a meticulous procedure to implement rescissions, detailing each step in the process, only to fail to mention that those procedures do not apply in a significant range of circumstances. *See Bates v. United States*, 522 U.S. 23, 29 (1997) (the Court will "ordinarily resist reading words or elements into a statute that do not appear on its face"). Because Section 1635(b)'s non-judicial procedures apply to all rescissions – "contested" or not – respondents ask this Court to engraft onto Section 1635 a sometimes-applicable requirement that a borrower file a lawsuit to exercise the right to rescind.

The final sentence of Section 1635(b) further undermines respondents' interpretation by providing that "[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court." 15 U.S.C. § 1635(b). Congress added that sentence in 1980 to reaffirm the equitable powers of courts in separate legal proceedings – such as declaratory judgment actions, judicial foreclosures, or bankruptcy proceedings – to alter Section 1635(b)'s procedures. *See* Pet. Br. 23-24. By specifying that those procedures "*shall* apply except when otherwise ordered by a *court*," Section 1635(b) refutes respondents' claim that the creditor's unilateral refusal to honor a rescission renders those procedures inapplicable. (Emphases added.)

Section 1635(g), on which respondents principally rely to infer their proposed distinction, neither creates a cause of action nor imposes a requirement that borrowers sue in order to exercise the right to rescind. That section – which respondents never quote in full – provides that, "[i]n *any action* in which it is determined that a creditor has violated this

section, in addition to rescission the court may award relief under section 1640 of this title not relating to the right to rescind." 15 U.S.C. § 1635(g) (emphasis added); *see also id.* § 1640(a)(3) (granting costs and attorney's fees "in *any action* in which a person is determined to have a right of rescission") (emphasis added). By using the phrase "any action," Section 1635(g) recognizes other legal proceedings that may implicate the right to rescind. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one of some indiscriminately of whatever kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976)). Section 1635(g) thus preserves the authority of a court in such a proceeding to award damages under Section 1640. *See* S. Rep. No. 96-368, at 29 (1979) (Section 1635(g) "explicitly provides that a consumer who exercises his right to rescind may also bring suit under the Act for other violations not relating to rescission"), *reprinted in* 1980 U.S.C.C.A.N. 236, 265. It is implausible that Congress meant to create implicitly a cause of action for rescission merely by referring to other proceedings, especially when it rejected an amendment that would have done so expressly just three years earlier. *See* Pet. Br. 22-23.

Respondents overread Section 1635(g) in asserting that it "prescribes" that 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." Br. 24 (emphasis added). Section 1635(g) does not alter Section 1635(a)'s express terms by implicitly requiring a lawsuit to exercise the right to rescind. Once a borrower notifies the creditor and thereby rescinds the transaction, a creditor might (as here) refuse to comply with the statutory procedures outlined in Section

1635(b). A borrower may then (as here) bring suit simply to enforce the rescission that already was effectuated by notice. *See* U.S. Br. 15-16 ("The court's role . . . is to determine whether the borrower has *already* rescinded the transaction through the (extra-judicial) means specified in the statute."). Accordingly, the Act's recognition of legal proceedings in which a court might "award relief" "in addition to rescission," 15 U.S.C. § 1635(g), or "determine[]" that a borrower "ha[s] a right of rescission," *id.* § 1640(a)(3), does not graft onto the statute a requirement – in conflict with Section 1635(a)'s explicit terms – that the borrower file a lawsuit to exercise that right. *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions").

3. The right of rescission Congress codified in Section 1635 comports with the non-judicial common-law remedy of rescission at law. *See* Pet. Br. 31-33; U.S. Br. 16 n.4. Under rescission at law, a party "is entitled to rescind by declaring the transaction rescinded." 1 Dan B. Dobbs, *Law of Remedies* § 4.3(6), at 616 (2d ed. 1993). Section 1635(a) conforms to that principle by providing a "right to rescind . . . by notifying the creditor."

In accord with the common law, Section 1635(b) "provide[s] for restoration of the status quo by requiring the [borrower] to return what he received from the [creditor]," *Pinter v. Dahl*, 486 U.S. 622, 641 n.18 (1988), here once the creditor satisfies its obligations. Congress expressly altered the common-law ordering of when a rescinding borrower must tender the proceeds of the loan to the creditor. *See* Pet. Br. 32 n.4;

15 U.S.C. § 1635(b) ("[u]pon the performance of the creditor's obligations . . . , the [borrower] shall tender the property to the creditor"); 1 Dobbs § 4.8, at 677 (citing 15 U.S.C. § 1635(b)). Congress thereby "sp[oke] directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal quotation marks omitted). In so doing, it carefully balanced the equitable considerations in ensuring homeowners' access to the rescission remedy and in safeguarding creditors' security interest.

Congress's reordering of the common-law tender rules was particularly sensible in the context of the rescission of mortgages. By terminating the lender's security interest in the property prior to requiring the borrower to tender, Section 1635(b) allows the borrower to secure another mortgage, to sell the house, or to offer the house itself as a substitute tender to the creditor. Absent that reordering, many borrowers would be unable to raise sufficient funds to tender the amount of the loan – which is often the largest financial obligation they will ever undertake – and therefore would be unable to rescind a mortgage no matter how egregious the creditor's violation of the Act. The reordering thus facilitates an orderly and equitable non-judicial process of rescission.

Respondents err in arguing (at 28) that "Congress enacted a statutory remedy that much more closely resembles rescission in equity," under which a rescission "must be decreed by a court." Both asserted grounds for that position are mistaken. *First*, respondents claim that, "when contested, there is no rescission until a court grants a borrower that remedy" because the statute "expressly speaks of a court 'award[ing]' 'rescission.'" Br. 31 (quoting

15 U.S.C. § 1635(g)) (alteration in original). But, as explained above, Section 1635(g) does not alter Section 1635(a) to require a borrower to file suit to exercise the right to rescind. Rather, Section 1635(a) requires only that a borrower "notify[] the creditor" – a requirement that mirrors rescission at law. A subsequent lawsuit enforces the rescission that was already effectuated by notice, which also accords with the common-law rule for rescission at law. *See* U.S. Br. 14-17. The fact that court proceedings may arise to enforce a rescission that was already accomplished by notice under Section 1635(a) thus comports both with the text of Section 1635 and with the common-law remedy of rescission at law. *See* 1 Dobbs § 4.3(6), at 616; Brooks Br. 11 ("In practice, the court's discretion to decree or deny rescission arises both in cases at law and cases in equity.").

Second, respondents erroneously suggest (at 30) that, "by separating the notice of intention to rescind from the tender, Congress removed the traditional underpinnings of 'unilateral' rescission." Respondents both overstate the uniformity of those "traditional underpinnings" and draw the wrong conclusion from Congress's reordering of the tender rules. As an initial matter, tender requirements at common law were not as rigid and uncompromising as respondents suggest. *See* Brooks Br. 12 (recognizing "exceptions" to tender rule where "a party could complete the rescission merely by having proper legal grounds and giving notice"). When Section 1635(a) was enacted, the relaxation of tender rules was already long recognized and applied where statutory procedures, such as those in Section 1635(b), protected the interests of both parties. *See* Restatement (First) of Restitution § 65 cmt. d (1937) ("[I]n proceedings at

law in which by statute or otherwise a conditional decree can be rendered, there need be no offer to restore antecedent to the proceedings. The mutual restoration can be accomplished by the decree."). Accordingly, the modern view "explicitly eliminates previous requirements that the claimant tender restitution to the other party as a precondition of rescission." Restatement (Third) of Restitution and Unjust Enrichment § 54 cmt. j (2011).

Moreover, it is implausible that Congress codified rescission at equity, thereby requiring a borrower to file a lawsuit to exercise the right to rescind, simply by "separating notice in time and sequence from tender." Resp. Br. 28. On respondents' view, by altering the order of tendering at common law, Congress codified rescission at equity and thereby silently required a lawsuit to rescind, notwithstanding Section 1635(a)'s express statement that a borrower rescinds "by notifying the creditor." Respondents' interpretation has the additional anomalous implication that, by requiring only notice for uncontested rescissions but mandating a lawsuit for contested rescissions, in a single sentence of Section 1635(a) Congress codified rescission at law for some cases but rescission in equity for other cases – without using any words to do so. The more plausible interpretation is that Congress codified rescission at law for all rescissions by explicitly specifying notice as the method for exercising the right to rescind while expressly reordering the tendering back of benefits to make rescission workable in the unique context of home mortgages.

4. Section 1635(f) does not require a borrower to file a lawsuit within three years. *See* Pet. Br. 40-43. That section provides that "[a] [borrower's] right

of rescission shall expire three years after the date of consummation of the transaction." 15 U.S.C. § 1635(f). As this Court recognized, Section 1635(f) "says nothing in terms of bringing an action." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998). All Section 1635(f) requires is that a borrower exercise the right to rescind – however the statute requires that rescission be exercised – within three years of the consummation of the transaction. The only question is what a borrower must do before that three-year period lapses. Section 1635(a) provides the answer: the borrower must "notify[] the creditor."

Respondents' contrary position relies heavily (at 32-36) on mischaracterizing Section 1635(f), which "talks not of a suit's commencement but of a right's duration." *Beach*, 523 U.S. at 417. Unlike time bars that speak directly and explicitly to a limitation on the initiation of litigation, Section 1635(f) does not mention lawsuits at all. *Compare CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2181 (2014) ("North Carolina's statute of repose" provides that "'[n]o cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action'") (citation omitted); *Merck & Co. v. Reynolds*, 559 U.S. 633, 650 (2010) ("an unqualified bar on actions instituted '5 years after such violation' [gives] total repose") (quoting 28 U.S.C. § 1658(b)(2) ("[A] private right of action . . . may be brought not later than . . . 5 years after such violation.")); *see also* U.S. Br. 26 ("When Congress wishes to limit the time for filing suit by means of a statute of repose, it does so expressly."); *cf. Beach*, 523 U.S. at 416 (recognizing it "is apparent from the plain language" of Section 1635 that it is not "a statute of limitation").

Reading Section 1635(f) as a traditional time bar to litigation is especially anomalous where the borrower previously exercised the right to rescind within the three-year period. Once the borrower has exercised the right by notifying the creditor, Section 1635(f) is simply inapplicable and the lapse of its time period is irrelevant. To hold otherwise would lead to untenable and unintended consequences. Under respondents' apparent view, Section 1635(f) terminates the rescission right even after a borrower had already exercised it if the borrower does not bring a lawsuit within the provision's three-year period because "only a court may 'award' 'rescission.'" Br. 22 (quoting 15 U.S.C. § 1635(g); *id.* § 1640(a)(3)); *see id.* at 31 ("when contested, there is no rescission until a court grants a borrower that remedy") (citing 15 U.S.C. § 1635(g)). Respondents' interpretation thus leads to the bizarre result that a timely filed lawsuit seeking to enforce the rescission right could "expire" while the suit awaits judicial resolution. *See* U.S. Br. 24-25. And, perhaps most peculiar, respondents' position would permit creditors to string along borrowers until the right expires simply by failing to respond to a notice of rescission or by engaging in fruitless negotiations over the rescission. *See, e.g.*, *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1326-27 (9th Cir. 2012). Congress should not be presumed to have subjected rescission to a lender's gamesmanship to the detriment of borrowers who encounter the bureaucratic silence or insincere assurances of a large bank. Properly understood, Section 1635(f) confirms the plain text of Section 1635(a)'s command that the right need only to be exercised – by notice – before the right expires after three years.

B. The Agency's Authoritative Interpretation That Notice Exercises The Right To Rescind Warrants Deference

The Court should defer to the agency's interpretation of Section 1635 in Regulation Z and the agency's *amicus* briefs, which confirm that notifying the creditor within three years is sufficient to exercise the right to rescind. *See* Pet. Br. 35-39; U.S. Br. 31-33. "[D]eference is especially appropriate in the process of interpreting the . . . Act and Regulation Z" and so, "[u]nless demonstrably irrational," the agency's interpretation "should be dispositive." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). Regulation Z construes Section 1635 to provide 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. § 226.23(a)(2), and provides model forms to exercise the right, *id.* pt. 226, Apps. H-8, H-9. The agency confirmed in its *amicus* briefs before this Court that a borrower "exercises the statutory right of rescission by sending a written notice," U.S. Br. 32 (citing 12 C.F.R. §§ 226.23(a)(2), 1026.23(a)(2)), and that "[n]one of the provisions [of the statute] requires [a borrower] to file suit to exercise the right to rescind," *id.* at 17.

Respondents' arguments to reject the agency's interpretation lack merit. *First*, respondents err in contending (at 43) that Regulation Z "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."[2] Regulation Z expressly

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[2] Respondents mischaracterize the agency's letter to the Third Circuit as "conced[ing]" that "Regulation Z provides no clarity on the relevant statutory interpretation issue here." Br.

provides the method "[t]o exercise the right to rescind": "the consumer shall notify the creditor" in writing. 12 C.F.R. § 226.23(a)(2). The regulation's failure to address explicitly respondents' proposed distinction between "contested" and "uncontested" cases is of no moment. By its terms, the regulation applies to all cases. As the Solicitor General explains, "[n]othing in that regulation suggests that the procedure for exercising the rescission right is any different . . . when the creditor disputes rather than accedes to the notice." U.S. Br. 32. The government's interpretation of Regulation Z rejecting respondents' atextual distinction between "contested" and "uncontested" cases is entitled to deference. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 878 (2011).

Second, respondents mistakenly suggest (at 44) that Regulation Z "only parrots the statute" and that the agency's *amicus* briefs "simply vouch for the . . . regulation." Regulation Z, however, undisputedly clarifies that, "[t]o exercise the right . . . , the consumer . . . notif[ies] the creditor" and further elaborates on the statutory text by requiring the notice be in writing and by specifying the concrete written means by which that notice must be given. 12 C.F.R. § 226.23(a)(2). The regulation thus "gave specificity to [the] statutory scheme" in Section 1635 and there-

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43 (citing CFPB Letter 2, *Sherzer v. Homestar Mortg. Servs.*, No. 11-4254 (3d Cir. filed Sept. 17, 2012)). The agency made no such concession. *See* CFPB Letter 2 ("Th[e] question [of] how a consumer 'exercises his right to rescind under [Section 1635(a)]" is "expressly resolved by Regulation Z"); *id.* at 2-3 ("[T]he agency's considered view [is] that neither [the Act] nor Regulation Z requires a consumer to file a lawsuit regarding his rescission within three years provided under [Section] 1635(f)").

fore warrants deference. *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006).

The agency's *amicus* briefs remove all doubt regarding the proper interpretation of Section 1635 by making clear that neither Section 1635(a) nor Regulation Z entail an unstated requirement to file a lawsuit, regardless of whether the lender "disputes" the rescission. U.S. Br. 32; *see* Pet. Br. 38-39. The agency's interpretation of its own regulation is precisely the sort of "fair and considered judgment as to what the regulation require[s]" to which this Court defers. *McCoy*, 131 S. Ct. at 881.

C. Respondents' Interpretation Would Frustrate Congress's Purpose In Enacting Section 1635

Congress enacted Section 1635 to provide borrowers with a robust remedy to relieve them of mortgages whose terms creditors misrepresented through incomplete and inaccurate disclosures. *See* Pet. Br. 30-31. That remedy empowers borrowers by protecting them from the burdens of mortgages solicited through deception and provides a powerful deterrent that discourages creditors from committing such violations in the first place. Section 1635 thus plays a central role in effectuating Congress's purpose that the Act "promot[e] 'the informed use of credit' by assuring 'meaningful disclosure of credit terms' to consumers." *Milhollin*, 444 U.S. at 559 (quoting 15 U.S.C. § 1601 (1970)).

Respondents' interpretation would eviscerate the protections Congress provided in the rescission remedy and enfeeble the rescission right's deterrent effect. By requiring borrowers to file a lawsuit to exercise the right to rescind, rather than simply to "notify" the creditor as the text of Section 1635(a)

and Regulation Z provides, respondents would impose a substantial obstacle to borrowers' vindication of their statutory rights. Respondents recognize (at 39-40) their position imposes that burden, but they perplexingly characterize that as a virtue of their statutory interpretation. That notion, however, is inconsistent with Congress's manifest purpose in providing a simple, non-judicial remedy for borrowers in a statute that was unambiguously designed to protect them, rather than the creditors whose misleading and predatory lending practices necessitated the Act.

II. RESPONDENTS' POLICY CONCERNS ARE UNPERSUASIVE

The text, structure, and purpose of Section 1635, confirmed by the agency's interpretation, establish that a borrower exercises the right to rescind "by notifying the creditor" and need not also file a lawsuit within three years. That should resolve the matter. *See* Pet. Br. 34; U.S. Br. 30-31; *Lewis v. City of Chicago*, 560 U.S. 205, 216-17 (2010). Respondents complain that the absence of a requirement that borrowers file suit within three years would "sow uncertainty where Congress intended repose," Br. 36, and would "proliferate unnecessary litigation," Br. 38. Even if those policy concerns could somehow justify disregarding Section 1635's plain terms, they lack merit.

A. Section 1635 Adequately Resolves Any Commercial Uncertainty By Providing That The Right To Rescind Expires After Three Years

Section 1635(f) provides that the right to rescind "shall expire" three years after the transaction and thereby requires a borrower to exercise the right

within that time limit. Congress enacted the time limit as a targeted solution to the specific problem of "unexpired" rights of rescission that could "cloud . . . title." Pet. Br. 40-41. Section 1635(f) thus adequately resolves any "commercial uncertainty" that could result from such "clouded titles" by ensuring that the right is exercised within three years. This Court recognized in *Beach* that Section 1635(f) "completely extinguishes the right of rescission at the end of the 3-year period." 523 U.S. at 412. Accordingly, if a borrower does not notify the creditor within three years of the transaction, the right irreversibly expires – thus providing absolute commercial certainty.

Respondents unpersuasively attempt to extend Congress's reasonable concern about lingering *unexercised* rights of rescission to include rights *already exercised* through notification to the creditor if the borrower has not also filed suit to enforce the rescission. But Congress enacted Section 1635(f) to address the different uncertainty of when, if ever, a borrower would exercise a right to rescind if that right never expired. Section 1635(f) solves that problem by requiring the borrower to notify the creditor within three years. A further requirement that the borrower sue within three years is merely additive: it does no more to settle the creditor's uncertainty because the creditor already knows for certain through the borrower's notification that rescission has been exercised.

Respondents further contend (at 37) that recognizing Section 1635(f)'s time limit as a deadline for notifying the creditor pursuant to Section 1635(a), as opposed to a time bar to suit, is untenable because it "leave[s] indeterminate the time for seeking an award of [the rescission] remedy." That criticism fundamentally misunderstands Section 1635. The

statute never requires the borrower to seek an "award" of rescission from a court. Rather, pursuant to Section 1635(a), a borrower rescinds the mortgage by "notifying the creditor," thereby triggering Section 1635(b)'s procedures to unwind the transaction. If a creditor "disputes" whether the borrower's exercise of the right was valid – because, for example, the creditor contends it provided all the required disclosures – then it may promptly file suit seeking a declaratory judgment that the right was not validly exercised. *See* U.S. Br. 28. But if (as here) the creditor both fails to follow the procedures set forth in Section 1635(b) and fails to seek judicial resolution of the "dispute" it created, then (as here) the borrower may be forced to file suit to compel the creditor to follow Section 1635(b)'s procedures. Section 1635(f) need not be construed to go beyond its text to impose a time limit for the filing of such a suit; other sources of state or federal law provide such limits. *See* Pet. Br. 43-46.

B. Respondents' Remaining Policy Concerns Are Illusory

Respondents speculate (at 38-39) that borrowers would routinely resort to dishonesty by sending "patently meritless" notices to secure rescissions because doing so "is a particularly attractive option for homeowners who are in default or facing foreclosure." Respondents thus speculate that borrowers might strategically rescind their loan agreements. Without offering any factual support, respondents then complain (*id.*) about the burdens of filing lawsuits to determine whether the rescission is valid.

To solve this invented problem, respondents would require homeowners to file a lawsuit to ensure that they are "properly confident" of their rescission

claim. Br. 40. But the Act imposes no such requirement. Congress was primarily concerned with ensuring that homeowners had ready access to the rescission remedy, not with relieving creditors of the burden of contesting in court some rescissions that may lack merit. The burden of filing suit weighs much more heavily on individual homeowners than it does on respondents, whose litigation departments have initiated hundreds of thousands of foreclosure proceedings over the last several years. *See*, *e.g.*, Michael B. Sauter et al., *Banks Foreclosing on the Most Homes*, 24/7 WALL ST (Mar. 12, 2013, 9:47 AM) (reporting that, in February 2013, Bank of America serviced 96,319 mortgages in foreclosure), http://247wallst.com/special-report/2013/03/12/banks-foreclosing-on-the-most-homes/3.

In any event, even if some homeowners send notices of rescission without having a valid right to rescind, this will not result in any more litigation than respondents' interpretation would require. Section 1635 creates a right to rescind that borrowers may exercise "by notifying the creditor" and establishes non-judicial procedures for unwinding the transaction. Litigation may be required only in those cases where a creditor disputes the validity of the exercise of the right. Respondents' interpretation, by contrast, would require a lawsuit for every rescission. Respondents thus paradoxically claim (at 38) that the way to limit the "proliferat[ion] [of] unnecessary litigation" is to require lawsuits. A plain language interpretation of Section 1635(a), however, would avoid such perverse logic.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

LYNN E. BLAIS
MICHAEL F. STURLEY
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1350

MICHAEL J. KEOGH
KEOGH LAW OFFICE
P.O. Box 11297
St. Paul, Minnesota 55111
(612) 644-2861

ERIN GLENN BUSBY
411 Highland Street
Houston, Texas 77009
(713) 868-4233

DAVID C. FREDERICK
Counsel of Record
MATTHEW A. SELIGMAN
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)

October 16, 2014