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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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ARGUMENT

1. Petitioners and respondents agree that the decision below warrants this Court's review. There is a "well-developed, irreconcilable split among the courts of appeals" that "only this Court can resolve" regarding whether notice to the creditor is sufficient to exercise the right to rescind a home loan under Section 1635 of the Truth in Lending Act. Resp. Br. 3. In addition to the decisions in the Eighth and Ninth Circuits on review, six other courts of appeals have divided on the issue. *See* Pet. 9-18 (discussing *Large v. Conseco Fin. Serv. Corp.*, 292 F.3d 49 (1st Cir. 2002); *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013); *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012); *Lumpkin v. Deutsche Bank Nat'l Trust Co.*, 534 F. App'x 335 (6th Cir. 2013); *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012); *Williams v. Homestake Mortg. Co.*, 968 F.2d 1137 (11th Cir. 1992)). There is thus no dispute that this Court's intervention is necessary to resolve a deep circuit conflict on a legal issue of pressing national importance.

Respondents agree that *Jesinoski* "most clearly and cleanly presents the legal issues for this Court's review." Resp. Br. 19. As respondents explain, "[t]he case was decided on a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c)" and "thus no factual disputes . . . would obscure or complicate resolution of the question presented." *Id.* The court of appeals in turn decided the case solely on the ground "that a party seeking to rescind a loan transaction must file suit within three years of consummating the loan." *Jesinoski* App. 2a.[1] Because

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[1] References to "*Jesinoski* App." are to the appendix filed in No. 13-684; references to "*Keiran* App." are to the appendix filed

Jesinoski is an ideal vehicle for this Court's review, therefore, the *Jesinoski* petition should be granted.

2. Respondents mistakenly argue that the judgment below is correct on the merits. Although a full explication of the merits arguments is not called for at this stage of the proceeding, it bears noting that respondents' merits arguments misconceive the statutory right to rescind and thereby mischaracterize the issue before the Court.[2]

Indeed, respondents' merits arguments essentially ignore the text of the statutory provision that creates the right to rescind. Section 1635(a) provides that a borrower "shall have the right to rescind the transaction until midnight of the third day following . . . the delivery of the information and rescission forms required under this section . . . by notifying the creditor . . . of his intention to do so." 15 U.S.C. § 1635(a). Section 1635(f), on which respondents exclusively focus, then provides that this "right of rescission shall expire three years after the date of consummation of the transaction." *Id.* § 1635(f). The question is not, as respondents suggest, whether a borrower may exercise the right to rescind by filing suit after the three-year period specified in Section 1635(f) because notice "indefinitely toll[s] [the Act's] statute of repose until such time as the borrower sees fit to file suit." Resp. Br. 3. Rather, the question is whether, in accordance with Section 1635(a)'s clear text, a borrower

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in No. 13-705; references to "*Takushi* App." are to the appendix filed in No. 13-884.

[2] Additionally, respondents erroneously assert that "the Jesinoskis' home was in foreclosure." Resp. Br. 13. However, there is no record of any foreclosure proceeding commenced by respondents since the mortgage loan's origination on February 23, 2007.

has *already* exercised the right to rescind "by notifying the creditor" within the three-year limitations period of Section 1635(f). *See* Pet. 1-2.

3. Respondents err in attempting to narrow the question presented. *See* Resp. Br. 2-3, 18-19. The courts of appeals that have considered the meaning of Section 1635 have analyzed the issue as presented in the petition. *See*, *e.g.*, *Jesinoski* App. 2a ("The sole issue on appeal is whether mailing a notice of rescission within three years of consummating a loan is sufficient to 'exercise' the right to rescind a loan transaction pursuant to 15 U.S.C. § 1635(a) or, alternatively, whether a party seeking to rescind the transaction is required to file a lawsuit within the three-year statutory period."); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1328 (9th Cir. 2012) ("under the case law of this court and the Supreme Court, rescission suits must be brought within three years from the consummation of the loan, regardless whether notice of rescission is delivered within that three-year period."). Moreover, the statutory text makes no distinction between situations in which the "creditor disputes the existence of the condition precedent," Resp. Br. 2-3, and those in which it does not. *See* 15 U.S.C. § 1635(a), (f). Respondents' formulation of the question presented thus artificially rewrites the statutory text and would impede its proper interpretation.

4. The Court should grant the petition in *Jesinoski* and hold the petitions in *Keiran* and *Takushi* pending resolution of this case. As respondents acknowledge, the *Jesinoski* case is the superior vehicle among the pending petitions for this Court to resolve the circuit conflict. Resp. Br. 19. By contrast, both *Keiran* and *Takushi* are less advanta-

geous petitions for resolving the question presented. In both cases consolidated in the *Keiran* petition, the district court made factual findings on the merits of the plaintiffs' claims under the Act. *See Keiran* App. 43a ("Bank of New York claims that no violations of the [Act] were evident on the face of the Keirans' loan documents. The court agrees.") (*Keiran*), 53a ("plaintiffs offer no evidence that their signatures on the cancellation notices and TILA disclosure do not mean what they say," and "a bald assertion . . . years later" to the contrary "is not sufficient to overcome the presumption" that they received the required disclosures) (*Sobieniak*). By contrast, the district court in *Jesinoski* explicitly stated that, "for purposes of the present motion, the Court assumes without deciding that [the Jesinoskis] have pled a plausible claim that they did not receive the required documents at closing." *Jesinoski* App. 7a n.3.

Although the petitions squarely present only the issue whether borrowers effectively exercise their right to rescind by providing written notice within three years of the consummation of the loan, petitioners in the consolidated *Kieran* petition suggest that a "subsidiary issue" involving the statute of limitations for enforcing the right to rescind may warrant the Court's attention. *See Kieran* Pet. 18-19. However, the Court need not, and should not, reach a "subsidiary issue" not clearly presented in the petitions or ruled on below. Moreover, the plaintiffs in the two cases consolidated in the *Keiran* petition are differently situated with respect to that "subsidiary issue" because only one filed suit within the one-year time frame that has been suggested as an appropriate statute of limitations. *See id.* at 19; *compare Keiran* App. 3a ("On January 15, 2010, the Sobieniaks sent a

notice of rescission . . . . On January 14, 2011, the Sobieniaks filed the present action . . . .") *with id.* at 4a ("On October 8, 2009, the Keirans sent rescission notices . . . . On October 29, 2010, the Keirans filed the current action . . . ."). As a result, briefing and advocacy for the *Keiran* petitioners may be complicated by the fact that one but not the other petitioner in that case would prevail under a one-year time limit for filing suit.

The petition in *Takushi* suffers from numerous factual and legal complications that render it less appropriate for this Court's review. *First*, the district court assumed without deciding that Takushi had standing. *See Takushi* App. A15 ("[t]he Court declines to decide the issue of Plaintiff's standing in the instant case because, even assuming, *arguendo*, that Plaintiff has standing as a trustee, heir, or successor-in-interest to bring his TILA claim, rescission is unavailable"). *Second*, the district court dismissed Takushi's suit solely on the independently sufficient ground that the sale of the property terminated the right to rescind under Section 1635(f) and explicitly declined to address the question presented. *See id.* at A48 ("The Court declines to consider the parties' arguments with respect to [the effect of a notice of rescission on the three-year TILA limitations period] because [that issue] does not affect this Court's finding that the sale of the Property terminated Plaintiff's right of rescission."). *Third*, the district court's decision on the effect of the sale of the property is deeply intertwined with issues of state law. *See id.* at A43 (holding that state law "bar[red] [Takushi] from now challenging the foreclosure sale").

Accordingly, the Court should follow its usual practice and grant the petition here while holding "the

certiorari papers [in *Keiran* and *Takushi*] . . . pending [the Court's] plenary ruling" in *Jesinoski*. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 346 (10th ed. 2013).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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