Nos. 13-684, 13-705, 13-884

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.

ALAN G. KEIRAN AND MARY JANE KEIRAN,
Petitioners,
v.
HOME CAPITAL, INC., *et al.*,
Respondents.

STEVEN J. SOBIENIAK AND VICTORIA MCKINNEY,
Petitioners,
v.
BAC HOME LOANS SERVICING, LP,
AS SUCCESSOR IN INTEREST TO
COUNTRYWIDE HOME LOANS SERVICING, LP, *et al.*,
Respondents.

ROCKY FUJIO TAKUSHI, INDIVIDUALLY AND AS TRUSTEE OF THE ALBERT G. TAKUSHI REVOCABLE LIVING TRUST DATED APRIL 11, 2007,
Petitioner,
v.
BAC HOME LOANS SERVICING, LP, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS
FOR THE EIGHTH AND NINTH CIRCUITS

RESPONSE TO PETITIONS FOR CERTIORARI

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QUESTION PRESENTED

The Truth in Lending Act provides that certain borrowers who secure a loan with a principal dwelling have an unconditional right to rescind that loan "until midnight of the third business day following the consummation of the transaction." 15 U.S.C. § 1635(a). After that three-day period expires, such borrowers may rescind the loan only if the creditor has not delivered "the information and rescission forms required under this section." *Id.* The Act provides for an "action in which it is determined that a creditor has violated" § 1635, *id.* § 1635(g), and provides for suit by the borrower to have a court "determine[]" whether the borrower has "a right of rescission," *id.* § 1640(a)(3). The Act further provides that the borrower's "right of rescission shall expire three years after the date of consummation of the transaction … notwithstanding the fact that the information and forms required under this section or any other disclosures required under [the Act] have not been delivered to the [borrower]." *Id.* § 1635(f).

The question presented is:

When a borrower sends notice of rescission to a creditor after the expiration of the three-day unconditional rescission period and the lender disputes the existence of the condition precedent to the right to rescind, must the borrower sue for rescission before any right to rescind expires under the three-year statute of repose?

RULE 29.6 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.

The Bank of New York Mellon, as Trustee, is a wholly owned subsidiary of The Bank of New York Mellon Corp. The Bank of New York Mellon Corp. is a publicly held company; no publicly held company owns 10% or more of The Bank of New York Mellon Corp.'s stock.*

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* Home Capital, Inc. is listed as a respondent in the caption of the *Keiran* petition (No. 13-705). Upon a review of the district court docket, it appears that Home Capital, Inc. was never served, and it never entered an appearance in that case.

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INTRODUCTION

The petitions for certiorari arise from four cases that present the same question of law. In each, borrowers took out a sizeable mortgage refinance loan, secured by their primary residence. At or shortly after the loan closing, the borrowers signed acknowledgements that they received the disclosures required by the Truth in Lending Act (TILA). Just under three years (and, in one case, exactly three years) after the closing—usually after having failed to repay their mortgage loan for some time, and faced with an impending foreclosure—the borrowers notified their lender of their intent to rescind the loan, based on the lender's alleged failure to provide the required disclosures at the closing. The lender denied the request for rescission, usually providing the borrowers with copies of their signed acknowledgements. More than three years after the closing, the borrowers sued for rescission.

The common legal question in these cases is narrower than the question presented in each of the petitions. The question is not, as petitioners would have it, whether a borrower in all circumstances is required to file suit within the three-year statute of repose prescribed by 15 U.S.C. § 1635(f) in order to rescind a mortgage loan. Instead, the question presented in these cases is whether, when a borrower seeks to rescind his mortgage loan after TILA's three-day unconditional rescission period and the lender disputes the existence of the condition precedent to the borrower's right to rescind—specifically, a failure to provide the

required disclosures—the borrower must sue for rescission before any right to rescind "expire[s]" under 15 U.S.C. § 1635(f).

The decisions on review—as well as those of the courts of appeals that are in accord—correctly held that, in cases where the lender disputes the existence of the borrower's right to rescind, a borrower cannot unilaterally rescind his mortgage simply by notifying the lender of his intent to do so. Instead, the borrower must file suit within the three-year statute of repose. That holding is consistent with the text and purpose of TILA in particular, and statutes of repose more generally. It is also consistent with settled law governing the right of rescission. The contrary, minority rule adopted by certain other courts of appeals would indefinitely toll TILA's statute of repose until such time as the borrower sees fit to file suit, unsettling the lender's expectations and vitiating the certainty of title that Congress sought to ensure through enactment of the three-year statute of repose in § 1635(f).

Notwithstanding our view that the decisions on review are correct, respondents recognize that there is a well-developed, irreconcilable split among the courts of appeals on the narrow question presented here, which only this Court can resolve.

STATEMENT

A. Rescission Under TILA

1. Congress passed the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601 *et seq.*, to promote the "informed use of credit" by requiring "meaningful disclosure of credit terms," *id.* § 1601(a). TILA requires lenders to provide "clear and accurate disclosures of terms dealing with things like finance charges, annual

percentage rates of interest, and borrower's rights." *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998).

Often described by courts as a "hypertechnical" statute, *Marr* v. *Bank of Am., N.A.*, 662 F.3d 963, 964, 968 (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 to TILA 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").

As relevant here, the statute and its implementing regulations require that, subject to exceptions not relevant here, a lender 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 "the annual percentage rate, the method of determining the finance charge and the balance upon which a finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total of payments, the number and amount of payments [and] the due dates or periods of payments scheduled to repay the indebtedness," 15 U.S.C. § 1602(v). 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).

Subject to exceptions not relevant here, when a borrower secures a loan with his principal dwelling, TILA provides for a "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 the regulations of the Bureau, of his intention to do so." 15 U.S.C. § 1635(a). This right to rescind can arise in two circumstances, depending on when it is asserted.

First, TILA grants a borrower "an unconditional right of rescission for the first three days following the consummation of the transaction." *Thompson* v. *Irwin Home Equity Corp.*, 300 F.3d 88, 89 (1st Cir. 2002). This unconditional right is the central objective of § 1635: It provides a brief "cooling off" period for loans in which a borrower has granted a security interest on his primary residence as part of the deal. *See, e.g.*, 119 Cong. Rec. S2803, S2811 (daily ed. Feb. 20, 1973) (statement of Sen. Proxmire). This right can be invoked "for any reason or for no reason"—the borrower need not offer any explanation or allege any violation of TILA. *McKenna*, 475 F.3d at 421.

During this "three-business-day period after closing," the rescission process is simple and "straightforward," given that lenders cannot object, "loan funds typically have not been disbursed yet," and no security interests have been recorded. 75 Fed. Reg. 58,539, 58,547 (Sept. 24, 2010). And, because Congress required that this unconditional right be exercised quite quickly—within three days—§ 1635(a) calls for meeting that deadline simply by sending notice to the lender.

Upon notice from the borrower, the lender must execute the remedial steps prescribed in the statute to return the parties to the *status quo ante*. Specifically, within 20 calendar days after receipt of the notice of rescission, the lender must return any money or property given in connection with the transaction and take all necessary action to reflect the termination of the security interest. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(2), 1026.23(d)(2). The borrower thereafter "is not liable for any finance charge or other charge, and any security interest given by the obligor … becomes void upon such a rescission." 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(1), 1026.23(d)(1). When the lender has performed its obligations, the consumer 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. §§ 1026.15(d)(3), 1026(d)(3).

Second, outside of the initial three-business-day period, TILA provides another possibility for rescission, but only on the condition that "the creditor fails to deliver certain forms and to disclose certain information" at the loan closing—that is, when the lender has in fact violated TILA. *Thompson*, 300 F.3d at 89. The rescission process here can be (and frequently is) "problematic," given that funds have already been disbursed, security interests perfected, and, most importantly, the claimed right itself can be contested. *See, e.g.*, 75 Fed. Reg. at 58,547.

When a borrower asserts a right of rescission in this context, the lender may agree that it violated TILA and rescind the loan. In such cases, the borrower and lender may follow the statutory process for unwinding the mortgage described above. *Cf. Keiran* App. 12a n.4. But if the lender disputes that it failed to

deliver the requisite disclosures at closing, an adjudication of the parties' rights is required. *See, e.g.*, *Large* v. *Conesco Fin. Servicing Corp.*, 292 F.3d 49, 52 (1st Cir. 2002). Congress understood the need for such resolution and provided for litigation as part of a contested rescission: TILA recognizes the availability of an "action in which it is determined that a creditor has violated" § 1635, 15 U.S.C. § 1635(g), and an "action in which a person is determined to have a right of rescission under section 1635," *id.* § 1640(a)(3); establishes a "rebuttable presumption" that a borrower who signs an acknowledgement of receipt in fact received the required disclosure forms, *id.* § 1635(c); and expressly contemplates court orders in the rescission process, *id.* § 1635(b). Put differently, outside of the three-day "unconditional" rescission period, TILA does not impose any obligation on lenders to rescind a mortgage upon a borrower's unilateral demand.

2. As originally enacted in 1968, TILA provided no time limit on rescission outside the three-day "unconditional" period. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, tit. I, § 125, 88 Stat. 153 (1968). 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 rights of rescission placed a cloud on title and the enforceability of loans. *See* Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1972* (Jan. 3, 1973) ("1973 FRB Report"), *reprinted in* 119 Cong. Rec. S2803, S2813 (daily ed. 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) ("1972 FRB Report") (same); National Commission on Consumer Finance, *Consumer Credit in the United States* 189-190 (Dec. 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." 1973 FRB Report, 119 Cong. Rec. at S2815; *see* 1972 FRB Report 19; *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.").

Following those recommendations, Congress amended the Act in 1974 to put a definitive end to that uncertainty. *See* Pub. L. No. 93-495, Title IV, § 405, 88 Stat. 1517 (1974), *as amended*, Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, Title VI, § 612(a)(6)). Congress added 15 U.S.C. § 1635(f), an "uncompromising provision" that categorically restricts the rescission right. *Beach*, 523 U.S. at 418. Section 1635(f) provides that the right "shall expire three years after the date of consummation of the transaction … notwithstanding the fact that the information and forms required under this section or

any other disclosures required under [the Act] have not been delivered to the [borrower]." 15 U.S.C. § 1635(f).[1]

3. TILA originally delegated the responsibility for implementing and promulgating rules regarding the Act to the Federal Reserve Board. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, Title I, § 105, 88 Stat. 153 (1968). In accordance with that grant of authority, the Federal Reserve Board in 1969 promulgated Regulation Z, TILA's implementing regulations. *See* 12 C.F.R. pt. 226.

The Federal Reserve Board administered TILA for the next 40 years, until the Dodd-Frank Wall Street Reform and Consumer Protection Act transferred the Federal Reserve Board's authority to the Consumer Financial Protection Bureau on July 21, 2011. *See* Pub. L. No. 111-243, §§ 1061(b)(1), (d), 124 Stat. 2079 (2010) (codified at 12 U.S.C. §§ 5581(b)(1), (d)); *Designated Transfer Date*, 75 Fed. Reg. 57,252, 57,252 (Sept. 20, 2010). In December 2011, the Bureau republished the Federal Reserve Board's Regulation Z as 12 C.F.R. § 1026 *et seq*. *See generally* 76 Fed. Reg. 79,768 (Dec. 22, 2011). Those regulations refer generally to a consumer's "right to rescind the transaction," without ref-

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[1] Section 1635(f), as enacted in 1974, applied in all circumstances. Congress thereafter recognized the need to defer the repose period deadline in one specific case: when "an agency institutes a formal proceeding" to enforce a borrower's rescission rights. 123 Cong. Rec. S9310, S9311 (daily ed. June 9, 1977) (statement of Sen. Riegel). As one senator explained, "Since a proceeding can take months, or even years, the rights of a consumer may be extinguished before a final order is issued." *Id.* Thus, in 1980, Congress added one narrow exception (not applicable here) to § 1635(f), deferring the deadline when an agency "institutes a proceeding" to enforce the provisions of § 1635. *See* Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, Title VI, § 612(a)(6), 94 Stat. 132.

erence to or discussion of the two periods during which rescission may be sought. 12 C.F.R. § 1026.23(a)(1). The regulations require at minimum 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." *Id.* § 1026.23(a)(2).

B. Factual Background And Proceedings In The District Courts

Keiran. On December 30, 2006, petitioners Alan and Mary Jane Keiran entered into a refinance mortgage on their primary residence with Home Capital, Inc. by executing a promissory note for $404,000. *Keiran* App. 38a. At the loan closing, each petitioner signed disclosures acknowledging receipt of two copies of the notice of right to cancel and one copy of the Truth in Lending Disclosure Statement. *Id.* 41a n.4; Alvarado Aff. ¶¶ 9-10, Dkt. 15, No. 10-cv-4418, *Keiran* v. *Home Capital Inc.* (D. Minn. Aug. 12, 2011). "The Keirans stopped making payments on the [loan] in November 2008." *Keiran* App. 38a.

On October 8, 2009—34 months after the loan closing—the Keirans notified respondents of their intent to rescind, based on the Keirans' assertion that although they received the required disclosures at the closing, they allegedly did not receive the required number of copies of the disclosures. *Keiran* App. 38a. Respondent BAC Home Loans Servicing, LP replied to the notice on January 7, 2010, informing the Keirans that there was no basis for rescission. *Id.*

The Keirans filed suit on October 29, 2010, nearly four years after the loan closing. The complaint sought rescission of the mortgage, money damages, and a declaratory judgment voiding respondents' security inter-

est. Respondents moved for summary judgment. Rejecting the Keirans' "claim that their request for rescission was timely, because it was received by [respondents] within three years of the December 30, 2006, closing," the district court found that "the language of TILA, the holding in *Beach* and the strong public policy favoring certainty of title all support the majority view that Congress intended that any lawsuit to enforce the right of rescission be brought within the three-year repose period." *Keiran* App. 44a. The court rejected the Keirans' interpretation of TILA, under which "a borrower who sends a letter claiming some disclosure defect, but who does not file suit, has indefinitely tolled the rescission period. Such an interpretation is improper, because it contradicts Congress's intent to create a three-year rescission period." *Id.*

Sobieniak. On March 22, 2007, petitioners Stephen Sobieniak and Victoria McKinney entered into a refinance mortgage on their primary residence with respondent Countrywide Home Loans, Inc., by executing a promissory note for $562,000. *Keiran* App. 48a.[2] At the loan closing, each petitioner signed disclosures acknowledging "'receipt of two copies of NOTICE of RIGHT TO CANCEL and one copy of the federal Truth in Lending Disclosure Statement.'" *Id.* 48a-49a. Each petitioner "also signed and 'acknowledge[d] reading and receiving a complete copy of [the TILA disclosure statement].'" *Id.* 49a (alterations in original).

On January 15, 2010—34 months after the loan closing—petitioners notified respondents of their intent to

[2] For ease of reference, respondents refer herein to the appendix to the joint petition for certiorari in *Keiran* and *Sobieniak* as the "*Keiran* App.," even when referring to lower-court decisions in *Sobieniak*.

rescind, based on petitioners' assertion that although they received the required disclosures at closing, they allegedly failed to receive the required number of copies of the disclosures. *Keiran* App. 3a, 49a. Respondent BAC Home Loans Servicing, LP replied to the notice on January 29, 2010, informing petitioners that there was no basis for rescission, and providing petitioners with "signed copies of the notices of right to cancel and TILA disclosures." *Id.* 49a; *see id.* 3a.

Petitioners Sobieniak and McKinney filed suit on January 14, 2011, nearly four years after the loan closing. The complaint sought rescission of the mortgage, money damages, and a declaratory judgment voiding respondents' security interest. Respondents moved to dismiss. The district court gave the parties notice of its intent to convert the motion to one for summary judgment and allowed the parties to submit evidence. The court then granted the converted motion. The court specifically found that petitioners each received the number of copies required under TILA. *Keiran* App. 53a. Further, relying on the district court decision in *Keiran*, the court held that petitioners' suit was barred in any event by the statute of repose because they "did not file suit until nearly four years after consummation of the transaction." *Id.* 56a.

Jesinoski. On February 23, 2007, petitioners Larry and Cheryle Jesinoski refinanced the mortgage on their primary residence by executing a promissory note for $611,000 with respondent Countrywide Home Loans, Inc. *Jesinoski* App. 5a. At the loan closing, each petitioner signed disclosures acknowledging "'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. The Jesinoskis

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, the Jesinoskis notified respondents of their intent to rescind the loan, on the ground that while Countrywide provided the required disclosures at closing, Countrywide allegedly failed to provide the required number of copies of the disclosures. *See Jesinoski* Pet. 6. At the time, the Jesinoskis' home was in foreclosure. Am. Compl. ¶¶ 3, 5, Dkt. 7, No. 11-cv-0474, *Jesinoski* v. *Countrywide Home Loans, Inc.* (D. Minn. July 22, 2011). On March 12, 2010, respondent BAC Home Loans Servicing, LP replied to the Jesinoskis' notice and refused to recognize the rescission. *Jesinoski* App. 5a. The Jesinoskis filed suit on February 24, 2011—four years and one day after the loan closed—but did not serve respondents with the complaint until "the last few days of the 120 days for service mandated by Fed. R. Civ. P. 4(m)." Letter from Pls.' Counsel, Dkt. 3, No. 11-cv-0474, *Jesinoski* v. *Countrywide Home Loans, Inc.* (D. Minn. July 8, 2011). The Jesinoskis filed an amended complaint on July 22, 2011, seeking a declaration that the mortgage transaction had been rescinded by their February 23, 2010 written notice as well as damages for respondents' alleged violations of TILA.

Respondents moved for judgment on the pleadings on the ground that the Jesinoskis' suit was barred by TILA's three-year statute of repose, as the complaint was filed more than four years after the loan closed. 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." *Jesinoski* App. 9a. The district court did not address the contested issue of whether the Jesinoskis 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.

Takushi. In April 2007, petitioner Rocky Fujio Takushi's parents conveyed to him, individually and as trustee for the Albert G. Takushi Revocable Living Trust, the deed for their primary residence. *Takushi* App. 2a. On September 19, 2007, petitioner's father, through petitioner acting as his father's attorney in fact, entered into a refinance mortgage on that residence with MortgageIT, by executing a promissory note for $230,000. *Takushi* App. 2a. Two days after the loan closing, petitioner (acting as his father's attorney in fact) signed disclosures acknowledging that he "received two (2) completed copies of this Notice of Right to Cancel" as well as the Federal Truth in Lending Disclosure Statement. Opp. to Mot. to Dismiss, Ex. 7, Notice of Right to Cancel, Dkt. 15-7, No. 11-cv-0189, *Takushi* v. *BAC Home Loans Servicing, LP* (D. Haw. Sept. 21, 2007). And that same day, petitioner reconveyed the property to his father; on September 29, 2007, petitioner's father died. *Takushi* App. 23a.

On December 31, 2009, respondent BAC Home Loans Servicing, LP initiated foreclosure proceedings on the property. *Takushi* App. 24a. On May 24, 2010—31 months after the loan closed—petitioner notified respondent of his intent to rescind the mortgage, based on, *inter alia*, BAC's failure to provide him with the required number of copies of the disclosures at closing. Compl., Ex. A, Dkt. 1-2, No. 11-cv-0189, *Takushi* v. *BAC Home Loans Servicing, LP* (D. Haw. May 24, 2010). BAC responded by letters dated June 8 and

June 9, 2010, denying the rescission and enclosing copies of petitioner's signed acknowledgements. Opp. to Mot. to Dismiss, Ex. 7, Dkt. 15-7, No. 11-cv-0189, *Takushi* v. *BAC Home Loans Servicing, LP* (D. Haw. June 8 & 9, 2010). BAC sold the property at a foreclosure sale on July 12, 2010. *Takushi* App. 25a.

Petitioner filed suit on February 9, 2011, seeking rescission of the loan and a declaration regarding the title of the property. The district court dismissed the complaint. Setting aside the question whether petitioner, as a trustee, heir, or successor-in-interest, had standing to sue under TILA—a question as to which the district court recognized there was a split in authority, *see Takushi* App. 9a-15a—the court held that the remedy of rescission was unavailable because the property had already been sold, *id.* 15a (citing 15 U.S.C. § 1635(f)). The court adhered to its ruling on reconsideration, and declined to consider whether petitioner's request for rescission was timely. *Id.* 48a.

C. Decisions Of The Courts Of Appeals

Petitioners each appealed the district court's judgment.

Keiran/Sobieniak. The *Keiran* and *Sobieniak* cases were consolidated for appeal, and the Eighth Circuit affirmed. The court of appeals noted the circuit split and sided with the Ninth and Tenth Circuits, holding that "notice without suit was [not] enough" to toll the three-year repose period for rescission claims; instead, "commencement of suit was required." *Keiran* App. 8a. That rule was mandated, the court explained, not only by TILA, but also by the "general nature of a statute of repose" and "the character of rescission." *Id.* 9a-10a.

As an initial matter, the court found Congress's intent to be clear from the face of the statute: By enacting a strict three-year statute of repose, "Congress intended to foreclose the federal right to rescind provided under TILA, defensively or otherwise, after the three-year period has run." *Keiran* App. 9a; *see also id.* 11a ("the text of the statute … establishes that filing suit is required"). Enforcing this limitation according to its terms was consistent with "the general nature of a statute of repose as a bar that completely extinguishes the right being claimed after it lapses," and which "serves as an unyielding and absolute barrier to a cause of action that is unconcerned with plaintiff's diligence; instead, a statute of repose is concerned with the defendant's peace." *Id.* 9a (internal quotation marks and alterations omitted).

Further, the court recognized that because "filing suit will certainly be necessary to actually accomplish rescission in most cases where rescission under TILA is sought," *Keiran* App. 11a, merely requiring a borrower to give notice of his intent to rescind would be insufficient to serve the goal of "remedial economy" at the heart of the rescission: "If a plaintiff must only notify the lender of his or her 'intent' to rescind, at some uncertain future date, the plaintiff may or may not take action upon that intent, serving as a cloud on the bank's title if the property proceeded to foreclosure before any action was taken." *Id.* 10a.

The Eighth Circuit disagreed with the CFPB's position—as set forth in an amicus brief—which would require mere notice from a borrower within three years of the loan to effectuate a rescission. The court found that the Bureau's interpretation was not only inconsistent with the text of the statute, but also flawed in failing to provide any guidance as to how rescission is to be effec-

tuated when the lender disputes the borrower's right to rescind. *Keiran* App. 11a. The court rejected the CFPB's position that, in such cases, "the bank, rather than the obligor, should be required to file suit to essentially prevent rescission. This would create a situation wherein rescission is complete, in effect, simply upon notice from the borrower, whether or not the borrower had a valid basis for such remedy." *Id.* 11a.

Judge Murphy dissented from the majority's ruling on the statute of repose.

Jesinoski. The Jesinoskis' appeal was heard separately and decided after the court of appeals issued its decision in *Keiran/Sobieniak*. Relying on its prior decision, the court of appeals affirmed the district court's judgment. *Jesinoski* App. 2a. The Eighth Circuit denied rehearing *en banc*. *Jesinoski* App. 10a. Judge Colloton concurred in the denial of rehearing *en banc*, explaining that, "[n]o matter how this court decides this case, there will remain a well-developed conflict in the circuits on the question how a consumer may exercise his or her right to rescind under [TILA]." *Id.* 11a.

Takushi. The Ninth Circuit affirmed the district court's order in *Takushi*. *Takushi* App. 53a-54a. The court of appeals did not reach the ground on which the district court ruled—that rescission was unavailable because the property had been sold—but instead found the complaint to be untimely, based on its decision in *McOmie-Gray* v. *Bank of America Home Loans*, 667 F.3d 1325 (9th Cir. 2012), which held that TILA's statute of repose "requir[es] dismissal of a claim for rescission brought more than three years after the consummation of the loan secured by the first trust deed, regardless of when the borrower sends notice of rescission," *id.* at 1326. *See Takushi* App. 53a-54a.

ARGUMENT

I. THE IRRECONCILABLE SPLIT AMONG THE COURTS OF APPEALS WARRANTS RESOLUTION BY THIS COURT

The courts of appeals are divided as to whether a borrower whose lender disputes his right to rescind his mortgage must file suit within the three-year statute of repose, or need only notify his lender of his intent to rescind. In the decisions on review, the Eighth and Ninth Circuits—consistent with the Tenth Circuit, *see Rosenfield* v. *HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012)—held that such a borrower must file suit before his right to rescind "expire[s]," 15 U.S.C. § 1635(f). In similar circumstances—*i.e.*, where the lender disputed the borrower's attempt to rescind the loan, more than three days after the closing, on the ground that the requisite disclosures were provided at closing—the Third and Fourth Circuits ruled that notice alone within the three-year period prescribed by 15 U.S.C. § 1635(f) sufficed. *See Sherzer* v. *Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013); *Gilbert* v. *Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012).[3]

The split among the courts of appeals on the question presented in this brief—not the broader question presented in the petitions for certiorari—warrants resolution by this Court. The CFPB agrees that the question posed is more narrow than the question presented

[3] The Sixth Circuit has issued an unpublished decision that is in accord with the Eighth, Ninth, and Tenth Circuits, *see Lumpkin* v. *Deutsche Bank Nat'l Trust Co.*, 534 F. App'x 335 (6th Cir. 2013), but has not ruled on the matter by published opinion. The First and Eleventh Circuits have also opined on this question, albeit on facts that differ from the common scenario presented in the cases that comprise the split just discussed. *See Large* v. *Conseco Fin. Serv. Corp.*, 292 F.3d 49 (1st Cir. 2002); *Williams* v. *Homestake Mortg. Co.*, 968 F.2d 1137 (11th Cir. 1992).

in each of the petitions, focusing specifically on circumstances in which the lender disputes the existence of the right of rescission. *See, e.g.*, CFPB Br. 1, *Sobieniak* v. *BAC Home Loans Servicing, L.P.*, No. 12-1053 (8th Cir. Apr. 17, 2012) ("When a consumer timely exercises an allegedly valid right of rescission by providing notice to the lender within three years, but the lender does not recognize the rescission, must the consumer also file a lawsuit against the lender within three years?").

Among the cases on review, *Jesinoski* most clearly and cleanly presents the pertinent legal issues for this Court's review. The case was decided on a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). There are thus no factual disputes that would obscure or complicate resolution of the question presented. Moreover, the complaint places the question presented in the starkest light: As the Jesinoskis allege, they notified their lender of their intent to rescind their mortgage three years to the day after the closing of the loan, and they filed suit one year and one day later.

II. THE JUDGMENTS ON REVIEW ARE CORRECT

When a borrower asserts a right to rescind his mortgage loan more than three business days after the closing and the lender disputes the existence of the condition precedent to that right, the majority rule is that a borrower must sue for rescission within the three-year repose period set forth in 15 U.S.C. § 1635(f). That rule is correct. Petitioners' proposed interpretation of TILA indefinitely extends the time for bringing suit, as long as a borrower sends notice to the lender at some point within the three-year repose period. That interpretation is unsupported by the text of TILA, is inconsistent with Congress's intent in enacting the statute of repose, and undermines the poli-

cies underlying both repose periods and rescission rights.

A. Section 1635(f) Completely Extinguishes The Statutory Right Of Rescission After Three Years

1. As originally enacted in 1968, TILA provided no time limit on the right of rescission outside the three-day "unconditional" period. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, tit. I, § 125, 88 Stat. 153 (1968). That proved problematic for the housing-finance market. As the Federal Reserve Board, among others, expressed to Congress: "[T]itles 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 1972* (Jan. 3, 1973) ("1973 FRB Report"), *reprinted in* 119 Cong. Rec. S2803, S2813 (daily ed. Feb. 20, 1973). In response to those concerns, Congress amended the Act to put a definitive end to that uncertainty. *See* Pub. L. No. 93-495, tit. IV, § 405, 88 Stat. 1517 (1974), *as amended*, Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, tit. VI, § 612(a)(6), 94 Stat. 132.

Choosing uncompromising terms, Congress enacted 15 U.S.C. § 1635(f), which states:

> An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor[.]

This Court found that provision "so straightforward as to render any limitation on the time for seeking a remedy superfluous." *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998). Congress expressed its "manifest intent," *id.* at 419, to "completely extinguish[] the right of rescission at the end of the 3-year period," *id.* at 412. Section 1635(f), this Court concluded, "*takes us beyond any question whether it limits more than the time for bringing suit*, by governing the life of the underlying right as well." *Id.* (emphasis added).

2. As *Beach* makes clear, the "uncompromising provision of § 1635(f)" is not a statute of limitation, but rather a statute of repose. *See* 523 U.S. at 417-419; *Hartman* v. *Smith*, 734 F.3d 752, 759 (8th Cir. 2013) (§ 1635(f) is a statute of repose); *accord Rosenfield* v. *HSBC Bank, USA*, 681 F.3d 1172, 1182 (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 Cmty. Bank of N. Va.*, 622 F.3d 275, 301 n.18 (3d Cir. 2010); *Jones* v. *Saxon Mortg., Inc.*, 537 F.3d 320, 326 (4th Cir. 1998).

In choosing a statute of repose over one of limitation, Congress enacted the most effective tool for addressing concerns about the uncertainty that lenders experienced regarding clouds on title and the enforceability of loan agreements, all occasioned by TILA's statutory right of rescission. *See Keiran* App. 10a-11a; *Rosenfield*, 681 F.3d at 1183, 1185; *see also 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[.]").

"Statutes of limitation and statutes of repose are close cousins, but they serve different goals and oper-

ate in slightly different ways." *Augutis* v. *United States*, 732 F.3d 749, 752 (7th Cir. 2013). A statute of limitations "'is a procedural device … [whose] running simply bars suit.'" *Id.* at 752-753 (alterations in original). In other words, "'[i]t cuts off the remedy.'" *Servicios-Expoarma, C.A.* v. *Industrial Mar. Carriers, Inc.*, 135 F.3d 984, 989 (5th Cir. 1998). A statute of repose, in contrast, "'is substantive. It extinguishes any right to bring any type of cause of action against a party, regardless of whether such action has accrued.'" *Augutis*, 732 F.3d at 753; *accord, e.g.*, *Wong* v. *Beebe*, 732 F.3d 1030, 1048 (9th Cir. 2013) ("statute of repose 'terminates a right of action after a specific time, even if the injury has not yet occurred'"); *McCann* v. *Hy-Vee, Inc.*, 663 F.3d 926 (7th Cir. 2011) (statute of repose "'serves as an unyielding and absolute barrier' to a cause of action"); *Umsted* v. *Umsted*, 446 F.3d 17, 22 n.4 (1st Cir. 2006) ("A statute of repose, contrary to a statute of limitations, terminates an action after a specific period of time not related to the injury or cause of action."). When such a statute "has been enacted, the time for filing suit is engrafted onto a substantive right created by law," and becomes "a substantive part of the plaintiff's cause of action." *Goad* v. *Celotex Corp.*, 831 F.2 508, 511 (4th Cir. 1987).

A period of repose "'is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace.'" *Rosenfield*, 681 F.3d at 1183. A statute of repose is thus a "substantive grant of immunity" representing "an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *First United Methodist Church of Hyattsville* v. *U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989). In sum, repose represents the clearest

way for a legislature to say, "Done is done." *Jones* v. *Thomas*, 491 U.S. 376, 392 (1989) (Scalia, J., dissenting).

3. Consistent with the plain language and intent of 15 U.S.C. § 1635(f), the majority rule in the circuits is that TILA requires a borrower to file suit within the three-year repose period to enforce a disputed right to rescind. *See Keiran* App. 9a-11a; *Rosenfield*, 681 F.3d at 1183, 1186-1188; *McOmie-Gray*, 667 F.3d at 1329; *see also Lumpkin* v. *Deutsche Bank Nat'l Trust Co.*, 534 F. App'x 335, 338-339 (6th Cir. 2013). As the Tenth Circuit held in *Rosenfield*, "it is the filing of an action in a court … that is required to invoke the right limited by the TILA statute of repose; the concept of repose itself (especially in the context here) fundamentally *limits* the ability to file an action." 681 F.3d at 1183.

Petitioners do not dispute that 15 U.S.C. § 1635(f) is a statute of repose (nor could they), but one petition argues that this fact does not necessarily mean the statute governs the time for bringing suit. *See Keiran* Pet. 18. As the argument goes, "'Congress may choose to use a statute of repose to make the filing of a lawsuit necessary in order to exercise a statutory right, but when it has chosen to do so, it has done so explicitly.'" *Id.* This argument misses the mark. Congress here used the clearest language possible—making any reference to an action itself superfluous. As the Court concluded in *Beach*: "To be sure, a limitation provision may be held to be nothing more than a bar to bringing suit[.] … *Section 1635(f), however, takes us beyond any question whether it limits more than the time for bringing suit*, by governing the life of the underlying right as well." 523 U.S. at 418 (emphasis added).

B. In A Case In Which The Condition Precedent To The Existence Of The Rescission Right Is Disputed, TILA Requires That A Borrower Bring Suit During The Repose Period To Rescind The Loan

1. In order to rescind their mortgage loans in these contested cases, petitioners were required to prove that the lender failed to comply with its disclosure obligations under the Act. *See Thompson* v. *Irwin Home Equity Corp.*, 300 F.3d 88, 89 (1st Cir. 2002); *Large* v. *Conseco Fin. Servicing Corp.*, 292 F.3d 49, 52 (1st Cir. 2002); *cf. Balderas* v. *Countrywide Bank, N.A.*, 664 F.3d 787, 791 (9th Cir. 2011) ("if [borrowers] can prove" a TILA violation, then "the bank will have forfeited the benefit of the three-day cooling off period and the [borrowers] would have three years to rescind"). Absent that failure, any rescission right expired three days following each transaction.

Petitioners ignore the critical distinction between rescission within three business days of closing—which is unconditional—and rescission outside that period—which is expressly conditioned on the existence of a TILA disclosure violation. *See Yamamoto* v. *Bank of New York*, 329 F.3d 1167, 1172 (9th Cir. 2003) (automatic rescission "makes no sense when … the lender contests the ground upon which the borrower rescinds"); *see id.* ("it cannot be that the security interest vanishes immediately upon the giving of notice"). In a case outside the unconditional period where the lender contests the borrower's right to rescind, a borrower's notice "does not actually rescind the transaction but merely communicates the obligor's '*intention* to [rescind the transaction]." *Hartman*, 734 F.3d at 760 n.2 (quoting 15 U.S.C. § 1635(a)) (emphasis and alteration in original). A consumer "'rescinds' the transaction" only when "the

right to rescind is determined in the borrower's favor." *Yamamoto*, 329 F.3d at 1172; *American Mortg. Network, Inc.* v. *Shelton*, 486 F.3d 815, 821 (4th Cir. 2007) ("This Court adopts the majority view of the reviewing courts that unilateral notification of cancellation does not automatically void the loan contract."); *Large*, 292 F.3d at 55 ("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."); *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."). "Until such decision is made," a borrower has "only advanced a claim seeking rescission." *Large*, 292 F.3d at 55.

2. Congress understood that borrowers and lenders could, and likely would, dispute the validity of a rescission claimed outside the initial three-day unconditional period. The problem with a later rescission notice, one senator observed, "is simply that a creditor has no way of knowing, upon receipt of a subsequent notice of rescission after the three-day right to rescission has expired, whether … the borrower has the right to rescind such a credit transaction." 123 Cong Rec. S7846, S7849 (daily ed. May 12, 1977) (statement of Sen. Garn). In the case of a dispute, any claim for rescission is only that—a claim—as to which questions of fact and law arise: Did the borrower receive the required disclosures? Did she sign for them? Were the disclosures legally sufficient under TILA?

These are questions that require judicial resolution, for which TILA expressly provides. The statute rec-

ognizes the availability of an "action in which it is determined that a creditor has violated" § 1635, 15 U.S.C. § 1635(g), and an "action in which a person is determined to have a right of rescission under section 1635," *id.* § 1640(a)(3). TILA also provides for a "rebuttable presumption" that a borrower who signs an acknowledgement of receipt in fact received the required disclosures. *Id.* § 1635(c). The purpose of such a presumption, of course, 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 TILA further provides that the rescission process set out in § 1635 will "apply except when otherwise ordered by a court." 15 U.S.C. § 1635(b).

Contrary to what petitioners suggest (*see Keiran* Pet. 13-14), litigation is an express and necessary part of a contested rescission. The CFPB, and previously the Federal Reserve Board, have acknowledged as much. *See* 12 C.F.R. pt. 226, Supp. I, cmt. § 226.23—Right of Rescission ¶ 23(d)(4) ("Where a consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind[.]"); 75 Fed. Reg. 58,539, 58,547 (proposed Sept. 24, 2010) ("If the consumer provides a notice of rescission after the initial three-business-day period … , the process is problematic. In this case, it may be unclear whether the consumer's right to rescind has expired."); *id.* at 58,629 ("[W]hen a creditor receives a consumer's notice after the initial-three-day period, the rescission process is unclear and courts are frequently called upon to resolve rescission claims."). And, as TILA makes clear, unless a borrower brings suit to effect rescission within the three-year period of repose—so as to have a court "determine[]" whether "a creditor

has violated" § 1635, *see* 15 U.S.C. § 1635(g); *see id.* § 1640(a)(3)—the right of rescission completely expires, *id.* § 1635(f).

C. Petitioners' Interpretation Of TILA Is Flawed

1. Petitioners ask this Court to "restore certainty to the housing market." *Keiran* Pet. 1. Yet petitioners' interpretation of TILA would do precisely the opposite, sowing uncertainty where Congress intended repose. Indeed, petitioners' interpretation, if adopted, would effectively amend TILA to its pre-1974 state in which there was no limit on the length of time that a borrower could bring an action seeking to enforce a contested right of rescission.

The petitions here illustrate the problem: The Keirans, for example, filed their suit for rescission nearly four years after the closing of the consummation of their loan. *See Keiran* Pet. 5-6. The Jesinoskis filed their suit four years and one day after their loan closed. *See Jesinoski* Pet. 6-7. And nothing under petitioners' reading of TILA would prevent borrowers from waiting even longer: On their view, a borrower need only notify the lender of his intent to rescind the mortgage—regardless of how frivolous the claimed TILA violation is—with no limitation on when he must sue. Notably, none of the petitioners proposes any time limit on when a borrower must file suit for rescission under TILA.

The only limit even mentioned as a possibility in any of the petitions is a one-year time limit drawn from 15 U.S.C. § 1640(e). *See Keiran* Pet. 19 (noting that CFPB has "observe[d] that 'some courts have concluded that'" the one-year statute of limitation from 15

U.S.C. § 1640 applies).[4] The lack of any endorsement from petitioners (or even the CFPB) is telling. In any event, that one-year statute of limitations applies to claims for damages—not claims for rescission. *See McOmie-Gray*, 667 F.3d at 1329 ("[A]dopting § 1640's one-year statute of limitations to rescission actions contradicts the plain language of the statute."). Indeed, this Court previously recognized the "stark contrast" between the "1-year limitation provision on damages actions" in § 1640(e) and the "treatment of rescission" in the "uncompromising provision of § 1635(f)." *Beach*, 523 U.S. at 418. Thus, as petitioners would have it, the same Congress that carefully provided a statute of limitations for damages actions and a statute of repose for rescission nevertheless provided no time limit for the judicial enforcement of a contested rescission right. That is plainly inconsistent with Congress's intent: To have a statute of repose in this context that speaks only to notice—leaving litigation wholly unaddressed—would "run counter to the commercial-certainty concerns of Congress (recognized in *Beach*) that led Congress to establish the fixed and limited repose period of § 1635(f) in the first place." *Rosenfield*, 681 F.3d at 1187.

2. Petitioners' interpretation is also inequitable and inconsistent "with the general goal and application of a rescission remedy." *Rosenfield*, 681 F.3d at 1185. "Rescission in its most basic form is an equitable remedy designed to return the parties to the status quo prevailing before the existence of an underlying contract." *Id.* at 1183; *see Keiran* App. 10a. "It confers upon a

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[4] Since the Jesinoskis filed their suit one year and one day after sending their notice, any time limit for bringing suit they might support would presumably extend longer than one year.

party the right to void a contract in equity—*i.e.*, to make it such that 'the agreement [had] never been executed.'" *Rosenfield*, 681 F.3d at 1184 (alteration in original). "[T]he primary justification of rescission" is that of "'remedial economy,' not … the compensatory goal of a damages award." *Id.*; *see Andrews* v. *Chevy Chase Bank*, 545 F.3d 570, 575 (7th Cir. 2008) (rescission under TILA is "restorative rather than compensatory"). "Consequently, it is not an appropriate remedy in circumstances where its application would lead to prohibitively difficult (or impossible) enforcement." *Rosenfield*, 681 F.3d at 1184; *see Keiran* App. 10a.

Under petitioners' approach, a borrower's notice within three years is all that is required to rescind a transaction; a lawsuit can come anytime thereafter. Under that view, "in a significant number of instances, the remedial economy of the remedy would be jeopardized." *Rosenfield*, 681 F.3d at 1185; *see Hartman*, 734 F.3d at 759. Unraveling a mortgage transaction three years after the fact is difficult enough; extending that period indefinitely on the mere sending of notice indicating the borrower's "intent" 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.

3. Petitioners say that requiring borrowers to file suit within three years would "'incentivize consumers to file suit immediately, rather than working privately with their lenders to unwind the transaction,' thereby creating unnecessary litigation." *Keiran* Pet. 15. That is wrong. Under the majority rule, there is no incentive for consumers to file suit "'immediately,'" *id.*; all that is required of a borrower is that he file suit, if at all, within the "generous three-year period of repose,"

Rosenfield, 683 F.3d at 1185 n.9—which provides more than sufficient time for the borrower and his lender to negotiate.

It is petitioners' interpretation of TILA that would bring about unnecessary, avoidable litigation. If, as petitioners would have it, a borrower need only notify his lender of his intent to rescind, then the lender's claim to title becomes fraught with uncertainty: Now that the borrower has put down the requisite placeholder, will he or will he not ever actually sue for rescission? *See Keiran* App. 10a. Unless the lender is willing to operate with a perpetual "cloud on [its] title," *id.*—in the form of some possible lawsuit at some point in the future—the lender's only option is to file a declaratory-judgment suit immediately upon receiving a rescission notice, even if that notice is facially meritless, *cf. id.* 11a (rejecting argument that "the bank, rather than the obligor, should be required to file suit to essentially prevent rescission").

D. The CFPB's View Deserves No Deference

Petitioners contend that the decisions on review "depart[] from settled principles of agency deference," *Keiran* Pet. 15, because they purportedly failed to accord deference to Regulation Z and the CFPB's interpretation of TILA as set forth in its amicus briefs below, *see id.* 15-17; *Jesinoski* Pet. 23-24. This argument misses the mark; the CFPB's view deserves no deference.

First, TILA's plain text, as reflected in the majority rule, is clear and "that 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).

Second, even if there were ambiguity in the Act (and there is not), no deference would be due to Regulation Z for a number of reasons, including because the regulation provides no clarity on the statutory interpretation issues here. The regulation refers generally to a consumer's "right to rescind the transaction," without reference to or discussion of the two periods during which rescission may be sought. 12 C.F.R. § 1026.23(a)(1). As this Court explained in *Gonzales* v. *Oregon*,

> Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. 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.

546 U.S. 243, 257 (2006).

To the extent that the CFPB has purported to interpret TILA itself—or the Bureau's own "parroting regulation"—in its amicus briefs below, its interpretation should be rejected. The CFPB's view of the statute and its own regulation, like that of petitioners, fundamentally disregards Congress's intent, vitiating the certainty of title that it sought to ensure through its enactment of § 1635(f). *Cf. Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (deference to agency interpretation of its own regulation, advanced in a legal brief, is unwarranted if that interpretation is "plainly erroneous").

CONCLUSION

The Court should grant certiorari to resolve the irreconcilable split among the courts of appeals and should affirm the majority rule, as reflected in the decisions below.

Respectfully submitted.

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