No. __-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Truth in Lending Act provides that a borrower "shall have the right to rescind the transaction until midnight of the third business 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). The Act further creates a "[t]ime limit for [the] exercise of [this] right," providing that the borrower's "right of rescission shall expire three years after the date of consummation of the transaction" even if the "disclosures required . . . have not been delivered." *Id.* § 1635(f).

The question presented is:

Does a borrower exercise his right to rescind a transaction in satisfaction of the requirements of Section 1635 by "notifying the creditor" in writing within three years of the consummation of the transaction, as the Third, Fourth, and Eleventh Circuits have held, or must a borrower file a lawsuit within three years of the consummation of the transaction, as the First, Sixth, Eighth, Ninth, and Tenth Circuits have held?

PARTIES TO THE PROCEEDINGS

Petitioners Larry D. Jesinoski and Cheryle Jesinoski were the plaintiffs and the appellants in the proceedings below.

Respondents Countrywide Home Loans, Inc., a subsidiary of Bank of America N.A., d/b/a America's Wholesale Lender; BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A., a Texas Limited Partnership, formerly known as Countrywide Home Loans Servicing, L.P.; Mortgage Electronic Registration Systems, Inc., a Delaware Corporation; and John and Jane Does 1-10 were the defendants and the appellees in the proceedings below.

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Petitioners Larry D. Jesinoski and Cheryle Jesinoski respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

INTRODUCTION

This case arises from a mortgage lender's violation of the Truth in Lending Act and the homeowners' obstructed attempt to exercise their right under the Act to rescind the mortgage as a remedy for that lender's statutory violation. In the years preceding the housing crisis of 2008, many mortgage lenders violated the Act's disclosure requirements in tens of thousands of loan transactions. As a result, countless homeowners were lured into oppressive mortgages on the basis of false, misleading, or incomplete disclosures of material information about loans secured by their homes.

The Jesinoskis did not receive complete disclosures. They refinanced their home mortgage with Countrywide Home Loans, Inc., in 2007, but Countrywide failed to furnish the Jesinoskis all the information and disclosures required by the Act. The Act creates a "right to rescind" the loan transaction within "three business days" of the delivery of all the required disclosures. A borrower exercises that right simply "by notifying the creditor." 15 U.S.C. § 1635(a). The Act further provides that the right "shall expire three years" after the closing of the transaction, even if all the required disclosures have not been delivered. *Id.* § 1635(f). When the Jesinoskis sought to exercise their rescission right under the Act by sending their creditors a written notice, those creditors refused to honor their right. When the Jesinoskis brought individual suit to enforce the rescission, the courts below refused to recognize that they had validly rescinded

their mortgage. Instead, the courts below held that the Act required the Jesinoskis to file a lawsuit to rescind.

The Eighth Circuit has joined four other circuits in holding that, to exercise the right to rescind under Section 1635, a borrower must file a lawsuit within three years of the closing of the transaction. The courts of appeals are starkly divided on the issue. Three other circuits hold that, in accord with the plain text of Section 1635 and with its implementing regulation, notifying the creditor in writing is all that is required to exercise that right. The Eighth Circuit's holding to the contrary, shared by a majority of the circuits that have ruled on the issue, derives from a misinterpretation of the statutory text and a misreading of this Court's decision in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998). The resulting rule does violence to the statutory text, manufactures legal obstacles for homeowners seeking to vindicate their rights under a law that was enacted to protect them, and risks flooding the federal courts with thousands of needless lawsuits to accomplish rescissions that Congress intended to be completed privately and without litigation. In the order denying rehearing en banc, Judge Colloton explicitly recognized the circuit conflict (as have many others) and opined that only this Court can resolve it. App. 11a. Because of the deeply entrenched circuit split and the national and recurring importance of the issue, the petition should be granted.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-3a) is reported at 729 F.3d 1092. The opinion of the district court (App. 4a-9a) is not reported (but is available at 2012 WL 1365751).

JURISDICTION

The court of appeals entered its judgment on September 10, 2013, and denied a petition for rehearing on November 13, 2013 (App. 10a-11a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and of the Federal Reserve Board's Regulation Z are reproduced at App. 12a-19a.

STATEMENT

A. Statutory and Regulatory Background

Congress enacted the Truth in Lending Act "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing . . . practices." 15 U.S.C. § 1601(a). The Act therefore requires creditors to disclose to borrowers various terms of a credit transaction, including "finance charges, annual percentage rates of interest, and the borrower's rights." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) (citing 15 U.S.C. §§ 1631, 1632, 1635, 1638).

Section 1635(a) provides that a borrower who secures the loan with a principal dwelling "shall have the right to rescind the transaction until midnight of the third business day following the consummation of

the transaction or the delivery of the information and rescission forms required under this section . . . whichever is later, by notifying the creditor . . . of his intention to do so." 15 U.S.C. § 1635(a). Section 1635(a) thereby creates an unconditional right to rescind for three days after the consummation of the transaction and, as a remedy for a creditor's violation of the Act's disclosure requirements, extends that right to rescind until three days following the ultimate delivery of the required disclosures.

A borrower's exercise of the right to rescind under Section 1635(a) sets in motion a series of automatic steps to unwind the transaction, imposing obligations on both the creditor and the borrower. When a borrower "exercises his right to rescind under [Section 1635(a)], he is not liable for any finance or other charge, and any security interest given by the [borrower] . . . becomes void upon such a rescission." *Id.* § 1635(b). Section 1635(b) next provides that, "[w]ithin 20 days after receipt of a notice of rescission, the creditor shall return to the [borrower] any money or property given as . . . downpayment . . . and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Id.* Subsequently, "[u]pon the performance of the creditor's obligations under this section, the [borrower] shall tender the property to the creditor," but, "[i]f the creditor does not take possession of the property within 20 days after tender by the [borrower], ownership of the property vests in the [borrower] without obligation on his part to pay for it." *Id.* These "procedures prescribed" by Section 1635(b) "shall apply except when otherwise ordered by a court." *Id.*

Although the Act originally extended the three-day rescission right until the creditor delivered proper

disclosures and notices, whenever that might be, Congress later limited to three years the time within which a borrower may exercise the right to rescind even if a creditor never delivers the disclosures required by the Act. *See* Act of Oct. 28, 1974, Pub. L. No. 93-495, § 405, 88 Stat. 1500, 1517 (codified at 15 U.S.C. § 1635(f)). Section 1635(f) thus provides that a borrower's "right of rescission shall expire three years after the date of consummation of the transaction . . . notwithstanding the fact that the information . . . 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).

Regulation Z, which implements the Act,* confirms that, "[i]f the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation." 12 C.F.R. § 226.23(a)(3). That Regulation further explains 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.* § 226.23(a)(2).

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* The Act originally vested the Federal Reserve Board with authority to promulgate regulations implementing the Act. *See* Pub. L. No. 90-321, tit. I, §§ 103(b), 105, 82 Stat. 146, 147, 148 (1968). Under this authority, the Board promulgated Regulation Z, after notice and comment. *See* 12 C.F.R. pt. 226. The Consumer Financial Protection Act of 2010 transferred implementing authority from the Federal Reserve Board to the Consumer Financial Protection Bureau. *See* Pub. L. No. 111-203, tit. X, § 1061(b)(1), (d), 124 Stat. 1376, 1955, 2036, 2039 (2010) (codified at 12 U.S.C. § 5581(b)(1), (d)). The Bureau re-promulgated Regulation Z without substantive changes. *See* Interim Final Rule, *Truth in Lending (Regulation Z),* 76 Fed. Reg. 79,768, 79,803-04 (Dec. 22, 2011) (promulgated at 12 C.F.R. § 1026.23).

B. Factual Background

On February 23, 2007, petitioners Larry and Cheryle Jesinoski refinanced the mortgage on their primary residence in Eagan, Minnesota, by executing a promissory note for $611,000 with Countrywide Home Loans, Inc. App. 5a. At the closing of the transaction, the creditor provided some of the disclosures required by the Act, but in violation of the Act failed to include two copies of a Notice of Right to Cancel for each of the Jesinoskis and two copies of a Truth in Lending Disclosure Statement. *See* Am. Compl. ¶¶ 19-20 (Dkt. No. 7); *see also* 12 C.F.R. § 226.23(b) ("[A] creditor shall deliver *two copies* of the notice of the right to rescind *to each consumer entitled to rescind*") (emphases added); *id.* § 226.17(d) ("If the transaction is rescindable . . . , the disclosures shall be made *to each consumer who has the right to rescind*.") (emphasis added). The creditors never delivered the additional required disclosures. App. 5a.

On February 23, 2010, within the three-year limitation period set by Section 1635(f), the Jesinoskis exercised their right to rescind the transaction by sending written notice of rescission to respondents. *Id.* On March 12, 2010, respondent Bank of America Home Loans replied to the Jesinoskis' notice of rescission refusing to acknowledge the rescission. *Id.* No other interested party responded to the Jesinoskis' notice of rescission. *See* Am. Compl. ¶ 33 (Dkt. No. 7). The creditors subsequently failed to take, within 20 days of receipt of the notice of rescission, any of the steps required by Section 1635(b) to reflect the termination of the security interest in the Jesinoskis' home. *See id.* ¶ 31.

C. Proceedings Below

On February 24, 2011, the Jesinoskis filed a complaint in the United States District Court for the District of Minnesota seeking to enforce the rescission they had exercised by notifying their creditors in writing of their intention to rescind. App. 5a-6a. Their amended complaint, filed on July 22, 2011, sought a declaration that the mortgage transaction had been rescinded by that written notice, damages under Section 1640 for respondents' violations of the Act, and damages under state-law causes of action arising from violations of federal mortgage regulatory law. App. 6a. Respondents answered and moved for judgment on the pleadings on the ground that the Jesinoskis' suit was barred because the complaint was filed more than three years after the consummation of the transaction. App. 7a-9a.

The district court granted respondents' motion. App. 9a. Following other decisions in the district, it held that "a suit for rescission filed more than three years after consummation of an eligible transaction is barred by [the Act's] statute of repose" in Section 1635(f). *Id.* Because "there is no dispute that [the Jesinoskis] failed to file suit within the three-year period," the court held that "their claims are time barred." *Id.*

The Jesinoskis appealed to the Eighth Circuit, which affirmed the district court's judgment. The per curiam opinion noted that the Eighth Circuit "recently weighed in on the circuit split regarding this precise issue and held that a party seeking to rescind a loan transaction must file suit within three years of consummating the loan." App. 2a (citing *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 726-29 (8th Cir. 2013)). On that ground alone, the court of

appeals "affirm[ed] the district court's judgment on the pleadings in favor of the lenders." *Id.*

Two members of the panel each concurred separately to express their views that the Eighth Circuit's precedent compelled the wrong result. Judge Melloy wrote that, "[w]ere we writing on a clean slate, . . . I would hold . . . that sending notice within three years of consummating a loan is sufficient to 'exercise' the right to rescind." App. 2a-3a (Melloy, J., concurring in the judgment) (citing 12 C.F.R. § 1026.23(a)(2)). Judge Colloton wrote that he "believe[s] that *Keiran* . . . was wrongly decided . . . and I would reverse the judgment of the district court if the question presented were open in this circuit." App. 3a (Colloton, J., concurring).

The Jesinoskis petitioned for rehearing en banc, which the Eighth Circuit denied by a vote of 6 to 4. App. 10a. Judge Colloton, concurring in the denial of rehearing en banc, again wrote separately to emphasize the need for this Court's intervention:

> No 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 the Truth in Lending Act, 15 U.S.C. § 1635(f). *Compare Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013), *and Gilbert v. Residential Funding LLC*, 678 F.3d 271, 277-78 (4th Cir. 2012), *with Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1187-88 (10th Cir. 2012), *and McOmie-Gray v. Bank Am. Home Loans*, 667 F.3d 1325, 1328 (9th Cir. 2012). It appears that none of these cases was presented to the Supreme Court by way of petition for writ of certiorari, so it cannot be said that the Court has resolved to

> leave the issue to individual circuits despite a conflict in authority. Therefore, I conclude that the resources of a rehearing en banc are not warranted at this time simply to move this court from one side to the other in what may prove to be a short-lived conflict in the circuits.

App. 11a (Colloton, J., concurring in denial of rehearing en banc).

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER WHETHER A BORROWER EXERCISES THE RIGHT TO RESCIND UNDER SECTION 1635 BY NOTIFYING A CREDITOR OR INSTEAD MUST FILE SUIT

The Eighth Circuit's decision in this case deepens a significant conflict among eight circuits by holding that a borrower must file suit within three years of the consummation of a loan to exercise his right to rescind the transaction under Section 1635. The Third, Fourth, and Eleventh Circuits properly rejected such a requirement, holding that the plain text of the statute and its implementing regulation dictate that written notice to the creditor is sufficient, and that neither the statute nor the regulation makes any mention of a further requirement to sue within the three-year time limit. The Eighth Circuit's holding, shared by the First, Sixth, Ninth, and Tenth Circuits, looks past the text of the statute and regulation, "[e]xtrapolating" from this Court's decision in *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 412 (1998), to impose a requirement that under Section 1635(f) "the [borrower] must file a rescission action in court" within three years. *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 728 (8th Cir. 2013). This Court's review is required to resolve this stark division in authority

and to establish uniform national requirements for a borrower's exercise of the right to rescind under Section 1635.

A. The Third, Fourth, And Eleventh Circuits Hold That Notifying A Creditor In Writing Within Three Years Of The Consummation Of The Transaction Is Sufficient To Exercise The Right To Rescind

1. *Third Circuit.* In *Sherzer v. Homestar Mortgage Services*, 707 F.3d 255 (3d Cir. 2013), the Third Circuit held on facts identical to those here that written notice to a creditor is sufficient to exercise the right to rescind under Section 1635. There, as here, the homeowners notified their creditors in writing of their intention to rescind the loan within three years of its consummation but did not file suit until after the three-year period had expired. *Id.* at 256. The court held that written notice was sufficient because "the text of [Section] 1635 and its implementing regulation . . . supports the view that to timely rescind a loan agreement, [a borrower] need only send a valid notice of rescission." *Id.* at 258. The court explained that "[n]either [Section] 1635(a) nor Regulation Z states that the [borrower] must also file suit; both refer exclusively to written notification as the means by which [a borrower] exercises his right of rescission," *id.*, and therefore rejected the creditor's invitation to "infer that the statute contains additional, unwritten requirements with which [borrowers] must comply," *id.* at 261. Accordingly, the court held that "[a borrower] exercises his right of rescission by sending the creditor valid notice of rescission, and need not also file suit within the three-year period." *Id.*

2. *Fourth Circuit.* In *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012), the Fourth Circuit similarly relied upon "the plain meaning of the applicable statute and regulation" to hold that a borrower exercises the right to rescind by notifying a creditor. *Id.* at 278. There, as in *Sherzer* and as here, the homeowner sent written notice of rescission within three years of the consummation of the loan but filed suit after three years. The *Gilbert* court explained that, "[s]imply stated, neither [Section] 1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them." *Id.* at 277. The court therefore held, in accord with the Third Circuit, that "a borrower exercises her right of rescission by merely communicating in writing her intention to rescind." *Id.*

3. *Eleventh Circuit.* The Eleventh Circuit reached the same conclusion in *Williams v. Homesake Mortgage Co.*, 968 F.2d 1137 (11th Cir. 1992). Although the homeowner in that case had both notified the creditor in writing and filed suit before the expiration of the three-year time limit, the Eleventh Circuit unmistakably held that written notice alone is sufficient to exercise the right to rescind. "Congress provided the consumer with the right to rescind a credit transaction . . . *solely* by notifying the creditor within set time limits of his right to rescind." *Id.* at 1139 (emphasis added). In modifying the default procedures established by Section 1635(b) to unwind the transaction, the court explained that "all that a consumer need do is notify the creditor of his intent to rescind [and] [t]he agreement is automatically rescinded." *Id.* at 1140. The *Williams* court further explained that Regulation Z "reaffirm[ed] . . . the Act's

intent to make rescission automatic upon notification." *Id.* at 1142. *See also Johnson v. Mortgage Elec. Registration Sys., Inc.*, 252 F. App'x 293, 294 (11th Cir. 2007) (per curiam) (explaining that a "borrower can trigger rescission 'solely by notifying the creditor within set time limits of [her] intent to rescind'" but holding that the borrower in that case had failed to do so) (citing *Williams v. Homesake Mortgage*) (alteration in original).

District courts in the Eleventh Circuit have followed *Williams v. Homesake Mortgage* in holding that written notice alone is sufficient to exercise the right to rescind. *See*, *e.g.*, *Carson v. Wells Fargo Bank, N.A.*, No. 8:10-CV-2362-T17-EAJ, 2011 WL 2470099, at *3 (M.D. Fla. June 20, 2011) ("Rescission is automatic once the creditor is notified. . . . [B]ecause notifying the creditor automatically triggers rescission, it is this notification, not the filing of the suit, that must be within the three-year period.") (citing *Williams v. Homesake Mortgage*); *Williams v. Saxon Mortg. Co.*, Civil Action No. 06-0799-WS-B, 2008 WL 45739, at *3 (S.D. Ala. Jan. 2, 2008) ("[A]ll that the consumer need do is notify the creditor of his intent to rescind. The agreement is then automatically rescinded and the creditor must . . . tender first.") (quoting *Williams v. Homesake Mortgage*).

B. The First, Sixth, Eighth, Ninth, And Tenth Circuits Hold That A Borrower Must File Suit Within Three Years Of The Consummation Of The Transaction To Exercise The Right To Rescind

The First, Sixth, Eighth, Ninth, and Tenth Circuits depart from this straightforward interpretation of the statutory text and its implementing regulation, instead requiring that a borrower must file a lawsuit

within three years to exercise the right to rescind. Those courts of appeals "[e]xtrapolat[e]," *Keiran*, 720 F.3d at 728, such a rule from this Court's decision in *Beach*, which held that a homeowner who had neither notified a creditor nor brought suit within the three-year time limit could not then assert rescission as an affirmative defense to a foreclosure action brought years later by the creditor.

1. *Ninth Circuit.* In *McOmie-Gray v. Bank of America Home Loans*, 667 F.3d 1325 (9th Cir. 2012), the Ninth Circuit held that "[Section] 1635(f) is a three-year statute of repose, requiring dismissal of a claim for rescission brought more than three years after the consummation of the loan . . . regardless of when the borrower sends notice of rescission." *Id.* at 1326. The court conceded that, "[w]ere [it] writing on a blank slate, [it] might consider whether notification within three years of the transaction could extend the time limit imposed by [Section] 1635(f)." *Id.* at 1328. Instead, though, the court suggested that it was bound "under the case law of [the Ninth Circuit] and the Supreme Court," which in its view indicated that "rescission suits must be brought within three years of the consummation of the loan, regardless whether notice of rescission is delivered within that three-year period." *Id.*

The Ninth Circuit based its holding on this Court's statement in *Beach* that Section 1635(f) "talks not of a suit's commencement but of a right's duration," *Beach*, 523 U.S. at 417, and its conclusion that the Act "permits no federal right to rescind, defensively or otherwise, after the 3-year period of [Section] 1635(f) has run," *id.* at 419. The Ninth Circuit acknowledged that this Court in *Beach* held merely that "the [borrower] could not raise the right to rescind as a defense to the [creditor's] foreclosure

action after the three-year period had run" when the borrower had neither notified the creditor nor brought suit himself. *McOmie-Gray*, 667 F.3d at 1328. It nonetheless suggested that "[t]he language the Court used, however, broadly assumes that a three-year limitation governs cases where a borrower, as plaintiff, seeks rescission of the mortgage transaction." *Id.* at 1328-29. On the basis of this extension of *Beach*, the Ninth Circuit concluded that "Section 1635(f) is . . . not merely a statute of limitations – it completely extinguishes the underlying right itself," and therefore as "a statute of repose" it "represents an absolute three-year bar on rescission actions," even if the borrower had notified the creditor in writing within the three-year period. *Id.* at 1329.

2. *Tenth Circuit.* In *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012), the Tenth Circuit joined the Ninth Circuit in holding that "the mere invocation of the right to rescission via a written letter, without more, is not enough to preserve a court's ability to effectuate (or recognize) a rescission claim after the three-year period has run." *Id.* at 1182. Like the Ninth Circuit in *McOmie-Gray*, the Tenth Circuit "believe[d] that *Beach* [was] dispositive of the instant question" and that "the Supreme Court has definitively foreclosed – through the implicit instruction of *Beach* – any argument that a consumer may exercise her right to rescind" by notifying the creditor of his intention to rescind. *Id.* In the Tenth Circuit's view, the homeowner's "position is not consistent with the effect of a strict repose period – which *Beach* held that [Section] 1635(f) establishes *in this context* – one that operates to *completely* extinguish the right claimed *after it lapses*." *Id.*

The Tenth Circuit disregarded the Consumer Financial Protection Bureau's ("Bureau") interpretation of the statute and of Regulation Z, advanced in an *amicus* brief, that a borrower need not file suit to exercise the right to rescind, again on the basis of the perceived implications of *Beach*. According to that court, "part and parcel of the Court's vision of repose was the manner in which a rescission must be asserted during the repose period – that is, by invoking the power of the courts through litigation." *Id.* at 1186 n.10 (citing *Beach*, 523 U.S. at 415-16). To hold otherwise, the court supposed, "could conflict with the Court's conception of repose under [the Act], in that it would effectively create commercial uncertainty." *Id.* On this policy basis, the court rejected the agency's authoritative interpretation of the Act and of Regulation Z.

3. *Eighth Circuit.* In *Keiran v. Home Capital, Inc.*, the Eighth Circuit surveyed the split among its sister circuits before joining the Ninth and Tenth Circuits in "hold[ing] that a plaintiff seeking rescission must file suit, as opposed to merely giving the bank notice, within three years in order to preserve th[e] right [to rescind] under [Section] 1635(f)." 720 F.3d at 726-28. The court "[e]xtrapolat[ed] from *Beach*" to infer that, "to accomplish rescission within the meaning of [Section] 1635(f), the [borrower] must file a rescission action in court." *Id.* at 728. The court further disregarded the Bureau's interpretation of Regulation Z, suggesting that "while Regulation Z sets forth one of the things [a borrower] must do to rescind the loan – give written notice to the bank – it does not set forth the entirety of the things necessary to accomplish rescission." *Id.* As a result, the court felt free to impose the additional requirement that the borrower file suit within three years. *Id.*

Judge Murphy dissented, explaining that "[t]he majority decision is contrary to the plain language of [the Act], the congressional intent behind it, and the position of the agency responsible for enforcing it." *Id.* at 731 (Murphy, J., concurring in part and dissenting in part). She recognized that "[n]owhere in the [Act] is there any requirement that a consumer must file a lawsuit in order to exercise a right of rescission." *Id.*; *see id.* at 733 ("[The Act] contains no language even hinting that a lawsuit is required to exercise the right of rescission."). Judge Murphy further explained that "[t]he majority['s] suggest[ion] that *Beach* . . . compels a different interpretation of the statute . . . is puzzling," because "in *Beach* the homeowners had unquestionably not exercised their right of rescission within three years, either by providing the statutory notice or by filing a lawsuit as the majority advocates." *Id.* at 731. Accordingly, she understood that "*Beach* provides no answer to the question in this case." *Id.* at 732. For these reasons, she properly concluded that "[t]he plain language of [the Act], its implementing regulations, and its supporting policy rationale all support reading [Section] 1635 to mean what it says: that rescission is exercised when a consumer provides written notice to the lender." *Id.* at 736.

4. *Sixth Circuit.* In *Lumpkin v. Deutsche Bank National Trust Co.*, No. 12-2317, 2013 WL 4007760 (6th Cir. Aug. 6, 2013), the Sixth Circuit shared the Eighth, Ninth, and Tenth Circuits' view in holding that a borrower must file suit to exercise his right to rescind. The court there held that the letter the homeowner had sent to his creditors within the three-year period did not qualify as a notice of rescission, *id.* at *2, and further held that "[t]he three years defined by [Section] 1365(f) were over by the

time this suit was filed, and so [the borrower's] right to bring a rescission suit had expired, regardless of when and whether he notified the lender of his rescission within those three years," *id.* at *3. The Sixth Circuit has thus unmistakably indicated that it would join the Eighth, Ninth, and Tenth Circuits in holding that written notice is insufficient to exercise the right to rescind.

5. *First Circuit.* The First Circuit has not yet considered this issue in the context of enforcing a rescission, but it has held that a notification within the three-year period did not effect a rescission without suit being filed within the three years. In *Large v. Conseco Finance Servicing Corp.*, 292 F.3d 49 (1st Cir. 2002), the First Circuit reached the same conclusion in enforcing an arbitration provision in the loan agreement a homeowner had attempted to rescind via written notice to his creditor within three years. There, the court rejected the homeowner's argument that his letter notifying his creditors of his intention to rescind "in fact rescinded the transaction the moment it was mailed." *Id.* at 54. The First Circuit instead held that "neither [Section 1635] nor [Regulation Z] establishes that a borrower's mere assertion of the right of rescission has the automatic effect of voiding the contract." *Id.* Rather, the court suggested, "[t]he natural reading of this language is that the security interest becomes void when the [borrower] exercises a right to rescind that is available in the particular case, either because the creditor acknowledges that the right of rescission is available or because the appropriate decision maker has so determined." *Id.* at 54-55. The court further inferred that, if "a lender disputes a borrower's purported right to rescind," as was the case in *Large* and is the

case here, "the designated decision maker," there an arbitrator and here a court, "must decide whether the conditions for rescission have been met," and, "[u]ntil such a decision is made, the [borrower] ha[s] only advanced a claim seeking rescission." *Id.* at 55. The court limited the Eleventh Circuit's approach in *Williams v. Homesake Mortgage* to cases in which the creditor agreed that grounds for rescission existed, thus holding that written notice alone does not exercise the right to rescind unless "the grounds for rescission have been established, either by agreement or by an appropriate decision maker." *Id.*

C. The Split Among The Courts Of Appeals Is Widely Recognized And Entrenched, And It Can Be Resolved Only By This Court

This entrenched conflict in authority is widely recognized among the courts of appeals. *See* App. 2a ("This Court recently weighed in on the circuit split regarding this precise issue."); *Keiran*, 720 F.3d at 726 ("Our sister circuits are split on this issue."); *Sherzer,* 707 F.3d at 258 (acknowledging circuit split); *Rosenfield*, 681 F.3d at 1187-88 (same); *Gilbert*, 678 F.3d at 276 (same); *see also* Saif Alaqili, Comment, *Striking a Balance: How Equitable Doctrine Restores the Purposes of TILA's Rescission Right*, 2013 U. Chi. Legal F. 711 (2013) (recognizing circuit split and advocating sufficiency of notice). As Judge Colloton recognized below in his opinion concurring in the denial of rehearing en banc, App. 11a, there is no realistic prospect that the courts of appeals will reconcile this "well-developed conflict" in authority without this Court's intervention. Accordingly, the Court should grant this petition to resolve the conflict.

II. THE EIGHTH CIRCUIT'S HOLDING THAT A BORROWER MUST FILE SUIT TO EXERCISE THE RIGHT TO RESCIND UNDER SECTION 1635 IS IN ERROR

This Court's review is further warranted because the Eighth Circuit's holding is incorrect on the merits. The plain text of the statute, the structure and purpose of the Act, and the clear direction of the implementing regulation establish that "notifying the creditor" is sufficient to exercise the right to rescind under Section 1635 and that there is no further requirement to file suit within the three-year time limit. This Court should grant review to correct the Eighth Circuit's misinterpretation of the Act, its failure to afford proper regard to the Bureau's implementing regulation, and its misapplication of this Court's decision in *Beach*.

A. Section 1635's Plain Text Establishes That Notice To A Creditor Is Sufficient To Exercise The Right To Rescind

The text of Section 1635(a) both creates a right of rescission and specifies the method of its exercise. The statute indisputably provides that the borrower "shall have the right to rescind the transaction." 15 U.S.C. § 1635(a). The statute further details the manner in which that right may be exercised by specifying that the borrower shall have the right to rescind "until midnight of the third business day" after the closing or the delivery of proper disclosures "by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so." *Id.* The clear meaning of this statutory text is that a borrower exercises his "right to rescind" a transaction "by notifying the creditor." *Id.*

Section 1635(f)'s text confirms that interpretation. That section creates a "time limit for [the] exercise of [the] right," *id.* § 1635(f), but does not restrict the manner in which that right may be exercised within that time limit. As this Court recognized in *Beach*, Section 1635(f) "says nothing in terms of bringing an action but instead provides that the 'right of rescission [under the Act] shall expire' at the end of the time period." 523 U.S. at 417. By addressing the "right's duration," *id.*, Section 1635(f) is simply silent regarding what a borrower must do within the time limit it establishes in order to exercise that right.

Beyond Section 1635(a)'s affirmative statement that a borrower exercises his right to rescind by "notifying the creditor" and Section 1635(f)'s notable silence on the issue, neither section gives any indication of a further requirement that the borrower must sue within the three-year time limit. Indeed, neither section even mentions a court or legal proceedings. *See Sherzer*, 707 F.3d at 260 ("[T]he absence of any reference to causes of action or the commencement of suits in [Section] 1635 also suggests that rescission may be accomplished without a formal court filing."); *Gilbert*, 678 F.3d at 277 ("Simply stated, neither [Section] 1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them."); *see also Keiran*, 720 F.3d at 728 ("Regulation Z says nothing about filing suit."). This conspicuous absence is notable in a statute that elsewhere explicitly establishes legal causes of action. *See* 15 U.S.C. § 1640 (creating damages cause of action for violations of the Act and a statute of limitations thereto). Accordingly, Section 1635 does not impose a requirement that a borrower sue to exercise the right to rescind.

B. The Structure And Purpose Of The Truth In Lending Act Confirm That Notice Alone Is Sufficient To Exercise The Right To Rescind

Congress designed the Act to effectuate rescission upon a borrower's notifying creditors without relying on the intervention of the courts. As an initial matter, there is no dispute that a borrower has an unconditional right to rescind under Section 1635(a) for three days after the closing of the transaction. No court has suggested that a borrower must file a lawsuit within three days to exercise that unconditional right. And it makes no sense to interpret that unconditional right to rescind as requiring only notice while interpreting the extended right to rescind, which is created by the very same clause in the very same sentence of Section 1635(a), as requiring the filing of a lawsuit. *See Sherzer*, 707 F.3d at 264. Such an incongruous interpretation of Section 1635(a) is unsupportable.

Moreover, Section 1635(b) establishes procedures to unwind the transaction "when [a borrower] exercises his right to rescind under [Section 1635(a)]," without mentioning or requiring the involvement of a court. 15 U.S.C. § 1635(b). Those procedures are triggered by the borrower "exercis[ing] his right" under Section 1635(a); that is, by "notifying the creditor." "When" the borrower "exercises his right," immediately and automatically he "is not liable for any finance or other charge." *Id.*; *see Williams*, 968 F.2d at 1140; *Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 705-06 (9th Cir. 1986). Moreover, "upon such a rescission" that a borrower exercises by notifying his creditor, "any security interest . . . becomes void." 15 U.S.C. § 1635(b).

Those first steps proceed automatically upon notice of rescission, and the statute does not require the involvement of a court.

The next steps in Section 1635(b)'s default procedures are affirmatively inconsistent with a court proceeding. The statute specifies that, "[w]ithin 20 days after receipt of a notice of rescission, the creditor shall return" any "money or property given as earnest money, downpayment, or otherwise" and "shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Id.* The provision specifies that those procedures of Section 1635(b) are triggered by "receipt of notice of rescission," not by a lawsuit. Moreover, the time limits established here and elsewhere in Section 1635(b) are tied to the actions of the borrower and creditor, *see Keiran*, 720 F.3d at 733 (Murphy, J., concurring in part and dissenting in part), and are therefore inconsistent with those established for a legal action by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(a) (establishing times for responsive pleadings). The only reasonable interpretation of Section 1635, therefore, is that notice to a creditor triggers rescission, and the default unwinding procedures of Section 1635(b) follow in due course from that notice without requiring the initiation of a court proceeding.

The structure of the statute, including the unwinding procedures in Section 1635(b), reflects the Act's purpose. "[S]ection 1635 is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts." *Belini v. Washington Mut. Bank, FA*, 412 F.3d 17, 25 (1st Cir. 2005). The Eighth Circuit would instead channel all rescissions

into the legal system, flooding the courts with thousands of unnecessary lawsuits. That rule not only flouts the structure of Section 1635 generally and the procedures of Section 1635(b) specifically, it eviscerates the efficiencies of the Act by manufacturing thousands of needless lawsuits from a regime that was designed to process rescissions privately in the first instance and without the intervention of the courts.

C. Regulation Z Removes All Doubt That Written Notice Is Sufficient To Exercise The Right To Rescind

Regulation Z resolves any remaining ambiguity regarding the interpretation of the Act in favor of the sufficiency of written notice. That regulation specifies 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). The Bureau's interpretation of the Act in Regulation Z, which makes clear that notifying a creditor is sufficient to exercise the right to rescind, is due deference. *See Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981) ("[A]bsent some obvious repugnance to the statute, the [Bureau's] regulation implementing [the Truth in Lending Act] should be accepted by the courts."). Because the text of Section 1635, which does not even mention a court proceeding, does not clearly preclude the Bureau's interpretation promulgated in Regulation Z, that interpretation of the statute is entitled to deference from this Court.

The Bureau has reiterated in numerous *amicus* briefs before the courts of appeals its view that a borrower need *only* notify a creditor to exercise the right to rescind. *See*, *e.g.*, Brief of the Consumer

Financial Protection Bureau as Amicus Curiae in Support of Plaintiff-Appellant and Reversal, *Rosenfield*, *supra*, No. 10-1442 (filed Mar. 26, 2012), 2012 WL 1074082. There, the Bureau confirmed that it interprets Section 1635 to require only notice to the creditor to exercise the right to rescind and that "[c]onsumers are not required also to sue their lender within the three-year period provided under [Section] 1635(f)." *Id.* at *14. The Bureau's interpretation in an *amicus* brief of its own regulations is itself entitled to deference. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) ("[W]e find Regulation Z ambiguous as to the question presented, and must therefore look to the [Bureau's] own interpretation of the regulation for guidance in deciding this case.") (citation omitted); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted). Accordingly, the Court should accept the Bureau's interpretation of Section 1635 and Regulation Z to hold that notice to a creditor is sufficient to exercise the right to rescind.

D. The Eighth Circuit's Reliance Upon *Beach* Is Misplaced

This Court's decision in *Beach*, on which the Eighth Circuit and several other circuits relied in departing from the clear meaning of Section 1635 and Regulation Z, is not to the contrary. *Beach* held that Section 1635(f) "permits no federal right to rescind, defensively or otherwise, after the 3-year period of [Section] 1635(f) has run." 523 U.S. at 419. The Court explained that Section 1635(f) "govern[s] the life of the underlying right" and "talks not of a suit's commencement but of a right's duration."

Id. at 417. Accordingly, because the homeowner in *Beach* had not attempted to exercise his right to rescind – by suit, by notifying the creditor, or by any other means – within the three-year period of Section 1635(f), that right was extinguished when that limitations period expired. *Id.*

That holding has no bearing on the question here. The Eighth Circuit failed to apprehend that the Jesinoskis do not seek to exercise an expired rescission right by filing their suit, as the homeowner in *Beach* had attempted to do by asserting an expired rescission right as an affirmative defense in a foreclosure action. Rather, as the Third, Fourth, and Eleventh Circuits recognize, the Jesinoskis already exercised their right within the three-year limitations period of Section 1635(f) by notifying their creditors, in accordance with the requirements of Section 1635(a).

This Court's decision in *Beach* in no way questions the legitimacy of that manner of exercising the right to rescind. As the Third Circuit explained in *Sherzer*, "nowhere in *Beach* does the Court address *how* [a borrower] must exercise his right of rescission within that three-year period." 707 F.3d at 262. Rather, "[t]he most that can be gleaned from [this Court's] oft-quoted statement" in *Beach* that the Act "permits no federal right to rescind, defensively or otherwise, after the 3-year period of [Section] 1635(f) has run," 523 U.S. at 419, is the unremarkable conclusion that, "however the right of rescission is to be exercised, it must be done within three years." *Sherzer*, 707 F.3d at 263. The Eighth Circuit, along with the Sixth, Ninth, and Tenth Circuits, were therefore mistaken to rely upon *Beach* as warrant to ignore the plain meaning of Section 1635 and Regulation Z.

III. THIS CASE IS A SUPERIOR VEHICLE FOR ADDRESSING A RECURRING QUESTION OF GREAT NATIONAL IMPORTANCE THAT WARRANTS THIS COURT'S IMMEDIATE REVIEW

The issue presented in this petition implicates a matter of surpassing national importance in the aftermath of a housing crisis that triggered the worst economic downturn since the Great Depression. As the agency responsible for administering the Act has recognized, "[t]he mortgage market is the single largest market for consumer financial products and services in the United States." Final Rule, *Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 10,902, 10,905 (Feb. 14, 2013). In September 2013, more than $13 trillion in mortgage debt remained outstanding in the domestic economy. *See* Board of Governors of the Federal Reserve System, *Mortgage Debt Outstanding* (updated Sept. 25, 2013), *at* http://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm (last visited Dec. 4, 2013). That massive market has been beset by defaults and foreclosures. *See* 78 Fed. Reg. at 10,906 ("[m]ortgage loan delinquency rates nearly doubled between 2007 and 2009," reaching nearly 10% in 2009); Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 Ohio St. L.J. 761, 764 (2010) (estimating 2.4 million foreclosures in 2009 and as many as 13 million by 2014). Rampant violations of the Act preceded the housing crisis, vastly increasing the number of borrowers eligible for rescission under the Act. *See* Lea Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission*

Under the Truth in Lending Act, 89 N.C. L. Rev. 171, 175 (2010) (stating that "TILA errors seemed surprisingly common, particularly during the early years of the mortgage bubble," and reporting that forensic auditing revealed "actionable mistakes in borrowers' disclosure documents . . . in as many as eighty percent of loans"). Clarification of the procedure that borrowers must follow to exercise their rights under the Act, especially when the majority of circuits would direct hundreds of thousands of rescission actions into federal court, warrants this Court's immediate attention.

This case is the ideal vehicle to resolve the question presented. The legal issue is cleanly presented and dispositive of the case. In contrast to other cases raising the same issue that may come before the Court, the district court granted respondents' motion for judgment on the pleadings solely on the procedural ground that the Jesinoskis' suit was time-barred, without reaching the merits of whether respondents had provided the information and disclosures required under the Act. *Compare* App. 7a n.3 ("[F]or the purposes of the present motion, the Court assumes without deciding that Plaintiffs have pled a plausible claim that they did not receive the required documents at the closing.") *with Sobieniak v. BAC Home Loans Servicing, LP*, 835 F. Supp. 2d 705, 709 (D. Minn. 2011) ("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), *aff'd sub nom. Keiran v. Home Capital, Inc.*, 720 F.3d 721 (8th Cir. 2013), *and Keiran v. Home Capital, Inc.*, Civil No. 10-4418

(DSD/JSM), 2011 WL 6003961, at *3 (D. Minn. Nov. 30, 2011) ("Bank of New York claims that no violations of the [Act] were evident on the face of the Keirans' loan documents. The court agrees."), *aff'd*, 720 F.3d 721 (8th Cir. 2013).

For these reasons, the Court should resolve the deeply entrenched conflict over the meaning of Section 1635 and provide clarity to homeowners seeking to vindicate their statutory rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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